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IN RE APPLICATION OF THE OMAHA PUBLIC POWER DISTRICT. OMAHA PUBLIC POWER DISTRICT, APPELLEE, V. NEBRASKA PUBLIC POWER PROJECT, APPELLANT.

243 N. W. 2d 770

Filed July 7, 1976. No. 40517.

Public Service Commissions: Electricity. This court cannot interfere with a decision of the Power Review Board unless there is no evidence to sustain the action of the board or, for some other reason, the record shows the action of the board is arbitrary and unreasonable.

Appeal from the Nebraska Power Review Board. Affirmed.

Dennis R. Keefe of Naylor & Keefe, for appellant.

Stephen G. Olson of Fraser, Stryker, Veach, Vaughn & Muesey, Delbert E. Dirrim, and Gene Watson, for appellee.

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

BOSLAUGH, J.

This appeal involves an application by the Omaha Public Power District for authority to construct a 1,150 megawatt nuclear-fueled electric generation facility in Washington County, Nebraska. The Nebraska Power Review Board approved the application on October 23, 1975.

The applicant is a public corporation engaged in the production, transmission, and sale of electrical energy in Omaha, Nebraska, and the surrounding area. It owns and operates a nuclear-fueled generation facility in Washington County, Nebraska, known as Fort Calhoun Station Unit No. 1, which has been in operation since 1973. The proposed plant would be located adjacent to the existing plant and would be known as Fort Calhoun Station Unit No. 2.

The appellant is the Nebraska Public Power Project,

a group of concerned citizens of Nebraska who filed a formal protest to the application. No alternate power supplier objected to the application.

The Legislature established the Power Review Board and gave it limited jurisdiction over the suppliers of electricity so that the duplication of facilities could be avoided and eliminated and the settlement of rate disputes facilitated. § 70-1001, R. R. S. 1943. Before any electric generation facilities may be constructed, an application must be filed with the board; a hearing must be held, at which any interested party may appear; and the application must be approved by the board.

The application was filed on June 5, 1975, and set for hearing on July 23, 1975. On July 11, 1975, the protestant moved for a continuance alleging it had inadequate time to prepare for the hearing on July 23, 1975. The motion was overruled on July 21, 1975, and the hearing commenced July 23, 1975.

The first assignment of error relates to the jurisdiction of the board. The protestant contends the board lost jurisdiction over the application because the evidentiary hearing before the board was not held within 30 days after the application was filed as required by section 70-1013, R. R. S. 1943.

Section 70-1013, R. R. S. 1943, provides that upon the filing of an application under section 70-1012, R. R. S. 1943, the board shall fix a time and place for hearing and give notice to alternate power suppliers deemed affected by the application; and further provides the hearing shall be had within 30 days unless for good cause shown the applicant shall request a continuance, but in any event the hearing shall not be more than 90 days from the filing of the application.

It is apparent that the purpose of the statute is to assure the applicant a prompt hearing after the application has been filed. It is difficult to see how the protestant could claim prejudice because of a delay of the

hearing, particularly where the protestant itself requested a continuance.

Statutory provisions of this nature are designed to further the orderly and prompt conduct of official business and are usually held to be directory rather than mandatory or jurisdictional. In Tash v. Ludden, 88 Neb. 292, 129 N. W. 417, this court quoted with approval from Cooley, Constitutional Limitations (6th Ed.), p. 92, as follows: " 'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.' " See, also, Cole v. M. L. Rawlings Ice Co., 139 Neb. 439, 297 N. W. 652; State ex rel. Kobes v. Grimm, 115 Neb. 230, 212 N. W. 437; Burkley v. City of Omaha, 102 Neb. 308, 167 N. W. 72; Hurford v. City of Omaha, 4 Neb. 336; Lamelo v. Mayo (Fla. App.), 204 So. 2d 550.

The requirement in section 70-1013, R. R. S. 1943, that the hearing before the Power Review Board be held within 30 days unless a continuance has been requested by the applicant is directory and not mandatory. The board did not lose jurisdiction over the application in this case because there was not strict compliance with the terms of the statute.

The other assignments of error relate to the sufficiency of the evidence to sustain the order of the board approving the application.

Before an application may be approved the board must find that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction and without unnecessary duplication of facilities or operations. The board here made detailed findings and concluded that the applicant could

most economically and feasibly supply the electric service resulting from the proposed construction without unnecessary duplication of facilities or operations.

The protestant contends the evidence does not support the finding that the proposed construction will serve the public convenience and necessity and provide adequate electric service at as low an overall cost as possible, consistent with sound business practices. The protestant contends the evidence did not demonstrate a need for the proposed facility; a fossil-fueled facility would be more economical than a nuclear facility; and no responsible plan exists for the permanent storage of radioactive wastes.

The proposed facility is to be a joint project between the applicant and the Nebraska Public Power District (NPPD). The applicant and NPPD have entered into an ownership agreement which provides for the construction of the proposed facility. Up to 20 percent of the proposed facility will be available to other power suppliers, such as municipalities. The balance will be owned in equal shares by the applicant and NPPD.

The applicant produced evidence that without the construction of the proposed facility it will not have the capability to meet its customers' demands by 1986. There was evidence that NPPD will be unable to supply its customers' demands after 1983 if it does not then have available its share of the capacity of the proposed facility. These calculations were based on estimates of what the future demand for energy will be and, as pointed out by the protestant, there will be some excess capacity when the proposed unit is first placed in operation. While there may be some basis for a difference of opinion as to whether the proposed facility is the best possible solution to the problem of supplying the future demands of the customers of the applicant and NPPD, there was substantial evidence that a need exists for the proposed facility. That is sufficient to sustain the finding of the board.

This court cannot interfere with a decision of the Power Review Board unless there is no evidence to sustain the action of the board, or, for some other reason, the record shows the action of the board is arbitrary and unreasonable. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629.

With respect to the question of whether a fossil-fueled facility would be more economical than a nuclear facility, the evidence shows that the applicant operates both types of facility. The applicant now has under construction a 575 megawatt coal-fired facility, known as Nebraska City Unit No. 1, which it expects to have in operation in 1979. The evidence produced by the applicant tended to show that the construction cost differential between construction of a nuclear-fueled generation facility and a comparably sized coal-fired unit is recaptured rapidly because of the fuel cost savings inherent in nuclear generation facilities. There was evidence which showed that the overall cost savings of a nuclear-fueled facility more than offset its higher operation and maintenance costs.

With respect to the problem of storing radioactive wastes, the evidence shows that this is a problem of national or international proportions and no satisfactory permanent solution has been found. However, reprocessing plants are under construction and it is at least possible that a use may be found for the wastes that must be stored at this time. There are a number of regulatory agencies in this field and there is no evidence that any of these agencies consider the storage problem to be of sufficient magnitude to outweigh the benefits to be derived from the use of nuclear power.

As we view the record there was substantial evidence to support all the findings of the board. The order approving the application must, therefore, be affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE H. KRITER, DECEASED. ROBERT SLOCUM, APPELLANT, V. M. S. HEVELONE, EXECUTOR OF THE ESTATE OF GEORGE H. KRITER, DECEASED, ET AL., APPELLEES.

243 N. W. 2d 773

Filed July 7, 1976. No. 40529.

1. **Wills.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. The intention is to be determined from the language of all the pertinent provisions of the will, and where applicable, the circumstances under which the will was made.
2. ———. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.
3. ———. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. ———. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator.
5. **Bonds: Contracts: United States.** A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy.
6. **Words and Phrases.** The word deliver is not ordinarily a dispositive term. Its ordinary meaning is simply to yield possession of or to hand over and does not necessarily refer to a transfer of ownership.
7. **Trial: Witnesses.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.

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

James M. Kelley of Wood, Kelley, Thorough & Wolfe, for appellant.

Steven R. Brott and Everson, Noble, Wullschleger, Sutter & Fischer, for appellees.

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

CLINTON, J.

The question on this appeal is the proper construction of the following provision of the last will and testament of George H. Kriter, deceased, to wit: "ITEM II. Any United States Bonds, issued in the joint name of myself and my nephew Robert Slocum, or any others which may be in my possession at the time of my death, shall be delivered to the said Robert Slocum or other designated beneficiaries." The appellant Robert Slocum, a nephew of the testator, takes the position that by virtue of this provision he was bequeathed all the United States bonds which belonged to the testator and as to which there was no surviving coowner or beneficiary at the time of the testator's death. The individual appellees, who are nieces and nephews of the testator, take the position that item II is not a dispositive provision, but simply an instruction to the executor to do what would have to be done in any event, namely, to deliver to coowners or beneficiaries those bonds as to which there was a surviving coowner or beneficiary, and that other bonds held by testator on his death, i.e., those on which no coowner or beneficiary is named and those in which a coowner or beneficiary predeceased the testator, should pass under the residuary clause of the will. Slocum also contends that the trial court erred in refusing to permit the introduction of the testimony of linguistic experts as to the meaning of item II. We affirm the judgment of the District Court.

The only evidence introduced or offered was a stipulation of facts and some attached exhibits. The record

shows the following. The will containing item II was executed by the testator on July 21, 1955. Item III of the will left the residue of his estate one-half to his sisters and one-half to his nieces and nephews. At the time of the execution of the will, testator was the owner and apparently in possession of United States bonds as follows: One United States bond, issue date November 1951, in which Robert Slocum was designated as co-owner; a number of bonds in which a sister, Lillie Kriter, was designated as coowner; and other bonds in which he was the sole owner. He owned no bonds on which a payable on death beneficiary was designated. After the execution of the will, Kriter acquired additional bonds of which he was sole owner. Lillie Kriter died before the testator.

On October 19, 1971, Kriter executed a codicil to his will which amended item III to leave an undivided two-fifths of the residue of his estate to his sister, Nellie, and an undivided three-fifths to his nieces and nephews in equal shares. The codicil also provided that if Nellie should predecease him the bequest to her should lapse and then "my entire estate shall be divided equally among my nieces and nephews." It also contained a provision for the children of any deceased niece or nephew to take per stirpes the share of any deceased parent.

Nellie died in 1972. Testator died in 1974. The only devisees and legatees are the nieces and nephews, including Slocum. Received in evidence were Treasury Department regulations governing ownership designation of United States bonds.

The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. The intention is to be determined from the language of all the pertinent provisions of the will, and where applicable, the circumstances under which the will was made. Wondra v. Platte Valley State Bank & Trust Co., 194 Neb. 41, 230 N. W. 2d 182. "A patent ambiguity in a will must be

removed by interpretation according to legal principles and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. . . . In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. . . . Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator." Gretchen Swanson Family Foundation, Inc. v. Johnson, 193 Neb. 641, 228 N. W. 2d 608.

Slocum's principal argument, as we see it, has two prongs: First, he contends that the phrase "or any others" in item II grammatically has no modifier, for example, "issued in the joint name of myself and other coowners," and therefore the phrase literally and grammatically means "all other bonds which may be in my possession at the time of my death." Slocum then eliminates the last phrase of the provision, to wit, "or other designated beneficiaries," by arguing that under Treasury Department regulations the term "beneficiaries" is a technical term referring only to the designations P.O.D., or payable on death, and since there were no bonds with that designation, the phrase must be eliminated and, accordingly, item II reads: "Any United States Bonds, issued in the joint name of myself and my nephew Robert Slocum, and all [any] other bonds which may be in my possession at the time of my death, shall be delivered to the said Robert Slocum." One of the problems of this interpretation is that under the rules of construction we are required to consider what the testator meant by the phrase "or other designated beneficiaries." When we ask the question, "Where designated?" the only answer we come up with is, "In the

bonds themselves." This then ungrammatically but by implication supplies the missing modifier of "any others" so that the provision reads: "Any United States Bonds issued in the joint name of myself and my nephew Robert Slocum, and all other bonds which may be in my possession at the time of my death, shall be delivered to the said Robert Slocum or other beneficiaries designated in the bonds." This version also is ambiguous. The conjunction "or" indicates an alternative. Are the bonds to be delivered to Slocum, or to the other (if any) designated beneficiaries, or perhaps divided between them? Is this a power of appointment in the executor? Surely not. It does not seem at all reasonable to conclude that the testator intended to make a bequest of those bonds which would not pass to a coowner or beneficiary under Treasury Department regulations depend upon the chance circumstance that such coowners or beneficiaries might survive him and then give the executor the power to choose between them. The fact that Slocum was the only surviving coowner would not seem to change this. Testator acquired additional bonds after executing the will. He could have designated coowners or beneficiaries therein. The language of item II would indicate he contemplated doing so.

The only reasonable construction of item II is that it was a provision designed only for the information of the executor as a direction to him to do what would have to be done in any event, namely, deliver jointly owned or beneficiary bonds, if any, to the persons legally entitled to them under Treasury Department regulations. "A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy." Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418.

In summary, as the trial judge pointed out in his memorandum opinion, item II was not a dispositive pro-

vision. Even the word "deliver" is not technically a dispositive term. Its ordinary meaning is simply "to yield possession . . . of . . . or hand over." Websters Third New International Dictionary (Unabridged). It does not necessarily refer to a transfer of ownership. On the other hand, the term usually used in dispositive provisions, i.e., "give" or "bequeath," do convey the concept of conferring ownership. Websters Third New International Dictionary (Unabridged). Also worthy of mention is the fact that item III as amended by the codicil of October 19, 1971, anticipates the possibility that testator's sister, Nellie, might predecease him and provides that in such event "my entire estate shall be divided equally among my nieces and nephews." This provision conflicts with the interpretation which Slocum urges. All the decedent's bonds on which there was no surviving coowner or beneficiary designated were part of his "entire estate."

Slocum's assignment of error pertaining to refusal of the trial court to permit two linguistic experts to testify to the correct grammatical meaning of item II is not well taken. Even if we assume the relevance and admissibility of such testimony, the record does not lay the necessary foundation for its admission. The witnesses were not called, no offer of testimony was made, and there is nothing in the record to establish that Slocum was deprived by the trial court of the opportunity to call such witnesses or to make an offer of such testimony. The transcript shows only that at pretrial conference: "Plaintiff intends to offer no other exhibits but proposes to call Sheldon Stick and Dr. Hassan Sharifi and a third witness yet unnamed. . . . The heirs propose no exhibits and no witness other than M. S. Hevelone; it being assumed that the stipulated matter will be evidence. . . . Executor propose no exhibits and no witness other than M. S. Hevelone; it being assumed that the stipulated matter will be evidence." The court ordered: ". . . that with respect to all parties no

other witnesses or exhibits shall be offered at trial unless the parties seeking to offer or call the same shall notice the court and opposing counsel in writing two weeks or more before date of trial indicating the witness to be called and the exhibit to be offered, unless good cause be shown at the time of trial." The applicable rule is: " 'In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.' Cox v. Kee, 107 Neb. 587, 186 N. W. 974." Gugelman v. Kansas City Life Ins. Co., 137 Neb. 411, 289 N. W. 842.

AFFIRMED.

PAUL JELINEK ET AL., APPELLANTS, V. NEBRASKA NATURAL GAS COMPANY, A CORPORATION, APPELLEE.
243 N. W. 2d 778

Filed July 7, 1976. No. 40544.

1. **Parties: Statutes: Actions.** Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest.
2. **Parties: Actions: Torts: Insurance.** An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor.

Appeal from the District Court for Webster County: NORRIS CHADDERDON, Judge. Affirmed.

Nye, Hervert & Jorgensen, for appellants.

Phillips & Garwood, for appellee.

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

SPENCER, J.

The issue involved herein is very simple. Are the plaintiffs the real parties in interest? The trial court

determined they were not and sustained defendant's motion to dismiss. We affirm.

The home of the plaintiffs was damaged by an explosion and fire caused by a break in a gas main maintained by the defendant. MFA Insurance Company paid the plaintiffs the full coverage of $7,000 on their dwelling policy and $2,000 on the household goods and furnishings coverage, or a total of $9,000. MFA took a subrogation agreement and filed this action in the name of the plaintiffs for $9,325.28, or $325.28 more than was paid on the insurance coverage.

Defendant took the deposition of both plaintiffs. Both of them testified that they had no claim against the defendant. Paul Jelinek testified the $9,000 he received covered the full cost. He was satisfied with the settlement paid and did not want his name used in litigation. Grace Jelinek testified that they did not have a claim against the Nebraska Natural Gas Company although they had signed the petition. She testified she did not read the petition or know what was in it.

It is not disputed, plaintiffs spent $325.28 more than the amount received on the insurance to repair, remodel, and refurnish their home. They concede, however, this put it in much better shape than it was before. The inference is they incurred expense not directly related to their loss. This case is not analogous to Schweitz v. Robatham (1975), 194 Neb. 668, 234 N. W. 2d 834, cited by plaintiffs. Here, the nominal plaintiffs are making no claim for other damages against the defendant. It is also obvious from the depositions of the plaintiffs that MFA Insurance Company is the real party in interest.

In Scholting v. Alley (1970), 185 Neb. 549, 178 N. W. 2d 273, we said: "Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. The purpose of statutes such as this is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause as well as

to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy."

In Schmidt v. Henke (1974), 192 Neb. 408, 222 N. W. 2d 114, we held: "An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor." Here, that cause of action was transferred to MFA Insurance Company. Plaintiffs are satisfied with the amount paid them by the insurance company. They considered it as settlement in full. They make no demand on the defendant for the payment of any additional amount because they feel that no additional amount is owing to them. On this record MFA Insurance Company is the real party in interest.

The motion to dismiss was properly sustained. The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF NEBRASKA RAILROADS.
CHICAGO & NORTHWESTERN TRANSPORTATION CO., ET AL., APPELLANTS, V. NEBCO, INC., APPELLEE.
243 N. W. 2d 779

Filed July 7, 1976. No. 40574.

Public Service Commissions: Appeal and Error: Notice: Motions, Rules, and Orders: Supersedeas: Statutes. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943.

Appeal from the Nebraska Public Service Commission. Affirmed.

Knudsen, Berkheimer, Endacott & Beam, for appellants.

James W. Hewitt, for appellee.

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

CLINTON, J.

This is an appeal by the Nebraska Railroads from a finding of the Public Service Commission upon application for a declaratory ruling under commission rules as to the effective date of a rate increase order, which order had, on appeal to this court, been affirmed.

The petition for the declaratory ruling alleged, among other matters: Pertinent dates and actions of the commission and parties as follows:

Date of the rate order 9-23-74.

Effective date of rate as per commission order 10-21-74.

Motion of Nebco for rehearing 10-1-74.

Motion overruled 10-21-74.

Nebco notice of appeal filed 10-31-74.

Supersedeas bonds filed by railroads as follows:

Burlington Northern 11-21-74.

Union Pacific 11-22-74.

Missouri Pacific 11-25-74.

North Western Railroad 11-25-74.

Rock Island 11-25-74.

The application for a declaratory ruling alleges that a dispute exists as to the following questions in light of certain provisions of Nebraska statutes: "(a) Where the Notice of Appeal was filed on October 31, 1974, does the new rate ordered go into abeyance on that day, October 31, 1974, or is the abeyance retroactive to October 21, 1974, the effective date of the order: . . . (b) Does the new rate in abeyance during November, 1974, become effective on the date of filing the respective supersedeas bonds or is the effective date retro-

active to October 21, 1974 or October 31, 1974?"

The substance of the response of Nebco to the application was that the rate increase was effective only as of the date of the filing of the various supersedeas bonds.

The commission upheld Nebco's position and ruled that the rate increases became effective on the date the supersedeas bonds were filed by the various railroads. We affirm.

Pertinent statutes are in part as follows: "Except as otherwise provided in sections 75-121 and 75-139, all commission orders shall go into effect ten days after the date of the mailing of a copy of the order to the parties of record unless the commission prescribes a later effective date; . . . provided further, that if one of the parties of record commences one of the appeal proceedings provided in section 75-137, the order appealed shall be in abeyance until the Supreme Court issues its mandate . . .." § 75-134, R. R. S. 1943.

Section 75-137, R. R. S. 1943, provides: "The procedure to obtain reversal, modification, or vacation of an order entered by the commission, shall be (1) by filing a notice of appeal with the commission within thirty days after the date of the mailing of a copy of the order by the commission to the party appealing, or (2) by filing a motion for rehearing within ten days after the date of the mailing of a copy of the order by the commission to the party appealing . . .."

"Except as otherwise provided in this section, the effective date of a rate order that is appealed to the Supreme Court shall be the first Monday following the date of the court's mandate if the order is affirmed; . . . and provided further, that a common carrier may make effective a rate order increasing a fixed rate by filing a supersedeas bond with the commission sufficient in amount to insure refund of the difference between the rate finally approved and the rate appealed to shippers or subscribers entitled thereto if the order appealed is

reversed. A supersedeas bond may be filed by any affected shipper or common carrier, including shippers or common carriers that were not parties to the rate proceeding, at any time prior to the issuance of the Supreme Court's mandate . . .." § 75-139, R. R. S. 1943.

The position of the railroads is that under the terms of section 75-137, R. R. S. 1943, the filing of a motion for rehearing is not the taking of an appeal and hence there was no abeyance under section 75-134, R. R. S. 1943, of the rate order during the period between 10-21-74, the effective date under the commission order, and 10-31-74 when the notice of appeal was filed. The railroads rely upon the principle that the filing of a motion for rehearing is not the commencement of appeal proceedings for, until the motion is ruled on by the tribunal before which it is pending and a notice of appeal is filed, the proceeding remains in the lower tribunal. They cite Harkness v. Central Nebraska P. P. & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385, as follows: "The general rule as stated by text writers is that a pending motion for a new trial seasonably filed keeps the cause in the trial court and so long as it remains undisposed of there can be no final judgment within the meaning of the statutes regulating appeals. As soon as a motion for a new trial is filed the district court's jurisdiction over the case is retained and continued." They then say, and we quote from their brief: "Turning to the statutes in question, it may be arguably advanced that Neb. Rev. Stat. §§ 75-134 and 75-137, (Reissue 1971) when read in conjunction, emasculate this distinction between 'appeal' and 'motion for rehearing.' Section 75-134 provides in part: '. . . provided further, that if one of the parties of record commences one of the appeal proceedings provided in section 75-137, the order appealed shall be in abeyance until the Supreme Court issues its mandate; . . .' Section 75-137 discusses the ways to obtain 'reversal, modification, or vacation of an order entered by the commission.' Those

ways are to (1) file a notice of appeal, or (2) file a motion for rehearing, which if denied may be followed by a notice of appeal. The Public Service Commission reads the language in Section 75-134 referring to 'appeal proceedings provided in Section 75-137' to mean *both* the appeal provisions *and* the motion for rehearing. It seems to imply this reading is mandated by the plural form of the word 'proceedings' in section 75-134. However, there is a much less strained way to read the statutes in question which will maintain accepted legal differences between 'appeal' and other proceedings. That is, that there *are* two appeal proceedings provided in section 75-137: one instead of a motion for rehearing and one after such a motion is decided. Moreover, this interpretation is given further credence by reading section 75-134 in context, wherein it provides that the appeal proceedings will cause the order to 'be in abeyance until the Supreme Court issues its mandate.' Motions for rehearing in section 75-137 are *not* before the Supreme Court, but before the Public Service Commission; thus, the 'appeal proceedings' referred to must be the traditional appeals instead of and after a motion for rehearing and not the intermediate device of the rehearing itself."

There can be no quarrel about the principle cited in Harkness when one is concerned with the time at which jurisdiction changes from the lower court tribunal to the appellate court. However, that is not the question before us. The question to be resolved is, What did the Legislature mean when in section 75-134 it referred to "one of the appeal proceedings in 75-137"? Did it intend to refer to the two different times at which notices of appeal would be filed under the procedures numbered (1) and (2) in section 75-137? Or was it referring to the different procedural steps numbered (1) and (2) as appeal proceedings? If the first interpretation was intended and the procedure designated (2) is used, that is, a motion for rehearing is filed as a preparatory step

in the appeal, there would exist a hiatus during which the appeal procedure is ineffective to put the rate order in abeyance.

To ask those questions is almost to answer them. Unless the Legislature intended to include the motion for rehearing as one of the appeal procedures, even though such language is not technically correct, then there really are not two "proceedings" but only one, that is, the filing of the notice of appeal. Further, no reason is suggested as to why the Legislature would intend that abeyance be delayed in one case and not in the other. The statute in question has not been previously interpreted by us and neither party can cite any case precisely on point.

It is pointed out to us that the motion for rehearing could be used to delay a rate increase or decrease by one who does not intend to perfect and prosecute his appeal to finality. Whether that could be the result, of course, is not before us in this appeal because the appeal was in fact perfected. When the Legislature used this language, no doubt it was acting on the premise that the appeal would be perfected if the motion for rehearing was denied. If a remedy is needed for the contingency mentioned, it must come from the Legislature.

We hold that the filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943.

Under the facts before us we need not decide whether a party desiring the order to go into effect may file a supersedeas immediately upon the filing of a motion for rehearing.

AFFIRMED.

KIMBERLY HOLMES, BY HER FATHER AND NEXT FRIEND, MILO C. HOLMES, APPELLANT, V. LOUIS S. CIRCO, DOING BUSINESS AS CIRCO'S BAR, ET AL., APPELLEES.
244 N. W. 2d 65

Filed July 14, 1976. No. 40442.

1. **Intoxicating Liquors: Actions.** There is no longer a dram shop or civil liability act imposing strict liability for sale of liquor in Nebraska.
2. **Intoxicating Liquors: Actions: Statutes.** Section 53-180, R. R. S. 1943, does not create a civil cause of action in favor of, or duty toward, third parties injured as a result of violations of section 53-180.
3. ———: ———: ———. In the absence of legislation specifically so providing, a tavern owner or operator in Nebraska is not liable to third parties injured by intoxicated persons to whom the tavern owner has served liquor in violation of section 53-180, R. R. S. 1943.
4. **Intoxicating Liquors: Actions: Statutes: Negligence.** A violation of section 53-180, R. R. S. 1943, does not constitute negligence, or evidence thereof, of which injured third parties may avail themselves in actions against a tavern owner or operator.

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

Warren C. Schrempp and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, for appellant.

Gross, Welch, Vinardi, Kauffman & Day, for appellees.

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

BRODKEY, J.

Kimberly Holmes, the plaintiff below, appeals from orders entered by the District Court sustaining defendants' motions to strike certain portions of her petition, and to dismiss the petition because of her failure to amend or plead further within the 10-day period granted to her by the court. The reason for the dismissal, as stated in the order of the court, was that the petition failed to state a cause of action. We affirm.

Plaintiff had instituted the action against Louis S. Circo, the owner of Circo's Bar, and Theresa Ann Jones, his employee, to recover damages for injuries sustained by her when a vehicle in which she was riding collided with an automobile driven by one George Allen Archer. Plaintiff's petition consisted of four separate causes of action, the first and third causes of action being based upon various specified negligent acts, including the violation of section 53-180, R. R. S. 1943. The second and fourth causes of action were not grounded upon the theory of negligence, but merely alleged a violation by the defendants of section 53-180, with the further allegation that the acts of the respective defendants were the proximate cause of plaintiff's injuries. Other than the violation of the statute above referred to, the acts on which the allegations of negligence were predicated consisted of defendants serving alcoholic beverages to Archer on the day of the accident knowing that he was "intoxicated and physically and mentally incapacitated by the consumption of alcoholic liquors and had at his disposal an automobile which he intended to operate upon leaving said premises."

Defendants' motion to strike was based principally on the ground that there was neither common law nor statutory relief available to the plaintiff. In his memorandum sustaining the motion to strike, the trial judge stated: "The Plaintiff, by the allegations in her Petition, seeks to have this Court impose Dram Shop Act liability on a tavern owner by construing certain alleged violations of criminal statutes in the Nebraska Liquor Control Act as constituting some evidence of negligence. * * * This would be a new legal doctrine in Nebraska." The court subsequently dismissed the petition on the ground it did not state a cause of action, and plaintiff thereafter perfected her appeal to this court.

In this appeal, we must decide whether or not plaintiff's petition stated a cause of action against defendants either on the theory of negligence, or on a statutory

cause of action created by section 53-180, R. R. S. 1943; and whether the violation of such statute may be considered as evidence of negligence.

We first discuss the nature and effect of section 53-180, R. R. S. 1943, relied upon by plaintiff as a basis of recovery. That section reads as follows: "No person shall sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquors, to or for any minor, any person who is mentally incompetent, or any person who is physically or mentally incapacitated by the consumption of such liquors." The penalty for violation of section 53-180, by a licensee or employee thereof, is set out in section 53-180.05 (2), which makes the violation of the provisions of that section a misdemeanor, and further provides that upon conviction, the penalty shall be a fine of not less than $250 nor more than $500 or imprisonment in the county jail for 15 days, or both such fine and imprisonment. The Nebraska Liquor Control Act, originally adopted in 1935, does not contain provisions establishing strict liability, creating a civil cause of action in favor of injured parties, or imposing civil penalties, as was true under Nebraska's former dram shop or civil liability acts.

By way of historical background to aid in a better understanding of the problems involved in this appeal, we point out that the first Nebraska civil damage action statute, sometimes termed the dram shop act, was enacted in 1881, and appeared as sections 3859 to 3864, R. S. 1913. It was broad in scope, and made liquor dispensers liable for all damages that "the community or individuals may sustain in consequence of such [liquor] traffic." With the advent of prohibition, the entire Chapter relating to and regulating the liquor business, including the dram shop provisions, were repealed in 1917; and an entirely new Chapter relating to intoxicating liquors was enacted. Laws 1917, chapter 187, section 52, page 448, contained wholly new dram shop provisions which were effective until repealed. That sec-

tion, as amended in ensuing years, appeared as section 53-147, C. S. 1929. In 1935, another new act, the Nebraska Liquor Control Act, was passed, which, among other things, repealed Chapter 53 of C. S. 1929, including the dram shop provisions of section 53-147, C. S. 1929. This is the act, which with occasional amendments since that date, is currently in effect.

In enacting the Nebraska Liquor Control Act in 1935, the Legislature did not include new dram shop provisions, as did the prior acts. Nor has our Legislature subsequently added the same or similar provisions, although it could well have done so had it wished to impose strict liability upon owners and operators of bars, or desired to create a civil cause of action in favor of those injured as a result of a violation of the liquor laws. The present law prohibits the dispensing of intoxicating liquors to certain classes of persons, and is a comprehensive act to regulate the manufacture, sale, and distribution of alcoholic liquors.

There are cases from other jurisdictions holding that the purpose of a prohibitory statute, such as the above, is to regulate the business of selling intoxicants, and not to enlarge civil remedies. Collier v. Stamatis, 63 Ariz. 285, 162 P. 2d 125 (1945); Carr v. Turner, 238 Ark. 889, 385 S. W. 2d 656 (1965); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966). In Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P. 2d 358 (1969), the court held that a violation of a statute, similar to Nebraska's, providing that the person in charge of a saloon or bar who sells intoxicating liquor to any person who is drunk is guilty of a misdemeanor does not impose civil liability on one in charge of the saloon or bar. We agree that statutes of this type do not create a civil remedy or impose a duty on the part of the bar or tavern operator toward injured third parties.

While not involving the liquor statute under consideration, the recent case of Kube v. Kube, 193 Neb. 559, 227 N. W. 2d 860 (1975), is relevant. Kube was an action

brought under the provisions of the federal Fair Labor Standards Act prohibiting employment of persons under the age of 16 in occupations that have been found and declared to be particularly hazardous for such persons, and involved the employment of a child under 16 years of age to operate a farm tractor of over 20 PTO horsepower. The petition there alleged that the employment of the plaintiff by the defendant was unlawful and in violation of the federal act and regulations, and that the violation of the law was the proximate cause of the accident and the injuries to the boy. The trial court sustained a general demurrer to the petition and dismissed the action. The federal act provided no civil remedy for violation of the act but prescribed criminal penalties, and the issue on appeal was whether a civil remedy might be implied. The court held it could not, basing its decision on the case of Breitwieser v. KMS Industries, Inc., 467 F. 2d 1391, where the United States Court of Appeals, 5th Circuit, held the Fair Labor Standards Act did not create a private cause of action for the death of a 16-year-old boy who was operating a forklift truck in violation of the provisions of the act and the regulations. In discussing Breitwieser, this court noted: "The Breitwieser case was decided upon the theory that the Fair Labor Standards Act contains a comprehensive enforcement scheme including substantial criminal penalties for violations of child labor law." This court stated that the District Court had based its decision on the ground that Congress did not intend that private damage suits should be an available remedy under the child labor section because civil remedies were provided for certain violations of the act but only criminal sections were provided under the child labor section. We likewise conclude the Nebraska liquor statute before us does not create a new cause of action.

We next consider whether plaintiff's petition states a cause of action based upon common law negligence. At common law, and apart from statute, no redress existed

against persons selling, giving, or furnishing intoxicating liquor, or their sureties, for resulting injuries or damages due to the acts of intoxicated persons, whether on the theory that the dispensing of the liquor constituted a direct wrong or constituted actionable negligence. This rule was based on the theory that the proximate cause of the injury was the act of the purchaser in drinking the liquor and not the act of the vendor in selling it. See, 48 C. J. S., Intoxicating Liquors, § 430, p. 716; 45 Am. Jur. 2d, Intoxicating Liquors, § 553, p. 852. In Kraus v. Schroeder, 105 Neb. 809, 182 N. W. 364 (1921), this court recognized the common law rule, stating: "The statute in question [a prior Nebraska dram shop act] was passed in 1881 and remained in force until May 1, 1917, when our prohibitory enactments became operative. During this long period it was frequently construed by the courts and was uniformly held to create a liability upon those who engaged in the liquor traffic under its provisions, creating a liability that did not exist at the common law." It is undoubtedly true that in recent years a respectable number of states have retreated from or have abrogated the strict common law rule. The present status of that rule is well summarized in the following opinions. In Garcia v. Hargrove, 46 Wis. 2d 724, 176 N. W. 2d 566 (1970), the court stated: "Counsel for both parties and the several briefs of amicus curiae have presented a most helpful review of the recent case law throughout the country. We have examined and considered the authorities cited. The landmark cases in which states have abrogated the common-law rule are Waynick v. Chicago's Last Dept. Store (7th Cir. 1959), 269 F. 2d 322, 77 A. L. R. 2d 1260; Rappaport v. Nichols (1959), 31 N. J. 188, 156 A. 2d 1. * * * Since Waynick and Rappaport, several states have developed their case law on the rationale of those cases and a lesser number of states have decided to abide by the common-law rule.

"In considering the case law of other states it is dif-

ficult to make a comparable analysis with the situation we find in Wisconsin. Some have dramshop laws, in some they have been repealed, others have never had them, and we find a variety of civil damage statutes. To the best of our knowledge none have comparative negligence. In some states, the problem is considered and deferred to the legislature, and many approach from the standpoint of 'proximate cause.' Whatever choice we make for Wisconsin is supportable by case authority elsewhere. See 75 A. L. R. 2d 833, 73-78 A. L. R. 2d Later Case Service (1968)." In that case, the Wisconsin Supreme Court declined to abrogate the common law rule, stating: "We look upon this as a policy decision and we are not persuaded to reverse the position previously taken by this court."

Another case discussing the erosion of the common law rule is Hamm v. Carson City Nugget, Inc., *supra*. In its opinion, the Supreme Court of Nevada states: "The common law rule has been eroded in recent years. Some courts now recognize a common law right of action on the premise that the serving of liquor initiates a foreseeable chain of events for which the tavern owner may be held liable. Waynick v. Chicago's Last Dept. Store, 269 F. 2d 322 (7 Cir. 1959); Rappaport v. Nichols, 156 A. 2d 1 (N. J. 1959); Jardine v. Upper Darby Lodge No. 1973, 198 A. 2d 550 (Pa. 1964); Elder v. Fisher, 217 N. E. 2d 847 (Ind. 1966). This recent trend has been rejected by other courts who continue to prefer the old doctrine. Carr v. Turner, 385 S. W. 2d 656 (Ark. 1965); Lee v. Peerless Ins. Co., 183 So. 2d 328 (La. 1966). Whatever choice we make for Nevada is supportable by case authority elsewhere. *In the final analysis the controlling consideration is public policy and whether the court or the legislature should declare it.*

"There are persuasive arguments either way." (Emphasis supplied.)

In Hamm, the Supreme Court of Nevada held that the violation of a statute similar to Nebraska's which pro-

vided that the person in charge of a saloon or bar who sells intoxicating liquor to any person who is drunk is guilty of a misdemeanor not only does not impose civil liability on the one in charge, but that the violation of its criminal statute would not constitute negligence per se. The court noted that in other contexts it had recognized that a violation of a penal statute is negligence per se, but it declined to so rule in that case since to do so would have subverted the apparent legislative intention. According to the court the statute was but one of many in the statutory scheme regulating the sale of tobacco and intoxicating liquor to minors and drunkards. See, also, Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); Hulse v. Driver, 11 Wash. App. 509, 524 P. 2d 255 (1974).

Plaintiff, on the other hand, cites an impressive number of cases from other jurisdictions to the contrary, holding that the violation of similar statutes may constitute negligence and give a right of action to a third party injured by reason of the violation of such statutes. See, for example, Elder v. Fisher, 247 Ind. 598, 217 N. E. 2d 847 (1966); Rappaport v. Nichols, 31 N. J. 188, 156 A. 2d 1 (1959); Vesely v. Sager, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P. 2d 151 (1971). In support of her position that the violation of section 53-180, R. R. S. 1943, is evidence of negligence, plaintiff also cites Hoopes v. Creighton, 100 Neb. 510, 160 N. W. 742 (1916), which, although not involving the violation of a liquor statute, holds that the violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, *if* other elements of actionable negligence concur. The case also holds that the failure of the statute or ordinance to provide civil liability does not prevent the violation from being evidence of negligence. Hoopes was an action for civil damages involving a Nebraska statute requiring the furnishing of fire escapes for hotels

and other buildings. The statute also provided for criminal penalties, and imposed a duty on the county attorney to prosecute violators. Plaintiff argues that the Nebraska statute under consideration is of the same nature; and, therefore, a violation of that statute constitutes evidence of negligence. While we recognize the cogency of plaintiff's argument, we are not convinced of its applicability in the present case. In view of our previous conclusion that the Nebraska statute under consideration does not create a civil cause of action in favor of third persons who are injured as a result of the violation of such statute, and what we believe was the purpose of the Legislature in enacting that type of statute after a former repeal of the prior Nebraska dram shop acts, we conclude that section 53-180, R. R. S. 1943, does not create a duty toward third parties, and, as such, the statute does not fix a standard of care, the violation of which could be proof of negligence in actions by third parties. To rule otherwise would thwart the intention of the Legislature.

With case law supporting the position of both parties, the ultimate decision of whether to impose a civil duty on the tavern owner because of a statute drawn to protect the public by preventing the sale of liquor to those intoxicated or under age is clearly a question of policy.

We are mindful of the misery caused by drunken drivers and the losses sustained by both individuals and society at the hands of drunken drivers, but the task of limiting and defining a new cause of action which could grow from a fact nucleus formed from any combination of numerous permutations of the fact situation before us is properly within the realm of the Legislature.

The imposition of a common law duty of due care would create a situation rife with uncertainty and difficulty. If the commercial vendor is liable for negligence, does the host at a social gathering owe a duty to prospective victims of guests? The difficulties of recognizing intoxication and predicting conduct of an intoxicated

patron without imposing some duty of inquiry are evident. Problems could also arise in the apportionment or sorting out of liability among the owners of various bars visited on "bar hopping" excursions. The correct standard of care to be used also presents a problem, as does the determination of whether all acts of the patron, including intentional torts, should be included within the liability of the tavern owner or operator.

We agree with the conclusion of the court in Hamm v. Carson City Nugget, Inc., *supra,* that, in the final analysis, the controlling considerations are public policy and whether the court or the Legislature should declare it. We believe that the decision should be left to the Legislature. The Legislature may hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event it determines a change in the law is necessary or desirable, it can then draft statutes which would most adequately meet the needs of the public in general, while balancing the interest of specific sectors.

The decision of the District Court is affirmed.

AFFIRMED.

NEWTON, J., concurs in the result.

LYLE HOHNEKE, APPELLEE, V. WILLIAM FRANKLIN FERGUSON, APPELLEE, IMPLEADED WITH LYLE R. HOHNEKE ET AL., APPELLANTS.

244 N. W. 2d 70

Filed July 14, 1976. No. 40468.

1. **Reformation of Instruments: Equity: Appeal and Error.** An action to reform a written instrument is equitable in nature and on appeal to this court is triable de novo.
2. **Reformation of Instruments: Equity: Parties.** A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent.

3. **Reformation of Instruments: Parties.** A purely voluntary conveyance will not be reformed at the behest of the grantee after the grantor's death as against the person who in the absence of reformation takes the property under the will of the grantor where the evidence establishes that the grantor would not have consented to the reformation had he lived.

Appeal from the District Court for Wayne County: GEORGE W. DITTRICK, Judge. Reversed.

Charles E. McDermott, Duane W. Schroeder, and Budd B. Bornhoft, for appellants.

Olds & Swarts, for appellee Hohneke.

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

CLINTON, J.

The question on this appeal is whether a certain gift deed, containing an admittedly erroneous description, may be reformed at the behest of the grantee after the death of the grantor. The District Court, without making any specific findings or stating any conclusions of law, granted the reformation. We reverse.

Both parties cite and rely upon principles announced in or claimed to be drawn from statements of this court in Dowding v. Dowding, 152 Neb. 61, 40 N. W. 2d 245. We there noted that: "Courts generally agree that a purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent." That this is the general rule there appears to be no doubt and we find no cases holding to the contrary. See, Annotation, 69 A. L. R. 423, part II, p. 424; Annotation, 128 A. L. R. 1299, part II, p. 1300; 76 C. J. S., Reformation of Instruments, § 10 (a) to (c), pp. 333, 334; 66 Am. Jur. 2d, Reformation of Instruments, § 42, p. 566.

The underlying rationale for the rule is set out at 66 Am. Jur. 2d, Reformation of Instruments, section 42, page 566: "Equity will not decree reformation of a gift

over the opposition of a grantor, since such opposition denies an essential element of the gift—namely, the voluntary action of the donor. . . . There being no consideration moving to the grantor, the volunteer has no claim on him. If there is a mistake or a defect, it is a mere failure in a bounty which the grantor was not bound to make and thus is not bound to perfect."

In Dowding v. Dowding, *supra,* we noted that " 'a volunteer must take the gift as he finds it,' " quoting M'Mechan v. Warburton, 1 Ir. R. 435 (1896).

The precise question we must answer here is whether the above principles are applicable under the particular facts of this case where the grantee brings the action not against the grantor who is deceased, but against the residuary devisee of the grantor's will. In Dowding v. Dowding, *supra,* we said that "the principles precluding reformation of a voluntary conveyance at the suit of the grantee against the grantor during his lifetime do not ordinarily, as a matter of law, apply in favor of the grantor's heirs at law after his death." The grantee relies upon the above statement to support his position and the judgment of the trial court in his favor. The defendant, residuary legatee, however, takes the position that the rules as actually applied in Dowding v. Dowding, *supra,* do not fit this case because here the evidence supports the conclusion that the grantor, had she lived, would not have consented to the reformation, whereas in Dowding v. Dowding, *supra,* the evidence tended to support the conclusion that the grantor would have corrected the mistake during his lifetime had he known of it. In Dowding v. Dowding, *supra,* we found that: " 'Under the record here presented, the . . . [grantor] would doubtless have desired to make the correction sought by this [reformation] action, had he learned of the mistake in his lifetime.' " We there also quoted the following language from M'Mechan v. Warburton, *supra*: " 'It was contended by the defendant Warburton that, as this was a voluntary deed, this court cannot interfere

to rectify it in favour of volunteers. The elementary principle of this Court, that it will not interfere to enforce specific performance of an incomplete voluntary agreement, or to rectify an erroneous voluntary disposition of property in favour of a volunteer, is subject to this exception, that after the death of the donor it will interfere to rectify a disposition which is clearly proved to have, through mistake, failed to carry out the proved intention. . . . If the donor were living it would have, of course, been competent for him to consent to such rectification, or to dissent from it. If the latter, it could not be reformed against his will, for a volunteer must take the gift as he finds it; but after his death, *and in absence of proof of any change of intention*, it cannot be assumed that he would have dissented, and it might even be presumed that he would not dissent.' " (Emphasis supplied.) This statement tends to support the proposition that the court will allow the reformation of a deed against a grantor's heirs if the grantor himself would have permitted such a reformation during his lifetime and, conversely, that if the evidence shows that the grantor would not have consented to the reformation had he lived, then reformation will not be granted.

We now review the evidence in the case before us. The plaintiff, Lyle Hohneke, a grantee in the deed, is the son of the deceased grantor and testatrix, Ella Ferguson. The deed named Lyle and the grantor, Ella, as joint tenants with right of survivorship. The defendant, "Ricky" Hohneke, residuary legatee, is the son of Lyle and grandson of Ella. The deed in question was executed on June 27, 1972, and delivered shortly thereafter. It purported to convey 80 acres of land in Wayne County, Nebraska. Because of a mistake in the description furnished the scrivener, the deed described not an 80-acre tract owned by Ella Ferguson, but an adjacent 160-acre tract. About 1 week previous to June 27, 1972, Ella conveyed two tracts of land in Arkansas which she owned to herself and Lyle as joint tenants. Shortly

after June 27, 1972, Ella became displeased with Lyle and, according to Lyle, a "family feud" ensued. Ella asked him to have his name "removed" from the deeds to the Arkansas land. He refused. Lyle further testified that he was "advised" (by whom the record does not show), that Ella wanted his name taken off the Nebraska deed as well. In August 1972 when the deed here involved was sent to Nebraska for recording the misdescription was discovered. The evidence indicates that Lyle was told by an attorney that it was advisable to procure a corrective deed from Ella. Lyle testified he did not attempt to do so. The evidence supports the conclusion that the reason he did not was because he felt that Ella would not execute a corrective instrument.

On January 2, 1973, Ella, who was domiciled either in Missouri or Arkansas, made a will. In this will she bequeathed to Lyle "the sum of $10 (Ten Dollars) as his full share of my estate." Paragraph third of the will provided: "After the payment of my just debts and taxes and the foregoing specific bequests, then I give, devise and bequeath all the rest, residue and remainder of my said estate and property, whether real, personal or mixed, and wheresoever situate, to my grandson, LYLE R. (RICKY) HOHNEKE, now residing at 2020 First, Apartment 80, Cherry, Washington, to have and to hold the same to himself and his heirs and assigns absolutely and forever in fee simple title." The will also provided that if Ricky should predecease the testatrix, his children should take his share.

The will has been admitted to probate in Wayne County, Nebraska. Lyle has not filed any objections to its probate. The record shows that the only property to which the residuary clause could apply is the 80 acres standing in the testatrix' name in Wayne County, Nebraska. If the deed is reformed no property will pass under the residuary clause.

Ella died on February 6, 1973. While on the way to the hospital in which Ella died, she told the ambulance

driver she did not want to see her son, Lyle. The evidence shows that Lyle considered that Ricky became the owner of the Wayne County land under the terms of the will. He obtained a power of attorney from Ricky to cause the will to be admitted to probate. Ricky was then in the Air Force and en route to foreign duty. Lyle induced Ricky to agree to give him a one-half interest in the land for his service as attorney in fact. Lyle went to Wayne County and began this litigation. Ricky then revoked the power of attorney.

An action to reform a written instrument is equitable in nature and on appeal to this court is triable de novo. Parry v. State Farm Mut. Auto. Ins. Co., 191 Neb. 628, 216 N. W. 2d 875. We conclude from the evidence that Ella would not have consented to the reformation during her lifetime had she known of the mistake after it was discovered.

We hold that a purely voluntary conveyance will not be reformed at the behest of the grantee after the grantor's death as against the person who in the absence of reformation takes the property under the will of the grantor where the evidence establishes that the grantor would not have consented to the reformation had he lived.

REVERSED.

NEWTON, J., concurs in the result.

JOHN VOYCHESKE, APPELLANT, V. D. E. (FRITZ) OSBORN, DOING BUSINESS AS IGA STORE, HAYS SPRINGS, NEBRASKA, ET AL., APPELLEES.

244 N. W. 2d 74

Filed July 14, 1976. No. 40484.

1. **Workmen's Compensation: Appeal and Error.** In workmen's compensation cases, where the new review procedures of section 48-185, R. S. Supp., 1975, are not applicable, the judgment,

order, or award will not be modified on appeal for insufficiency of evidence, if there is reasonable competent evidence to support findings of fact in the trial court.

2. **Workmen's Compensation.** There is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case.

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

Fisher & Fisher, for appellant.

Crites, Shaffer & Slavik, for appellee Osborn.

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

BRODKEY, J.

The plaintiff, John Voycheske, filed an action in the Nebraska Workmen's Compensation Court on December 18, 1974, to recover benefits for injuries allegedly sustained by him on July 23, 1974, while working for D. E. (Fritz) Osborn, doing business as IGA Store, Hays Springs, Nebraska. The case was first heard before a one judge compensation court, which, on May 7, 1975, entered an order dismissing plaintiff's petition on the ground that plaintiff had failed to maintain his burden of proving that he was an employee of the defendant; and finding that plaintiff was an independent contractor and did not come within the provisions of the Nebraska Workmen's Compensation Act. A rehearing was held before a three judge workmen's compensation court, sitting en banc, which court, on August 5, 1975, affirmed the order of dismissal previously entered by the one judge court, and again dismissed plaintiff's petition on the grounds previously stated. Plaintiff then appealed to the District Court for Sheridan County, which, following a hearing, entered an order on November 12, 1975, affirming the order of the Nebraska Workmen's Compen-

sation Court and dismissing the case. Plaintiff has now appealed to this court. We affirm.

The facts of this case are that Voycheske, who in his testimony characterized himself as a maintenance employee of D. E. "Fritz" Osborn, broke his leg on July 23, 1974, when he tripped over a pipe after stepping off a ladder used in installing an incinerator back of Osborn's IGA Store. According to Osborn, Voycheske had done all Osborn's "maintenance" work since 1949. The "maintenance" work was generally more complicated than cleanup or odd jobs, and seems to have been in the field of construction, building, and repairing. Among other things, Voycheske repaired the elevator, installed gutters, hung tracks for overhead cranes, and installed a scale in the butchering room of the store. Aside from a minor repair job on the store door, Voycheske's last job with Osborn was completed in September 1972.

Voycheske set his own wages, submitting charges on an hourly basis at the end of a job. Sometimes the amount due him would be applied to his bill at Osborn's grocery store. Osborn did not withhold social security taxes for Voycheske, but Osborn explained this omission as being due to his belief that all maintenance jobs were excluded from social security requirements.

Osborn supplied the materials for the incinerator installation, but Voycheske occasionally would pick up some items not available locally and charge Osborn for them on his bill. Voycheske supplied his own tools, and also set his own hours, working when the weather was cool. Voycheske testified that Osborn would tell him what he wanted done, the location and the purpose, leaving him free to do the work as he saw fit. If problems arose, or Voycheske needed or had suggestions, he would consult with Osborn. Osborn stated that he told Voycheske what he "wanted and he done the job," because "no better than I am at building, there's no use at me supervising." He reiterated that he could not tell Voycheske anything about the actual construction of the

incinerator, but just told him to build it. Voycheske worked for Osborn on a job-by-job basis, waiting to be contacted by Osborn for specific repair work. He also sporadically worked on other jobs between jobs at Osborn's.

Under the Nebraska Workmen's Compensation Act, the determination of a claimant's status as an employee or as an independent contractor involves an evaluation of all the facts of each case in light of various criteria, each shedding some light on the nature of the relationship between the parties. There is no single test by which that determination can be made. Bohy v. Pfister Hybrid Co., 179 Neb. 337, 138 N. W. 2d 23 (1965). The burden is on the plaintiff to prove that he was an employee at the time of the accident. Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N. W. 2d 66 (1958).

This court has said that an independent contractor is generally distinguished from an employee in that the contractor performs according to his own method, and is not subject to the employer's control except as to the results of the work. Snodgrass v. City of Holdrege, *supra*; Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N .W. 940 (1922). The employer, however, has the right to give directions necessary to insure compliance with the contract. In order to be considered an independent contractor it is generally necessary that he has contracted to do a specific job, although not necessarily for a specific price, and has retained the right to control the means of doing the job. Petrow & Giannou v. Shewan, *supra;* Peterson v. Christenson, 141 Neb. 151, 3 N. W. 2d 204 (1942).

That the worker supplies his own materials and tools may be indicative of contractor status. Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810 (1943). See, however, Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527 (1953). The power to determine the hours of work and details of his working conditions may also be indicia of independent contractor

status. Bohy v. Pfister Hybrid Co., *supra*. But, see, Schneider v. Village of Shickley, *supra*.

If the contract requires the personal services of the party to the contract, he may be considered an employee. Barrett v. Selden-Breck Constr. Co., 103 Neb. 850, 174 N. W. 866 (1919). The deduction of social security taxes may tend to show that a claimant was an employee rather than an independent contractor, and the failure to do so may indicate the contrary. Riggins v. Lincoln Tent & Awning Co., *supra*. The power of either party to terminate the relationship at will may also indicate that the workman is an employee. Schneider v. Village of Shickley, *supra*. Other relevant considerations are whether the worker is engaged in a distinct occupation, whether the work is usually done without supervision, the skill required, the method of payment, and the length of employment. Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N. W. 2d 554 (1942); Snodgrass v. City of Holdrege, *supra;* Petrow & Giannou v. Shewan, *supra*.

The facts support a finding that Voycheske was an independent contractor. Osborn exercised control over the end result of the contract, giving advice and directions only to insure that the contract's objects would be fulfilled. The methods of construction were in control of Voycheske, who also set his own hours and wages, and who was employed only on a job-by-job basis as his services were required. There was no standing agreement between Voycheske and Osborn that Voycheske give preferential service to Osborn's store or that Voycheske handle all the building and repair work at the store, which might have bolstered his claim of employee status. See e.g., Schneider v. Village of Shickley, *supra*; Cole v. Minnick, 123 Neb. 871, 244 N. W. 785 (1932); 1A Larson, Workmen's Compensation Law, § 45.31(a), p. 8-111. While the record does contain some indicia supporting Voycheske's claim of the status of an employee, such as, for example, the hourly wage basis, Osborn's supplying of materials, the apparent right to

terminate the relationship at will, nevertheless, as a whole, it preponderates in favor of the conclusion that Voycheske was an independent contractor.

On the appeal of a workmen's compensation case to the Supreme Court, the applicable standard of review is that if there is reasonable competent evidence to support findings of fact in the trial court, the judgment, order, or award will not be modified for insufficiency of the evidence. The cause will be considered de novo in this court 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 (1971).

We wish to call attention, however, to a recent statutory change in the appeal procedure to this court from judgments of the Nebraska Workmen's Compensation Court after rehearing. Under the new procedure, appeals are no longer taken from the compensation court to the District Court, but are taken directly to the Supreme Court. Under section 48-185, R. S. Supp., 1975, effective August 24, 1975, there is no provision for a de novo review in this court, as under the previous statute. Further, section 48-185 now provides: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside *only* upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) *there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award,* or (4) the findings of fact by the court do not support the order or award." (Emphasis supplied.) While the provisions of the new procedure contained in the amendment above referred to are clearly not applicable to this case because of section 48-182.01, R. S. Supp., 1975, there is little doubt

that the result would be the same. There is no doubt that under the test of either Gifford v. Ag Lime, Sand & Gravel Co., *supra*, or the new statute, there is "reasonable competent evidence" in the record to support the action of the District Court affirming the dismissal of the case by the Workmen's Compensation Court on the ground that plaintiff did not sustain his burden of proof that he was an employee, and finding on the contrary that he was an independent contractor. We affirm the judgment of the District Court.

AFFIRMED.

DOUGLAS D. RAMSEY, APPELLANT, V. GORDON E. RIMPLEY, ET AL., APPELLEES.
244 N. W. 2d 78

Filed July 14, 1976. No. 40485.

Motor Vehicles: Negligence: Parties. Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine be the head of the family, it is settled that it is an indispensable element of recovery under Nebraska law.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Wightman & Fallesen, for appellant.

Cook, Lubberstedt & Kopf, for appellees.

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

WHITE, C. J.

This action was brought to recover damages for property and personal injuries sustained in a motorcycle-automobile accident. The District Court sustained the demurrer of the defendant, Edna J. Rimpley, and dismissed the action against her following the plaintiff's

election not to amend his petition. From that decision, the plaintiff appeals. We affirm the judgment of the District Court.

On August 3, 1974, the plaintiff was driving his motorcycle east on U.S. Highway No. 30 near the east edge of Lexington, Nebraska. Simultaneously, the defendant, Gordon E. Rimpley, the sole passenger in his car, was driving north on a private drive. In approaching the intersection with U.S. Highway No. 30, Rimpley failed to yield the right-of-way and negligently collided with the plaintiff's motorcycle. In bringing suit, the plaintiff joined Edna J. Rimpley as a defendant, contending that Gordon E. Rimpley's negligence was imputable to her as coowner of the automobile under the family purpose doctrine. The District Court dismissed the action against Edna J. Rimpley on the ground that the plaintiff failed to allege she was head of the household at the time of the accident, a requisite element under Nebraska's application of the family purpose doctrine. We agree.

Subsequent to the District Court's disposition of the action against Edna J. Rimpley, we had occasion to consider the issue raised here on appeal in Marcus v. Everett, 195 Neb. 518, 239 N. W. 2d 487 (1976). Reflecting on the long line of cases supporting our decision, we stated: "The family purpose doctrine, as developed by Nebraska case law, may be fairly stated to be that where the head of the family purchases, owns, maintains, furnishes, or provides a motor vehicle for the general use, pleasure, and convenience of the family, and a family member is using the car with the express or implied consent or permission of the owner, the negligence of the family member driver is imputed to the *head of the family.*" (Emphasis supplied.) Joint ownership of the vehicle is not by itself a sufficient basis for imputing the negligence of a family member. As we held in Marcus, in order to recover under the family purpose doctrine, four essential elements must be proved: "(1) that the defendant who is sought to be charged with liability

was the head of his family, (2) that he furnished the car for the use and pleasure of his family, (3) that the driver of the automobile was a member of his family and one for whose use or pleasure the car was furnished, and (4) that the driver was, at the time of the accident, using the car for which it was furnished with the authority, expressed or implied, of the head of the family."

In the Marcus case we stated in language that requires no interpretation as follows: "Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine be the head of the family, it is clear under the decisions previously cited that it is an indispensible element to recovery under Nebraska law."

We reaffirm the above declaration in Marcus v. Everett, *supra,* and adhere to our past decisions limiting application of the family purpose doctrine to the head of the household and refuse to extend its reach to the facts presented in this case.

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

AFFIRMED.

B. C. CHRISTOPHER & COMPANY, A PARTNERSHIP, APPELLANT, V. ALBERT D. DANKER, APPELLEE.
244 N. W. 2d 79

Filed July 14, 1976. No. 40516.

1. **Pleadings.** Pleadings perform a useful and necessary purpose. They frame the issues upon which the cause is to be tried and advise the adversary as to what he is called upon to meet.
2. ———. A pleading should be construed with reference to the general theory upon which it proceeds, and should not be uncertain as to which of two or more theories is relied on.
3. **Account Stated: Trial: Account, Action on.** Ordinarily, an account stated should be set aside if the case is to be tried on the original claims upon which it is based.

4. **Brokers: Account, Action on.** Where a broker fails to execute a customer's orders or executes them improperly or at variance with the instructions given, the customer may treat the transaction as a nullity. If a customer elects to repudiate a transaction because it took place contrary to his instructions he has no liability to the broker as a result of the transaction.

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

William J. Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

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

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

BOSLAUGH, J.

This case involves a controversy arising out of transactions in commodity futures. The plaintiff, B. C. Christopher & Company, is a member of the Chicago Board of Trade and operates a brokerage business in Omaha, Nebraska. The defendant, Albert D. Danker, was a customer of the plaintiff and maintained a commodity trading margin account with the plaintiff. On Friday, April 26, 1974, the defendant had no position in the market and his account with the plaintiff had a credit balance of $75.

On April 26, 1974, the defendant placed two trading orders by telephone with Douglas Brown, an employee of the plaintiff. The evidence is in conflict and there is a dispute between the parties as to the nature of these transactions. According to the defendant, he told Brown to buy 50,000 bushels of July soybeans at $5.80 for his account and sell 50,000 bushels of May soybeans at the market price, which was then about $5.90. Brown testified that the defendant ordered him to sell 50,000 bushels of July beans at $5.91. The sell order was not executed because July beans did not reach $5.91 that day.

The buy order was executed at $5.80. As the market price continued to fall a second buy order for 50,000 bushels of July beans was executed at $5.66. Late in the day an order to sell 100,000 bushels of May beans was executed. These last two transactions were made after the defendant learned his first sell order had not been executed, and were designed to avoid or minimize his losses.

The defendant also claims Brown failed to execute an order to sell 100,000 bushels of July beans at $5.73. Brown claims the defendant placed a stop sell order for 100,000 bushels of July beans at $5.73 which was not executed because a stop sell order can not be executed until the market reaches a higher price. July beans did not go above $5.73 that day, although there were some traded at $5.73. The defendant also claims he placed a later order to sell 100,000 bushels of July beans at any price over $5.70 which was not executed. Brown denies such an order was placed.

On the following Monday, April 29, the plaintiff demanded $21,000 from the defendant in order to hold his position in the market. The defendant then delivered a check for $21,000 to Brown. A buy order and sell order for 100,000 bushels each of May soybeans were executed on Monday for the defendant's account. There is no dispute concerning these transactions which resulted in a loss of $2,400 to the defendant.

On May 1, the $21,000 check was returned to the plaintiff as an insufficient fund check. The defendant told the plaintiff he could not make the check good. The plaintiff then closed out the account by buying 100,000 bushels of May beans for the defendant's account and selling 100,000 bushels of July beans. Brown advised the defendant he owed the plaintiff $13,025 as a result of these transactions and the defendant delivered a check in the amount of $13,025 to Brown. The defendant testified that he told Brown the check was no good at the time he delivered it to Brown. The defendant

then consulted a lawyer and stopped payment on both checks.

The petition alleged the defendant maintained a commodity trading account with the plaintiff, a copy of which was attached to the petition showing a $13,025 balance due the plaintiff. The petition further alleged the defendant had tendered the $21,000 check for credit to his account, and the $13,025 check in payment of the "stated amount" of his account, both of which were returned for insufficient funds. The petition then alleged there was $13,025 due the plaintiff and prayed for judgment in that amount.

The answer admitted the plaintiff was engaged in the brokerage business and that the cause of action arose out of business transacted in Nebraska. It contained a general denial and further alleged that the balance due as shown on the account alleged in the petition was not true and correct; that the plaintiff had not followed the defendant's instructions, and the defendant would have sustained no trading losses if the plaintiff had followed the defendant's instructions.

At the close of the evidence there was an instruction conference in chambers. The plaintiff took the position that under the allegations of the petition it could recover upon the theory of an open account, an account stated, or upon the $13,025 check, and contended that all three theories of recovery should be submitted to the jury. The trial court construed the petition as alleging an action upon an open account and submitted the case to the jury on that theory only.

The petition was susceptible to the construction placed on it by the trial court. Although the petition referred to a "stated amount," the petition pleaded the transactions in detail by incorporating a copy of the account in the petition. It was in the usual form of a petition alleging a cause of action on an open account. See, § 25-837, R. R. S. 1943; Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165. Most of the allegations in the petition

were surplusage if the plaintiff intended to sue on the $13,025 check.

Pleadings perform a useful and necessary purpose. They frame the issues upon which the cause is to be tried and advise the adversary as to what he is called upon to meet. Pinkerton v. Leonhardt, 184 Neb. 430, 168 N. W. 2d 272. A pleading should be construed with reference to the general theory upon which it proceeds, and should not be uncertain as to which of two or more theories is relied on. Fellers v. Howe, 106 Neb. 495, 184 N. W. 122.

Ordinarily, an account stated should be set aside if the case is to be tried on the original claims upon which it is based. Andrews Electric Co. v. Farm Automation, Inc., 188 Neb. 669, 198 N. W. 2d 463. Here the plaintiff elected to try the case upon the theory of an open account by producing testimony in its case-in-chief as to the transactions between April 26 and May 1. The defendant produced testimony concerning the same transactions and claimed he was not indebted to the plaintiff in any amount.

There was no dispute as to whether purchases and sales had been made for the defendant's account. The issue was whether the plaintiff had followed the defendant's instructions in regard to orders that were not executed. As a practical matter, the defendant's evidence, if believed, prevented a recovery by the plaintiff on any theory. See, McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705; 6 Williston on Contracts, § 1684, p. 5236. We conclude there was no prejudicial error in submitting the case to the jury on the theory of an open account.

The plaintiff also objected to instruction No. 13 which was as follows: "You are instructed that, where the stockbroker or commodities broker fails to execute the customer's orders or executes them improperly or at variance with the instructions given, the customer may rescind his agreement or treat the transaction as a

nullity, and the customer may recover back any money he has deposited with the broker, regardless of whether or not the customer has sustained a loss. You are further instructed that, if the customer elects to, and does, repudiate such a transaction, he is entitled to immunity from liability to the broker; and, the customer has the right to repudiate a transaction whenever facts come to his knowledge or attention showing that the transaction took place contrary to his instructions, regardless of how long that may be after the transaction occurred."

The instruction appears to have been based upon language appearing in 12 Am. Jur. 2d, Brokers, § 121, p. 868, and is supported by Clothier v. Beane, 187 Okla. 693, 105 P. 2d 752; Baldwin v. Peters, Writer & Christensen, 141 Colo. 529, 349 P. 2d 146; Krinsky v. Whitney, 315 Mass. 661, 54 N. E. 2d 36.

Although the instruction given may have been somewhat broader than was required under the facts in this case, we find no prejudicial error in the instruction. The trial court was required to instruct the jury as to the rights of the defendant if it found that the plaintiff had failed to execute the defendant's orders or had executed them improperly. The instruction given was a correct statement of the law so far as it was material to the issues in this case.

It is unnecessary to discuss the other assignments of error.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. COHEN, APPELLANT.
243 N. W. 2d 782

Filed July 14, 1976. No. 40520.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

MCCOWN, J.

Defendant pleaded guilty to a felony charge of second offense petit larceny and was sentenced to 1 year imprisonment. The only issue on appeal is whether or not the sentence was excessive.

The statutory penalty for petit larceny second offense is imprisonment for not less than 1 year nor more than 2 years. See § 28-512, R. S. Supp., 1974. The only alternative disposition is probation. Although the stolen property involved in the specific charge here was of comparatively small value, there were prior convictions, both in this state and elsewhere, on petit larceny charges. In this case also, as a result of plea bargaining, another petit larceny charge was dismissed.

The defendant's criminal record dates back to 1961, when the defendant was convicted of assault and battery on a deputy sheriff. His record includes a federal conviction in 1968 for selling sealed grain, for which he was sentenced to 4 months imprisonment and placed on probation for 3 years. His record also includes numerous check charges and includes an extensive number of alcohol related offenses. He had also been committed to the Lincoln Regional Center in 1971 and again in 1972.

The record establishes that the defendant was not a fit subject for probation. The trial court recognized the difficulties involved in the limitation of sentencing alternatives and imposed the statutory minimum sentence.

A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State

v. Braasch, *ante* p. 240, 242 N. W. 2d 119. There was no abuse of discretion here.

AFFIRMED.

UNITED MATERIALS, INC., A CORPORATION, APPELLANT, V. ALBERT L. LANDRETH, APPELLEE.

244 N. W. 2d 164

Filed July 14, 1976. No. 40526.

1. **Workmen's Compensation: Subrogation: Parties: Actions.** Under the Workmen's Compensation Act, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee.
2. **Wrongful Death: Parties: Actions.** An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate.
3. **Workmen's Compensation: Wrongful Death: Actions.** The Workmen's Compensation Act does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action.
4. **Limitation of Actions: Wrongful Death.** A wrongful death action cannot be maintained under the provisions of sections 30-809 and 30-810, R. R. S. 1943, unless commenced within 2 years of the death.

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

Michael V. Smith of Smith & King, and Harry R. Henatsch of Katskee & Henatsch, for appellant.

Fisher & Fisher, for appellee.

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

McCOWN, J.

The plaintiff employer filed its petition on August 23, 1974. One cause of action sought to recover amounts paid and to be paid as death benefits under the Workmen's Compensation Act for the death of an employee on April 10, 1972, resulting from an automobile accident allegedly caused by the negligence of the defendant. The District Court sustained defendant's demurrer and dismissed the cause of action.

The parties have agreed to a case stated, duly certified by the trial court. On April 10, 1972, a truck owned by the plaintiff, United Materials, Inc., a corporation, and operated by Joseph L. Westman, an employee of the plaintiff, was involved in an accident with the defendant, Albert L. Landreth, the owner and operator of a pickup truck, on State Highway No. 87 in Sheridan County, Nebraska. As a result of that accident, Joseph L. Westman died. No administration of the estate of Joseph L. Westman was initiated in any court, and no personal representative was appointed to represent Elizabeth Westman, his surviving spouse, or any of his next of kin. No action for wrongful death was filed by any party at any time.

Under the provisions of the Nebraska Workmen's Compensation Act, plaintiff became obligated to, and did, pay benefits to the widow of Joseph L. Westman, which obligation continues throughout her lifetime.

The plaintiff's first cause of action was for the damages to its truck, and the second cause of action was for the death benefits paid and to be paid under the Nebraska Workmen's Compensation Act. The defendant demurred upon grounds inter alia that the petition did not state facts sufficient to constitute a cause of action, and that the plaintiff had no legal capacity to sue. The District Court sustained the demurrer as to the second cause of action, holding that the type of action which may be initiated by an employer pursuant to section 48-118, R. R. S. 1943, for recovery of death benefits

paid pursuant to the Workmen's Compensation Act by subrogation to the right of the deceased employee or his dependents, could not be maintained unless a personal representative of the deceased employee had first filed a wrongful death action within 2 years of the death of the deceased employee.

The plaintiff contends that section 48-118, R. R. S. 1943, provides for a separate action by an employer against a third party for death benefits paid to the family of a deceased employee, and that such an action is not dependent upon a wrongful death action being first filed by the legal representative of the deceased employee within the 2-year statute of limitations provided for wrongful death actions.

Section 48-118, R. R. S. 1943, provides, among other things, that: "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person * * *."

Section 30-810, R. R. S. 1943, provides that every wrongful death action "shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin."

This court, in construing the provisions of the Workmen's Compensation Act and the wrongful death statutes together to give effect to both, has held that an employer can bring an action directly against a third party tort-feasor for injuries suffered by an employee but that only the personal representative of the deceased employee can bring an action for wrongful death. The leading case is Luckey v. Union Pacific R.R. Co., 117 Neb. 85, 219 N. W. 802. In that case we said: "Under the workmen's compensation law, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents and may

bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee. * * * An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate. * * * The workmen's compensation law does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action."

The plaintiff contends that the Luckey case did not contemplate the situation where the dependents of a deceased employee failed, neglected, or refused to have a personal representative appointed for the estate of the deceased employee. The argument is that under such circumstances the employer has no standing to seek damages from a negligent third party and, therefore, is effectively deprived of the subrogation right granted to him.

That argument assumes that the employer has no right or authority to bring any proceeding for the appointment of an administrator in the estate of the deceased employee. Under section 30-315, R. R. S. 1943, if no application for administration has been filed by a widow or next of kin for 30 days after death, the administration may be granted to one or more of the principal creditors if any are competent and willing to take it, or may be committed to such other person or persons as the judge of probate may think proper. If the employer deemed it advisable to bring an action for wrongful death to recover death benefits paid or payable, there was nothing to prevent the filing of a petition for the appointment of an administrator of the deceased employee's estate.

An employer's subrogation rights with respect to a

statute of limitations can be no better than the rights of those through whom he is subrogated. A wrongful death action cannot be maintained under the provisions of sections 30-809 and 30-810, R. R. S. 1943, unless it is commenced within 2 years after the death.

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

AFFIRMED.

CLINTON, J., concurs in the result.

JOHN GUNSET ET AL., APPELLANTS, V. DAVID MOSSMAN, APPELLEE.
243 N. W. 2d 783

Filed July 14, 1976. No. 40527.

1. **Contracts.** A contract must receive a reasonable construction consistent with the intention of the parties existing at the time it was entered into.
2. ———. Through construction, the court seeks to enforce the contract made by the parties, not to create a new one.

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

Warren C. Schrempp, Thomas G. McQuade, and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, for appellants.

Warren S. Zweiback and Mark L. McLaughlin of Zweiback & Laughlin, for appellee.

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

WHITE, C. J.

This is an action for breach of contract arising from a clause in a purchase agreement for the sale of the defendant's home to the plaintiffs. The suit originated in the municipal court of the City of Omaha, Nebraska,

where judgment was entered for the plaintiffs in the amount of $2,400 damages. The defendant appealed to the District Court for Douglas County, Nebraska, where the court tried the case de novo on the record. The District Court entered judgment for the defendant and subsequently overruled the plaintiffs' motion for a new trial. We affirm the judgment of the District Court.

The essential facts of this case are not in dispute. On August 25, 1972, the plaintiffs, John and Veronica Gunset, entered into a purchase agreement with the defendant to buy a home located at 301 South Fifty-seventh Street, Omaha, Nebraska. The defendant and his family had lived in the home for approximately 7 years. During that period, the boiler, the subject matter of this contract dispute, *was checked annually by a heating and plumbing contractor and flushed in accordance with maintenance directions.* Although the boiler admittedly leaked throughout the 7 years the defendant resided there, it continued to provide adequate heat through the date of the home's sale to the plaintiffs.

Among the provisions embodied in the standard agreement was the following clause: "Seller agrees to maintain, until delivery of possession, the heating, air conditioning, water heater, sewer, plumbing and electrical systems and any built-in appliances in *working condition.*" (Emphasis supplied.)

Shortly after taking possession of the house, Mr. Gunset called the Metropolitan Utilities District, requesting inspection of the furnace' boiler. On September 22, 1972, an employee of the Metropolitan Utilities District inspected the boiler, affixing a "red-tag" to the unit. Pertinent language on the tag stated that the boiler was leaking water and that "correction of the above condition is required by our rules and regulations."

Within a short time following this inspection, the plaintiffs and the real estate company, N. P. Dodge Company, contacted the defendant, notifying him of the

leak in the boiler. Sometime in October 1972, the plaintiffs employed a licensed heating and air conditioning contractor to examine the boiler. Upon learning the estimated expenses necessary to replace the boiler, the plaintiffs filed suit. Nothing was apparently done to remedy the condition and, for the following 2 years, the plaintiffs continued to use the furnace while living in the house.

The sole issue before this court on appeal is whether the defendant breached a condition in the purchase agreement requiring the heating system to be maintained in "working condition" until the plaintiffs obtained possession of the house. No allegations of fraud are raised.

This court has long followed the elementary, yet basic, proposition that to effectuate the purposes for which it is made, a contract must receive a reasonable construction consistent with the intention of the parties existing at the time it was entered into. O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N. W. 2d 507; General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516. Through construction, the court seeks to enforce the contract made by the parties, not to create a new one. Bushman Constr. Co. v. Sanitary Dist. No. 1 of Lancaster County, 138 Neb. 538, 293 N. W. 380. We believe that an examination of the uncontroverted circumstances in this case demonstrates that the plaintiffs seek to impose an unreasonable interpretation of the words "working condition" in the purchase agreement.

Of particular importance in this case are the actions of the parties preceding the signing of the agreement and the reasonable expectations attending such actions. Under direct examination by his counsel, Mr. Gunset stated that the boiler looked in "excellent" condition when he inspected it prior to signing the purchase agreement. But the record shows that at no time did the defendant make any representations with regard to

its operating condition, present or future. Additionally, the plaintiffs made no further inquiry as to the boiler's operation, notwithstanding their awareness that the furnace was probably as old as the house, approximately 50 years. Under such circumstances, the plaintiffs could only reasonably expect to acquire the furnace in its existing condition. This conclusion is supported by the language in the purchase agreement that the plaintiffs *subsequently* signed. The sentence immediately preceding the clause cited above reads: "This offer is based upon my personal inspection or investigation of the premises and not upon any representations or warranties of condition by the Seller or his agent."

The plaintiffs' primary contention is that expert testimony elicited at the trial is instrumental in determining whether the furnace was in "working condition" upon transfer of possession. Based upon examination of the degree of calcium deposits built up on the section containing the leak 2 years after execution of the agreement, these experts concluded that, in their opinion, the boiler was not in working condition at delivery of possession. The error in the plaintiffs' contention is that they seek to substitute the judgment of experts for the understanding of the parties existing at the date the contract was entered into. It is that understanding of "working condition" which is controlling.

The only reasonable interpretation of the words "working condition" under the facts of this case is that the defendant agreed to deliver possession of the furnace in the same operating condition existing at the time the agreement was signed. The clause in dispute was not a warranty. Since no allegation is made that the boiler's condition worsened from the date the agreement was signed to the date the plaintiffs obtained possession, the plaintiffs received all they bargained for.

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

AFFIRMED.

DOROTHY M. MALEC, APPELLEE, V. JERRY P. MALEC, APPELLANT.
244 N. W. 2d 82

Filed July 14, 1976. No. 40532.

1. **Contempt.** Contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction.
2. **Contempt: Pleadings: Affidavits.** The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime.
3. **Contempt: Pleadings: Motions, Rules, and Orders.** In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.
4. **Contempt: Evidence.** Before a person may be said to be in contempt of court for failure to comply with a restraining order, the evidence must disclose not only the failure to comply with the order but also that the failure was willful.
5. **Contempt: Evidence: Motions, Rules, and Orders.** A party is not in contempt of court for failure to comply with an order directing him to pay money unless it is shown that he had sufficient ability to pay, and that his refusal was willful, contumacious, and without just and reasonable grounds.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Judgment reversed. Contempt proceedings dismissed.

Thomas P. Leary, for appellant.

Lathrop & Albracht, for appellee.

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

McCOWN, J.

The respondent, Jerry P. Malec, was found guilty of willful contempt of a temporary restraining order in a divorce proceeding and sentenced to 30 days in the county jail.

Dorothy M. Malec and Jerry P. Malec were married July 11, 1973. On May 8, 1974, Dorothy filed a petition

for dissolution of marriage against Jerry, the respondent. On June 25, 1975, a second amended and supplemental petition was filed. It alleged, among other things, that the respondent was providing the petitioner with a rental car from Custom Leasing, Inc., and requested that he be restrained and enjoined from disturbing petitioner's possession of the automobile. The respondent filed his answer on July 8, 1975, joining in the prayer for the dissolution of the marriage but alleging that the petitioner was not entitled to maintenance, alimony, or property division because of the terms of an antenuptial agreement, a copy of which was attached to the pleading.

On the 8th day of October 1975, the petitioner filed a verified application alleging that respondent had sold petitioner's car for $1,000 and kept the money, and to replace it, a 1973 Datsun automobile had been leased by respondent for petitioner's use; that respondent had stopped making the lease payments on the vehicle; and had insisted that the leasing company capture the car and turn it over to him. She prayed for a restraining order "restraining and enjoining the respondent from disturbing her possession and custody of the 1973 Datsun." The District Court on that date entered its ex parte temporary order accordingly. The court set hearing on the order for October 16, 1975. On hearing the court continued the temporary order in effect, and ordered that the respondent be "restrained and enjoined from disturbing the petitioner's possession and use of the 1973 Datsun 240Z automobile or causing her possession and use of said automobile to be disturbed in any way."

The evidence shows without dispute that the Datsun automobile was leased by Custom Leasing, Incorporated, to Malco Engineering Co., Inc., on July 6, 1973. Malco Engineering Co., Inc., is a corporation, the stock of which is owned by the respondent husband, who is its president. In September 1975, the monthly lease pay-

ments for August and September 1975, of $152.95 each were delinquent, and the total balance still due Custom Leasing on the lease was $1,690.

About September 27, 1975, petitioner's counsel tendered a check for $500 to Custom Leasing to bring the lease payments up to date, but, on advice of Custom Leasing counsel, it was returned. In September 1975, the respondent made arrangements to obtain a loan of $3,600 from North Side Bank on the Datsun automobile. The loan was made October 20, 1975, by the bank by a bank check which was valid only if the car title was attached. On October 20, 1975, Malco Engineering Co., Inc., through Malec, the respondent, paid Custom Leasing, Incorporated, the balance due on the Datsun lease of approximately $1,700, and received the title from Custom Leasing. The title received and attached to the North Side Bank check was in the name of Malco Engineering Co., Inc. Malec also paid off other leases from Custom Leasing covering equipment used in the Malco plant in the amount of $1,139.67, and received title to them. There is no evidence as to the use made of the balance of the $3,600 loan from North Side Bank. The North Side Bank lien on the Datsun was recorded on October 21, 1975. On November 19, 1975, the respondent advised the North Side Bank that he was unable to make the payments on the Datsun loan and told the bank where the car could probably be found. During all the times mentioned the car had been continuously in the possession of the petitioner wife. The North Side Bank repossessed the automobile from a parking lot on November 19, 1975.

On November 24, 1975, the petitioner filed an application for an order to show cause why the respondent should not be punished for contempt for deliberate and willful disregard of the order restraining and enjoining him from disturbing the petitioner's possession and use of the Datsun automobile. On December 9, 1975, hearing was held on that application. The evidence affirm-

atively established that respondent had paid the petitioner the $1,000 sale price for her original car, and that the $1,000 had been deposited in petitioner's personal bank account. That evidence flatly contradicted specific allegations of the petitioner in her application for the restraining order. It should be noted also that the evidence at the hearing as to the financial condition of the respondent and the Malco Company was uncontradicted.

Malco Engineering Co., Inc., was a production machine shop for the manufacture of airline components and air valves. It had lost $35,000 over the preceding 2 years. Its October 31, 1975, balance sheet showed no cash, but only accounts receivable and inventory in current assets. Attempts to sell it for many months had been unsuccessful. The stockholders equity of some $41,000 in the balance sheet was obviously speculative, and the tangible property and equipment of the company was mortgaged to banks or other creditors. The principal creditor, who held the mortgage on the machinery and equipment, had refused any additional loans. Stockholders, presumably respondent, had previously loaned the company over $53,000. The company owed the Internal Revenue Service on withholding and social security taxes approximately $12,000.

Respondent's personal finances reflected the condition of his company. Respondent had drawn no salary from the company for about 3 years. Any automobiles or recreational equipment used by the respondent were owned by the company and encumbered by mortgages or liens. Respondent's only personal income was $52 a month from an annuity. He had borrowed money from the business, but his apartment rent of $205 a month was a month and a half delinquent. The joint income tax return of the petitioner and respondent for 1974 disclosed total gross income of $12,479, of which $12,241 was the wife's salary.

The District Court found the respondent guilty of a willful violation of the restraining order and sentenced

him to 30 days in the county jail. This appeal followed. Initially, there is a serious question as to the court's power and authority to enter an order with respect to property which was not the property of either party to the divorce action, but even aside from that issue, it is obvious that the contempt conviction here must be reversed.

It has long been established in this state that contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction. Halverson v. Halverson, 189 Neb. 489, 203 N. W. 2d 452.

As early as 1937, we held that strict rules of construction applicable to criminal proceedings are to govern and that: " 'The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime.' " Thomas v. Thomas, 132 Neb. 827, 273 N. W. 483. In the case before us, the language of the order simply restrained the respondent from doing any affirmative act which would cause the petitioner's possession and use of the car to be disturbed. It did not require the respondent to make any payment on any contract. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Drake v. Drake, 183 Neb. 677, 163 N. W. 2d 598. No reasonable interpretation can expand the order here to require respondent to make any payments on any car loan or contract.

Even if the restraining order here could be reasonably interpreted to require the respondent to make the car payment involved, his failure to do so must still be willful. The rule is well settled in this state that before a person may be said to be in contempt of court for failure to comply with a restraining order, the evidence must disclose not only the failure to comply with the order but also that the failure was willful. Halverson v. Hal-

verson, *supra*; Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468.

A party is not in contempt of court for a failure to comply with an order directing him to pay money unless it is shown that he had sufficient ability to pay, and that his refusal was willful, contumacious, and without just and reasonable grounds. Wright v. Wright, 132 Neb. 619, 272 N. W. 568. The evidence here is uncontradicted that the respondent was financially unable to make the car payment and his failure was therefore not willful.

The conviction and sentence of the respondent for civil contempt was arbitrary and erroneous. The judgment is reversed and the proceedings for contempt dismissed.

JUDGMENT REVERSED. CONTEMPT PROCEEDINGS DISMISSED.

FARMLAND SERVICE COOP, INC., A COOPERATIVE CORPORATION, APPELLANT, V. RAYMOND D. KLEIN, ET AL., APPELLEES.
244 N. W. 2d 86

Filed July 14, 1976. No. 40573.

1. **Summary Judgments.** The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled.
2. ———. Upon a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
3. ———. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom.
4. **Equity: Frauds, Statute of.** Equity will not allow the statute of frauds to be used as an instrument of fraud.
5. **Contracts: Frauds, Statute of: Waiver: Estoppel.** Where a

party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing.

6. ———: ———: ———: ———. Promissory estoppel applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee.

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

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Padley & Dudden and James M. Tyler, for appellees.

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

SPENCER, J.

Plaintiff seeks damages for the breach of an oral agreement to sell 90,000 bushels of corn. The District Court sustained a motion for summary judgment on the ground that the plaintiff's action was barred by the statute of frauds. Plaintiff premises this appeal on its theory that fact issues are present which are not determinable at a hearing on a motion for summary judgment. We affirm.

Plaintiff-appellant, Farmland Service Coop, Inc., hereinafter referred to as Coop, alleges that Ross Klein, acting on behalf of the defendants collectively, agreed to sell it 90,000 bushels of corn. The corn was to be No. 2 yellow corn and the sale price was $1.39 per bushel, with delivery during June, July, and August. Coop further alleges defendants knew it would rely on defendants' agreement and immediately enter into resale agreements with others.

The alleged sale agreement was entirely an oral telephone transaction. No written memorandum of any

nature was prepared or signed by the parties. Nor was any letter confirming the transaction sent to the defendants. The evidence does refer to a letter sent to the defendants after the repudiation of the alleged contract. That letter, however, while referred to in a deposition, was never offered or received in evidence. Defendants denied the existence of a contract. In their motion for summary judgment defendants contend that because the agreement alleged by Coop was an oral agreement for the sale of goods for the price of $500 or more, the contract, if one existed, was not enforceable due to the statute of frauds.

Uniform Commercial Code, section 2-201, provides as follows: "(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

"(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

"(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

"(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the

seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

"(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

"(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2-606)."

In support of their motion, defendants offered the depositions of Louis, Ross, and Raymond Klein, all of whom denied committing any grain to the Coop or the existence of any contract with it. Defendants also offered the deposition of Howard Houser, Coop's grain division manager, who testified that he was "relatively sure" that defendants, after obtaining an offer from the Coop, had phoned and accepted an offer of $1.39 per bushel for 90,000 bushels of corn. To show reliance on the sale agreement, Houser also identified exhibit 1, a confirmation of purchase by Far-Mar-Co., Inc., from Farmland Service Coop, Inc., of 102,000 bushels of corn, dated March 31, 1973. This carries a notation "Klein Corn, 90000 Bu." He concedes, however, that this notation was made by Coop sometime after the confirmation form was received by it from Far-Mar-Co.

Coop produced no evidence in opposition to the motion for a summary judgment. The District Court sustained the motion "for the reason that the action is barred by the Statute of frauds and for that reason no issue remains." Coop, which made no showing by affidavit or otherwise in opposition to the motion for summary judgment, now urges that its cause of action is based on promissory estoppel and under that claim defendants' defense of the statute of frauds raises many issues of

fact, which preclude the sustaining of a summary judgment motion. There is no merit to these contentions.

The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Upon a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. See Pfeifer v. Pfeifer (1976), 195 Neb. 369, 238 N. W. 2d 451.

Applying these rules, we are at a loss to see what factual issues Coop believes exist in the record before us. The sale was for much more than $500. It was not in writing. There was no written confirmation of the contract. It was not within any of the exceptions enumerated in section 2-201(3), U.C.C. On the record, the trial court properly sustained the motion for summary judgment.

Coop urges that equity will not allow the statute of frauds to be used as a shield for wrongdoing. In support of this point, it quotes the following from Hecht v. Marsh (1920), 105 Neb. 502, 181 N. W. 135, 17 A. L. R. 1: "In Simonton, Jones & Hatcher v. Liverpool, London & Globe Ins. Co., 51 Ga. 76, the following rule is announced: 'Equity will not allow the statute of frauds to be used as an instrument of fraud, and will decree specific performance or hold the maker of a parol contract estopped from denying it when the other party, by virtue of it, and under and in pursuance of it, has so far acted as that it would be aiding in a fraud to permit the contract to be repudiated. And what equity would do, our courts of law, under proper allegations, will also do.' "

Hecht v. Marsh, *supra,* involved a sale and exchange

of lands. The seller refused to sign the contract unless the buyer put up forfeit money as evidence of good faith. To induce the seller to waive this requirement, the broker orally agreed to waive his commission if the transaction was not completed. When the contract was not performed, the broker sued for his commission. This court held that equity will not allow the statute of frauds to be used as an instrument of fraud. Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing. This, however, is not the situation in the instant case.

Coop is laboring under a misapprehension. It is clear to us that the mere breach or violation of an oral agreement which is specifically covered by the statute of frauds by one of the parties thereto or the mere denial of an agreement or refusal to perform it is not of itself a fraud either in equity or in law for which the court should give relief. The mere pleading of reliance on the contract to his detriment should not be sufficient to permit a party to assert rights and defenses based on a contract barred by the statute of frauds. If he were permitted to do so, the statute of frauds would be rendered meaningless and nugatory. The mere failure to perform an oral contract within the statute where no relation of trust and confidence exists does not constitute fraud authorizing the right to relief. In Hecht v. Marsh, *supra,* the broker induced the seller to waive specific provisions of a written contract on his oral agreement to waive his fee. To have permitted the broker to have used the statute on his oral inducing agreement would have constituted a fraud on the seller.

The plaintiff's petition is framed on the theory of promissory estoppel, which generally is a promise by one party upon which another relies to his detriment, and

which the promisor should reasonably have foreseen would cause the promisee to so rely. It operates not in regard to a part or presently existing state of facts but rather to a situation which one party promises will be true in the future. Unlike equitable estoppel, it gives rise to a cause of action for damages. In determining whether promissory estoppel establishes a defense to the statute of frauds, as contended by Coop, it is necessary to analyze the doctrine of promissory estoppel.

Section 90 of Restatement, Contracts 2d, Tent. Dr. No. 2 (1965), states the doctrine of promissory estoppel in the following terms: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy for breach may be limited as justice requires."

Traditionally, the promissory estoppel claim has been used to supply the element of consideration where to refuse enforcement of a promise unsupported by a consideration would work an injustice to the party who relied to his detriment on the promise. Calamari & Perillo, The Law of Contracts, §§ 99 to 105 (1970). We do not have such situation here.

We note that section 2-201, U.C.C., contains no promissory estoppel exception to the statute of frauds. The statute of frauds is still operative in this jurisdiction. It applies to the enforcement of oral contracts except as otherwise provided by section 2-201, U.C.C. The position we take is that promissory estoppel usually applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee. This was the situation present in the Hecht case. This also is the interpretation which gives full effect to the statute of frauds rather than rendering it nugatory as the interpretation urged by Coop would

do. In reference to this position, we determine section 90 of Restatement, Contracts 2d, Tent. Dr. No. 2 (1965), is limited in scope to informal contracts of a unilateral nature and its purpose in such instances is to dispense with the requirements of consideration to support the promise where it applies.

The motion for summary judgment was properly sustained. The judgment is affirmed.

AFFIRMED.

H. DALE VON SEGGERN, APPELLANT, V. JOHN VON SEGGERN ET AL., APPELLEES.
244 N. W. 2d 166

Filed July 21, 1976. No. 40365.

1. **Partnership: Accounting: Trial.** In an accounting action between partners, the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items.
2. **Equity: Appeal and Error: Trial.** In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with ordinary rules governing the burden of proof, and competency and materiality of the evidence.
3. **Appeal and Error: Evidence: Witnesses.** When credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
4. **Appeal and Error: Trial.** Even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight.

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

Hurt & Gallant and Daniel A. Smith, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellees.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

This case involves three brothers, two partnerships, and a family dispute. Appellant, H. Dale Von Seggern, who is referred to as Dale in both the record and in this opinion, brought this action in the District Court for Dodge County on April 19, 1973, alleging the existence of a farming partnership between himself and his brother, John Von Seggern; and also a trucking partnership between himself and his brothers, John and Egbert. In his petition, Dale prayed for the dissolution of both partnerships, an accounting and distribution of the assets, and the appointment of a receiver. John and Egbert filed a joint answer in which they denied that a farming partnership existed between Dale and John, contending, instead, that a joint venture existed as to part of the farming activities. They admitted existence of a trucking partnership between the three brothers. In what they term a cross-petition, but which is actually part of the prayer of their answer, the defendants also prayed that the court dissolve the trucking partnership and determine the obligation of each party to the other arising out of the joint farming venture. Following numerous hearings, extending from February 21, 1974, to July 28, 1975, the court entered its final decree containing many specific findings of fact and ordering "that the partnerships are dissolved and terminated in accordance with the findings herein and that the Clerk of the District Court make the necessary payments as set forth herein; that the plaintiff has no legal ownership in the real estate described herein and the costs herein are taxed equally to H. Dale Von Seggern and John Von Seggern."

Dale's motion for new trial was overruled and he then

perfected his appeal to this court. The record in this case is rather lengthy, consisting of 632 pages of testimony, 102 exhibits, and 85 pages of transcript composed principally of the pleadings, orders, and decrees of the court, and miscellaneous items. It is clear from the assignments of error and his argument, both written and oral, that Dale's appeal is concerned almost exclusively with matters relating to the farming partnership, not the trucking partnership, and we shall likewise confine our discussion to these matters as assigned and argued by Dale to this court.

In his brief, Dale assigns 14 alleged errors which he claims were prejudicial, but only argues 4 of them, all referable to the farming partnership. These are: (1) The court erred in finding that a certain farm purchased by John was not partnership property and in failing to require an accounting of partnership funds which went into the purchase of the farm; (2) the court improperly and unfairly distributed the proceeds from sales of partnership hogs and grain; (3) John did not comply with an interlocutory order entered by the District Court requiring the performance of certain acts; and (4) Dale and John did not receive equal treatment by the court in the allowance of partnership expenses and the disallowance of items of personal expense.

It is clear from a reading of the record that most, if not all, of the problems that have arisen in this case result from the lack or inadequacy of records relative to the operation of the farm partnership over the years involved in this accounting action, as well as from the conflicting nature of the testimony. In deciding this case, we must keep in mind the general rule that, as in other civil cases, the burden is on the plaintiff in an action between partners to prove every material allegation and issue that is necessary to establish his cause of action, and general rules as to presumptions are applied. 68 C. J. S., Partnership, § 130, p. 566, et seq. This court has held that in an accounting action between partners,

the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Barthuly v. Barthuly, 192 Neb. 610, 223 N. W. 2d 429 (1974).

By way of background, it appears that prior to 1965, John and Dale were associated in farming under a loose arrangement exchanging labor and machinery, and sharing the use of their father's machinery. Each financed his own operations through Production Credit Association (P.C.A.), Fremont, Nebraska, and each had his separate account. In February 1965, P.C.A. required that they merge their accounts into one, indicating it would not continue financing unless this was done. There is evidence that P.C.A. had misgivings about Dale's financial stability, and insisted upon the merger to make both Dale and John liable. Dale contends that he and John became partners in everything as of that date. John contends that there was no farming partnership, although there was a trucking partnership. The trial court found that there were partnerships existing as to both the farming and trucking operations, and this was not an issue in this appeal.

No formal partnership agreement relating to the farming operations was ever entered into, setting forth rights and liabilities of the partners specifying their capital contributions or division of profits. The only actual evidence of this partnership were the records of P.C.A., which referred to their relationship as a partnership. The records of the farming partnership were principally kept by John and his wife, Billie Jean, on their farm. There is no evidence in the record as to the nature and extent of these records, although it seems fairly clear that there was no capital contributions account for the partners. Both John and Dale maintained checking accounts showing, among other things, the checks drawn on their private accounts in payment of partnership obligations. While partnership income tax returns were filed with reference to the operations of the trucking

partnership, both parties testified that there were no partnership returns filed during the years in question for the farming partnership. The individual returns of the partners were filed purportedly disclosing information on income from the farm partnership and details with reference to crops and livestock raised and sold by the partnership. In the brief filed by counsel for Dale, it is repeatedly claimed that John and his wife refused to allow Dale to see the partnership books and records. This is clearly refuted by Dale's own testimony and admissions in the record. He testified that at one time he and his wife offered to take care of the books, but admitted that there was no flat refusal by John. Later in his testimony he again testified that during an audit of his income tax return by the Internal Revenue Service, he had requested permission to take the books to his home, and that John refused to allow him to do so. However, he admitted that John and his wife told him that he could send a lawyer around to examine the books in their home, or at an attorney's or accountant's office. In any event, there is nothing to indicate why Dale could not have obtained the partnership records for use at the trial by discovery proceedings.

Both partners had the right to, and did, draw upon P.C.A. for money, some of which was applied to partnership obligations, and some to personal expenditures. The records of P.C.A., received in evidence, show withdrawals from the joint account of the partners, but do not clearly indicate what was withdrawn by whom, and for what purpose. The evidence and exhibits relating to the partners' respective draws for the years 1964 through 1973, were hopelessly muddled and confused. In order to clarify these matters for trial, both parties stipulated to retaining an accounting firm to examine the available records. The accountant handling the matter for that firm testified at the trial that by comparing the loan balance sheets at P.C.A. for the "partnership account" with deposits in Dale and John's individual savings and

checking accounts, and also the income tax returns for the individual partners, he was able to reach certain conclusions about each party's draws since the inception of the partnership, but he was not able to reconcile all the items shown on the records. His figures were accepted by the District Court and incorporated in its final decree, charging John with withdrawals of $108,643.14, and Dale with withdrawals of $74,145.93. Although Dale did not agree with the accountant's figures, he never supplied any figures of his own to contradict them.

The trial court also accepted without change John's estimate of his partnership expenses over the years in the amount of $115,729.54. Dale contends some of the items were for personal expenses, but this was denied by John and his wife in their testimony. The court allowed Dale $56,000 for expenses, although Dale claimed the amount of $62,195.38 for that purpose. The testimony indicated that most of the livestock maintenance and feeding took place at John's farm and that he handled most of the disbursements for these activities. The record also reveals that Dale's income tax records and expense records were conflicting, and he also admitted on cross-examination that he had improperly listed certain other items as expenses. This casts some doubt on the reliability of Dale's claims. The decree of the court, among other things, also required that John repay the excess amount from sales made in winding up the farming operations, and allowed him a credit for feeding the livestock before they were sold.

Dale's first assignment of error is that a farm purchased in 1967, by John and his wife Billie Jean, under an installment contract, was actually purchased with partnership funds, and is, therefore, partnership property. There is no question that the evidence fully supports the trial court's conclusion that the farm in question was owned by John and his wife. Egbert, in his testimony, related the conversations between the brothers about buying the farm, and testified that both he

and Dale told John they wanted no part of the farm and that John would have it as his own. However, there was some testimony to the effect that John promised to assist Dale in buying a farm at some later date. Dale claims, however, that part of the payments for the farm were taken from partnership funds, and should be accounted for. We believe the court was correct in finding that the farm was purchased with funds drawn in the most part from the trucking partnership, which the court in its decree found was owing to the partnership by John. The downpayment on the farm was made by John out of proceeds from the sale of his own Class A, P.C.A. stock. The proceeds from the crops grown on his land were to go toward payment of the purchase price, and, for the most part, were placed in the brothers' joint P.C.A. account, at P.C.A.'s insistence. Taxes were paid out of the transfers from the P.C.A. account to John's personal checking account.

The history of this partnership indicates that various transfers were made out of the P.C.A. account to the partners' personal accounts with few records being kept as to their ultimate use, partnership or personal. Egbert was adamant that none of the advances from the trucking company used for the farm payments indicated that the farm was partnership property. Dale testified that he knew if John did not complete the installment contract, he, Dale, would not be liable for any payments and that the seller would retain the farm. The evidence indicates that, despite Dale's current perceptions to the contrary, the farm was not bought with partnership funds nor was it ever intended to be partnership property.

Appellant's second assignment of error is that the court incorrectly determined the parties' shares of the proceeds of the sale of the partnership hogs and grain. In its decree, the court found that John had disposed of partnership livestock, cattle, and hogs, in a total value of $54,715.95, of which $41,785 was applied to P.C.A.'s

indebtedness, leaving $12,920.95 owing to the partnership. Appellant contends that "by the arbitrary ruling of the trial court," in effect, all the hogs ceased to be partnership hogs on September 1, 1973. The partnership ceased operation as a partnership in December 1972, as found by the court in its decree. At that time, the partnership owned 293 hogs of various ages and varieties. The cattle and grain sales accounted for almost $14,000 of the $54,715.95 of sales. The court apparently attributed approximately $40,000 to hog sales for 1973. John testified that the proceeds were applied, as ordered, to P.C.A. indebtedness. Dale's counsel disputes this, arguing that, as is apparent from the P.C.A. loan summary sheet for 1973, $877.01 from a July 19, 1973, sale of sows was not applied to the P.C.A. account. It is true that the $877.01 is not credited as a payment for July 19, but the sheet shows that on that date $877.01 was applied to interest on the partnership loan. Few of the deposits in the P.C.A. account coincide exactly with the amounts reportedly received in payment for the hogs, as shown by the parties' testimony and exhibits. However, totalling and comparing the amounts of the sales reported by John, the amount shown by Dale, and the amounts deposited in the P.C.A. account, convinces us that the District Court's findings were correct. The court's decision to select a date of September 1, 1973, nearly three-quarters of a year after the breakup of the partnership, as a cutoff point for determining the ownership of the partnership hogs was, we believe, proper. Given the natural geometric growth pattern and the life cycle of the animals, a cutoff date was absolutely essential in order to make an accounting between the partners. The partnership was credited with proceeds from the sale of upwards of 300 hogs, which we find to be substantially correct.

The final decree found $15,528.97 owed to the partnership by John as proceeds from grain sales which had not been applied to P.C.A. indebtedness. Appellant argues

that the District Court allowed John to convert the proceeds of grain and soybeans, but cites no persuasive evidence of a conversion. Counsel for Dale refers to some 50 tons of ensilage also allegedly converted by John, but offers no proof of this allegation. John, on the contrary, testified that a substantial portion of the ensilage was probably used to feed the partnership cattle before their sale. In any event, the amount assessed against John for alleged grain sales appears to be greater than the amount of grain and soybean sale proceeds shown at the trial.

Appellant's third assignment of error is also without merit. The court's interlocutory order of May 2, 1973, did direct that the excess funds derived from the sale of livestock and grain be deposited in a savings account in a financial institution in Fremont, Nebraska, "in the names of H. Dale Von Seggern and John Von Seggern in such manner that the funds cannot be pledged or withdrawn without the signature of both parties hereto." While it is true that the record reveals that John deposited such proceeds in a special account in his own name, nevertheless, we feel that this is a matter that should have been thrashed out, if necessary, in a contempt proceeding in the trial court. We do not find that Dale was prejudiced by this technical violation, as the trial court adjusted the parties' rights by requiring John to pay the partnership the proceeds of the sales not deposited as ordered by the court.

Appellant's final assignment of error is that he and John were treated differently in the court's decree as to the allowance of expenses. As previously stated, there was considerable dispute in the record as to the nature of certain expenditures. For example, Dale contends that the District Court improperly awarded John compensation for winding up the affairs of the farming operation, which, of course, would be improper. The decree, however, does not state that any such compensation was included in the division of partnership funds. In this case,

the accountant testified that the livestock operation was evidently based on a fifty-fifty distribution of proceeds, but that he could discern no pattern in the distribution of the grain proceeds. Dale stated he believed that the entire farm operation was on a fifty-fifty basis. The trial court in its decree divided the total credit in the partnership equally between John and Dale, after allowing the approved expenditures of each. It does not appear that John was given any extra consideration apart from the allowance of partnership operating costs. It is possible, however, that since John's personal skill and services in managing the operation after dissolution resulted in additional partnership income, the court might well have considered that fact in apportioning the brothers' shares.

In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with ordinary rules governing the burden of proof, and competency and materiality of the evidence. Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433 (1974). We have also held that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Pinney v. Hill, 191 Neb. 844, 218 N. W. 2d 212 (1974); Scripter v. Scripter, 188 Neb. 576, 198 N. W. 2d 201 (1972). This court has also held many times that even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight. Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752 (1975); Klecan v. Schmal, *ante* p. 100, 241 N. W. 2d 529 (1976).

Counsel for Dale urges this court to remand this case to the District Court "to complete the accounting." As previously stated, the burden of proof in this action is upon the appellant. He has already had one trial on the issues. If additional evidence was needed and available, it should have been obtained prior to the trial and introduced below. While appellant alleges error in the District Court's accounting and requests further action, nowhere does he specifically indicate what the correct figures should be.

The trial judge used great diligence and effort to bring order out of chaos and to adjust equitably the interests of the partners, so far as possible from the evidence and records before him. We find no reason to depart from his conclusions and, therefore, affirm the judgment below.

AFFIRMED.

ROYCE KOLLBAUM ET AL., APPELLANTS, V. K & K CHEVROLET, INC., A CORPORATION, ET AL., APPELLEES.
244 N. W. 2d 173

Filed July 21, 1976. No. 40409.

1. **Trusts: Words and Phrases.** Although the term "resulting trust" has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
2. ———: ———. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another.

3. **Corporations: Dissolution: Statutes.** Section 21-2096, R. R. S. 1943, provides that the District Court has the power to dissolve any corporation when, in an action brought by a shareholder, it is established that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered.

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

Norris G. Leamer, for appellants.

Smith, Smith & Boyd and Don A. Fitch, for appellees.

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

WHITE, C. J.

The appellants, minority shareholders in the defendant corporation, originally brought this action to dissolve K & K Chevrolet, Inc. (hereinafter referred to as K & K, Inc.), and liquidate its assets. The defendants, K & K, Inc., and Marvin M. Engel, the majority shareholder of K & K, Inc., cross-petitioned to have the appellants execute a deed to certain realty to K & K, Inc., before the corporation was dissolved. By agreement, the District Court first decided the defendants' cross-petition and determined that the real estate in question belonged to K & K, Inc. The appellants then dismissed their original petition. The defendants then amended their cross-petition and prayed for the dissolution of K & K, Inc. The District Court then entered an order dissolving K & K, Inc., and appointed a receiver to liquidate the assets of the corporation and distribute the net proceeds to the stockholders. The appellants challenge the District Court's order requiring the appellants to execute a deed of the realty to the defendants and also the order of the District Court dissolving the corporation. We affirm the judgment of the District Court.

Royce Kollbaum, one of the plaintiffs, and Wilfred

J. Kamrath were employees of Verzani Chevrolet Company of Ponca, Nebraska. The owner of Verzani Chevrolet Company died on July 30, 1970, and on June 24, 1971, Kollbaum and Kamrath entered into a contract with Verzani's heirs to purchase the business, including the real estate, fixtures, and equipment of the business. However, Kollbaum and Kamrath did not have the money to complete the contract, so they sought help from the defendant, Engel. Engel agreed to provide the money needed to complete the contract, approximately $18,100, but in consideration for the money, the business was incorporated and Engel was given 55 percent of the stock. Kamrath owned 25 percent of the stock, and Kollbaum owned the remaining 20 percent of the stock. A stockholders' agreement was signed and Kollbaum and Kamrath were given the option to buy out Engel's shares after a 5-year period had expired. The agreement provided that when the option was exercised, Engel was entitled to $18,100, plus 55 percent of the net profits, plus 9 percent per annum interest on his $18,100 investment.

The new business obtained a Chevrolet franchise in August 1971 with Kamrath as the franchise dealer. All bills were paid by K & K, Inc., including the payments on the purchase contract with the Verzani heirs. On January 20, 1973, Wilfred Kamrath died. Elmer Kamrath, the administrator of his estate, is a plaintiff in this case along with Kollbaum.

Since Wilfred Kamrath had been the franchise dealer, it was necessary to pick a new dealer to represent K & K, Inc., with the Chevrolet corporation. Kollbaum desired to be the new dealer, but Engel felt that Chevrolet would not accept him, and therefore Engel suggested a William Wente be allowed to buy Kamrath's stock and then be appointed dealer. Kollbaum and Engel could not agree on a dealer, and subsequently K & K, Inc., lost its Chevrolet franchise. Hard feelings developed between Engel and Kollbaum. Kollbaum opened up his own repair shop on part of K & K, Inc., property

and Wente operated a new Chevrolet franchise out of the remainder of K & K, Inc., property which he leased from K & K, Inc.

Kollbaum and the administrator of Kamrath's estate brought this action to dissolve K & K, Inc., on the theory that the real estate which K & K, Inc., had used was the appellants, since they had the legal title to it. When the District Court held that the land was owned by K & K, Inc., the appellants did not desire to dissolve the corporation, but rather attempted to enforce their option to buy out Engel. However, the District Court ordered that K & K, Inc., be dissolved and appointed a receiver to distribute the proceeds from the sale of the assets.

The appellants' first contention is that the District Court was in error in finding on the cross-petition that a resulting trust was created in the real estate and that, therefore, K & K, Inc., should be declared the owner of said real estate. The appellants insist that the legal title was in the appellants and that the statute of frauds requires a transfer of title to real estate (section 36-103, R. R. S. 1943), and can only be accomplished by a written instrument signed and acknowledged by the grantor. It is settled law that where the evidence is clear and convincing that a resulting trust has been established, the statute of frauds is not applicable. The District Court found that a resulting trust had been established by virtue of the agreement between the parties and the circumstances surrounding the performance of the agreement, and decreed title in K & K, Inc. From an analysis of the agreement, the evidence, and the attending circumstances, we are convinced, as was the District Court, that a resulting trust was created.

We stated in the very recent case of Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792, as follows: "We said in Reetz v. Olson (1945), 146 Neb. 621, 20 N. W. 2d 687: 'Although the term has been broadly defined as a trust which is raised or created by the act or con-

struction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance * * *. Such trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, *where one person pays the consideration for a purchase and the title is taken in the name of another,* * * *.' " (Emphasis supplied.)

The pertinent facts and the inferences to be drawn therefrom are undisputed. The stockholders' agreement of July 23, 1971, provided for the formation of a corporation and clearly contemplated that the property and the business of operating the Chevrolet franchise was to be conducted in a corporate form. The basic scheme or pattern of operation was reaffirmed, when subsequently a new page two of the stockholders' agreement was prepared and executed in order to satisfy the requirements of the Chevrolet motor company as to the extension of time for the option agreement. Immediately following the execution of this agreement, the business commenced operation under the new management about August 1, 1971. The actions, the conduct, and the performance under this agreement demonstrate conclusively that it was the intention that the new K & K, Inc., should be the owner of the assets of the corporation, including the title to the land. K & K, Inc., made the payments under the contract which conveyed the real estate to the appellants. K & K, Inc., paid the taxes on the property. K & K, Inc., never paid rent on the property, but carried the property as an asset on its books. The operations of K & K, Inc., and the execution of these acts and the bookkeeping involved was under the control of the appellants. Their own

actions indicate clearly their intentions that the ownership of the real estate should be in the corporation. The appellants did not show the land as an asset on their personal tax returns. Although not officially incorporated until January 1972, all business was carried on under the name of K & K Chevrolet, Inc. The late incorporation has no significance so far as the parties are concerned. Putting all these facts together, we feel that the evidence is clearly convincing, as the District Court did, that it was the intent of the parties that K & K, Inc., provide the consideration for the purchase of the land; that K & K, Inc., actually did furnish the consideration for the land; and it was their continued intention to treat the land as though K & K, Inc., was the owner. The consideration for the purchase was paid by K & K, Inc., and the intention of the parties and the performance of their agreement leave no other conclusion but that the ownership of the land should be vested in the corporation which was formed for the very purpose of acquiring and operating the assets necessary to acquire the franchise of the Chevrolet motor company. Under these circumstances, equity will not permit the appellants to assert independent ownership of their naked record title. The District Court was correct in declaring a resulting trust and holding that K & K, Inc., was the owner of the real estate involved.

The record reveals that the basic issue upon which this case was tried to the District Court was the ownership of the real estate involved. What we have said disposes of that issue. Nevertheless, on oral argument and in the conclusion of their brief, the appellants request the court to enforce the stock option agreement and permit the appellants to buy out Engel's stock for $18,100. This is based on the provision in the shareholders' agreement that the minority stockholders, after a 5-year period has expired, have the right to buy out Engel's stock. This option agreement does not expire until July 23, 1976, and so is premature. We observe that the appellants have

assigned no error in the decision of the District Court dissolving the corporation. The only assignments of error made in this case are the general ones that the decision of the court is not sustained by the evidence; that it is contrary to law; and that there were errors of law occurring at the trial. The validity of the court's action in dissolving the corporation is not specifically attacked in argument or in any proposition of law upon which they rely. The brief reveals that the whole real issue in this case is the title to the real estate. The appellants themselves originally pleaded for dissolution of the corporation, then withdrew it, and stipulated that the issue of the ownership of the real estate should be the real issue to be tried first by the court. It is doubtful that the issue of the dissolution of the corporation is properly presented under the assignments of error, and the argument in the brief. Be that as it may, shortly before this case was tried, the court gave the appellants an opportunity to file an amended answer to the defendant's cross-petition herein. In this amended answer to the defendants' cross-petition the appellants herein prayed as follows: "3. That the appointment of a Receiver be denied *or in the alternative* that should the Court determine that Plaintiffs are not entitled to exercise the stock option to purchase the shares of Marvin M. Engel, that a Receiver then be appointed *to liquidate said corporation after a full and complete accounting of all the assets* due to the corporation; * * *." (Emphasis supplied.) Thus, by the terms of their own amended cross-petition and prayer, the appellants presented to the court an alternative disposition for the case, and the court followed it by dissolving the corporation and ordering an accounting between the parties. It is settled law that the parties are bound by the theory upon which the case was tried from the pleadings. We come to the conclusion that the trial court's action in dissolving the corporation, under all the circumstances, was proper, especially considering the appellants' original contention

that the corporation should be dissolved and then the renewal of that position by requesting alternative relief in their final amended answer.

Although not briefed by the parties, the action of the court in dissolving the corporation was amply justified under the statute. Section 21-2096, R. R. S. 1943, provides that the District Court has the power to dissolve any corporation when, in an action brought by a shareholder, it is established that "the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered * * *." The meaning of the term "deadlocked" within the context of this statute is a corporation which, because of decision or indecision of the stockholders, cannot perform its corporate powers. Murray-Baumgartner Surgical Instrument Co. v. Requardt, 180 Md. 245, 23 A. 2d 697; RKO Theatres, Inc. v. Trenton-New Brunswick Theatres Co., 9 N. J. Super. 401, 74 A. 2d 914. We come to the same conclusion that the trial court did in examining the undisputed facts in this case. Management and the majority stockholder were hampered in the effective operation of the business as evidenced by the failure on the part of the appellants to agree on an arrangement to save the Chevrolet franchise. The appellants would not agree to the Wente lease which ultimately fell in the decision of the District Court. Appellant Kollbaum even moved into the rear portion of the building premises and operated separately and distinctly from the corporation. The Board of Directors is likewise split, with Engel and Wente voting one way and Kollbaum voting the other way. It is undisputed that hard feelings exist between the shareholders and this litigation demonstrates that the corporation can no longer function in a viable fashion. It, therefore, appears that the District Court's determination to dissolve the corporation, to have a full accounting between the parties, and determine the title of the real estate

was correct and followed precisely the very purpose of the dissolution statute, section 21-2096, R. R. S. 1943.

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

AFFIRMED.

NEWTON, J., not participating.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. JAMES GILLHAM, APPELLANT.
244 N. W. 2d 177

Filed July 21, 1976. No. 40428.

Criminal Law: Sentences. In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal.

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

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

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

WHITE, C. J.

The sole assignment of error in this case is the excessiveness of the sentence imposed upon the defendant.

On January 20, 1975, the defendant and an accomplice robbed at gun point the F.O.E. #38 in Omaha, Nebraska. After obtaining entrance to the establishment, defendant and his accomplice displayed their weapons and forced the manager and a clean-up man to lie on the floor while they took the money. Approximately $5,000 was taken. Defendant plead guilty to this robbery.

Pursuant to a plea bargain, another charge, use of a firearm in the commission of a felony, was dismissed. The District Court sentenced the defendant to a term of 15 to 50 years imprisonment in the Nebraska Penal and Correctional Complex.

The defendant first notes the power given this court by virtue of section 29-2308, R. R. S. 1943, to reduce sentences rendered by the District Court when in our opinion they are excessive, and then proceeds to cite to us a number of recent cases in which we exercised this power and reduced sentences.

While this review of past cases wherein this court exercised its power to reduce sentences is always helpful, it necessarily remains true that when excessiveness of a sentence is alleged as error, this court must review each case on an individual basis. Our determination of whether or not a particular sentence in a given case is excessive rests solely upon the facts and circumstances of that case as revealed by the record.

The record in this case reveals that previous to this conviction, the defendant had been charged with robbery in Hastings, Nebraska. This incident involved violence. Pursuant to a plea bargain, the robbery charge was reduced to one of larceny from a person. Defendant was sentenced to 1 year's probation on this charge. Defendant immediately violated the terms of his probation. In fact, he never even reported once to his probation officer. In addition to this, the presentence report reveals a lengthy and consistent report of other more minor offenses, ranging from numerous and varied traffic offenses to repeated occasions of public drunkenness.

The sentence imposed by the District Court fell within the statutory limits. As such, it will not be disturbed on appeal absent an abuse of discretion. State v. Ralls, 192 Neb. 621, 223 N. W. 2d 432 (1974); State v. Howard, 194 Neb. 521, 233 N. W. 2d 573 (1975). We have carefully reviewed the record in this case and find

no abuse of discretion by the District Court in imposing the sentence that it did.

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

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEE, V. COUNTY OF BANNER, NEBRASKA, APPELLANT.

244 N. W. 2d 179

Filed July 21, 1976. No. 40435.

1. **Statutes.** Statutes pertaining to the same subject matter should be construed together as if they were one law and effect given to every provision.
2. **Taxation: Constitutional Law: Legislature.** In order for the state Constitution to restrict plenary power of the Legislature to tax, the language of the restriction must be clear.
3. **Taxation: Constitutional Law: Statutes: Governmental Subdivisions.** A statute authorizing or requiring a county to levy a property tax for purposes substantially local does not contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes.
4. **Taxation: Governmental Subdivisions.** The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy.
5. **Taxation: Constitutional Law: Governmental Subdivisions.** The adoption of Article VIII, section 1A, Constitution of Nebraska, was not intended to disturb traditional and historical property tax support from counties or other local taxing subdivisions for continuing governmental activities commingling state and local purposes.
6. ———: ———: ———. Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court; a District Court; prosecuting criminal law violations; and conducting state and national elections do not contravene Article VIII, section 1A, Constitution of Nebraska, prohibiting the State from levying a property tax for state purposes.

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Affirmed.

Robert G. Simmons, Jr., for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

MCCOWN, J.

The State of Nebraska brought this action against Banner County to recover funds alleged to be due for the period of December 1, 1969, to December 31, 1972, to the Nebraska Retirement Fund for Judges with respect to the county judge of Banner County. Banner County denied liability and by counterclaim and cross-petition sought reimbursement for costs and expenses paid by the county for maintaining the county court and District Court; for prosecuting persons for state crimes; and for conducting state and national elections. Such payments by the county are alleged to be unconstitutional under Article VIII, section 1A, of the Nebraska Constitution, prohibiting the state from levying a property tax for state purposes.

The District Court entered judgment for the State in the sum of $493.33 upon the cause of action set out in the petition; found against the county on the causes of action set out in the counterclaim and cross-petition; and dismissed those causes of action. The county has appealed.

Virtually all facts are stipulated and not in dispute. At all times relevant to the cause of action set out in plaintiff's petition the county judge of Banner County was an employee of the county and his salary was paid by the county. The cause of action set out in the petition rests on the provisions of section 24-703.01, R. S. Supp., 1969. That section provided: "Counties and municipalities shall remit to the State Treasurer each

month a sum equal to the amount any county judge or municipal judge, as the case may be, contributes to the Nebraska Retirement Fund for Judges, to be placed in the Retirement Fund for Judges * * *."

Section 24-703, R. S. Supp., 1969, among other provisions, required the county clerk of each county to deduct from the payroll the contribution required of the county judge, and to pay the amounts so deducted to the executive officer in charge of the judges retirement system to be credited to the Nebraska Retirement Fund for Judges.

Banner County contends that section 24-703.01, R. S. Supp., 1969, was not intended to require a matching contribution from the county but only to require the county to remit the amount contributed by the county judge.

Under section 24-703, R. S. Supp., 1969, the State was required to pay each year, in addition to contributions from judges and supplementary court fees received, an amount necessary to fully fund all unfunded accrued liabilities of the retirement system. That contribution was for the benefit of all judges, whether their salaries were paid by the State or by a county or a municipality. Section 24-703.01, R. S. Supp., 1969, simply required counties and municipalities, as employers, to match the contribution of their employee judges.

If there were serious doubt as to the statutory meaning, it should be resolved by the fact that the amount required to be deducted from the pay of the county judge by the county clerk in section 24-703, R. S. Supp., 1969, was required to be paid to the executive officer in charge of the judges' retirement system. The amount required to be remitted by the county under section 24-703.01, R. S. Supp., 1969, was required to be paid to the State Treasurer. The fact that separate liabilities and payments are required is obvious. That conclusion is reinforced by subsequent statutory changes which refer to "matching contributions." See § 24-703(5), R. S. Supp., 1974.

Statutes pertaining to the same subject matter should be construed together as if they were one law and effect given to every provision. Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752. The District Court properly construed the statutes involved here and its judgment was correct unless it is affected by the constitutional issues raised in defendant's counterclaim and cross-petition.

By counterclaim and cross-petition the county seeks reimbursement from the State and declaratory relief from liability for costs and expenses required by statute to be paid by the county for maintaining a county court; for maintaining a District Court; for prosecuting state criminal law violations; and for conducting state and national elections. The county contends that these costs and expenses are for state purposes rather than local purposes and are raised by the county and paid from property taxes, and argues that, therefore, the State is indirectly levying a property tax for state purposes in violation of Article VIII, section 1A, Nebraska Constitution.

Article VIII, section 1A, first adopted in 1954, became effective in its present form in 1966. It provides: "The state shall be prohibited from levying a property tax for state purposes." Prior to 1966, there was no income or sales tax, and the principal tax source for the support of state government was a property tax, imposed by a state levy, separate and distinct from the levies imposed by counties, cities, and other political subdivisions. The amendment became effective with the adoption of an income and sales tax by the State in 1966.

The amendment, by its terms, prohibits only the State from levying a property tax, and then only for state purposes. It does not affect the use of property taxes by a county, city, or other local subdivision. Counties, cities, and other taxing subdivisions of state government have traditionally relied and still rely upon property taxes as their major source of revenue. Historically

and currently the governmental activities supported by a county property tax at the time the amendment was adopted were and are serving substantial local purposes. The constitutional amendment was not intended to disturb that tax structure nor effect any change in the use of property taxation by any governmental unit except the State itself.

In three of the four areas of governmental activity involved here there has been no major statutory change in the manner of operation, nor in the manner or proportion of local tax support for a period beginning long prior to the adoption of the amendment. The same was true of the county court system until the unified system of county courts became operative on January 4, 1973. Prior to that change, the counties had been responsible for all costs and expenses involved in maintaining and operating the county courts. Under the unified system, the counties' responsibility for costs and expenses has been reduced to establishing, furnishing, and maintaining appropriate courtroom and office facilities for the county court and the State has assumed all salaries and other expenses involved in the operation of the county court system.

In all areas challenged here, the proportion of county tax support is either the same or smaller than it was when the constitutional amendment was adopted.

In the landmark case of Craig v. Board of Equalization, 183 Neb. 779, 164 N. W. 2d 445, this court said: "The county has been viewed historically as a limited agency. Funding most, if not all, county functions has served state purposes. State government has remained largely free to supervise local administration of the property tax. Programs of state assistance to local units have been tied to effective, equitable use of the property tax by the local units themselves. Federal, state, and local governments have joined to combat conditions of common concern."

In that case we held: "In order for the state Con-

stitution to restrict plenary power of the Legislature to tax, the language of restriction must be clear." We also held that a statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes. That holding is controlling here.

In Kovarik v. County of Banner, 192 Neb. 816, 224 N. W. 2d 761, this court was dealing with a similar constitutional challenge involving payment of the costs of furnishing counsel to indigent defendants in the prosecution of crime. We determined that criminal prosecutions were substantially local in purpose and benefit and said: "(H)istorically and traditionally the counties have been given the responsibility of paying for the expenses of criminal prosecution. In adopting the Duis amendment to Article VIII, section 1A, Constitution, there is no reason to believe the people intended to disturb the historical method of financing criminal prosecutions." That same statement applies to all the governmental activities challenged here. The statutory scheme is clearly indicative of the fact that each of these governmental activities has always been regarded as being a substantial function of the counties.

The county contends that because the areas of expenditure here involved governmental activity or governmental purposes, therefore they are automatically state purposes rather than local purposes. The same argument was answered by this court in R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N. W. 2d 746. In that case we said: "If we were to accept the reasoning urged by the plaintiff, any property tax for governmental purposes levied by a city or county under legislative directions fixing a maximum amount and a maximum levy would become a tax levy by the state for state purposes. * * * The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the

Legislature has authorized or required the local governmental unit to make the levy. Neither should the fact that the tax is for a 'governmental' purpose make it automatically for state purposes rather than local."

In effect, the position of the county here is that if state purposes are involved in the activity, the constitutional amendment prohibits the use of a county or local property tax levy to support or fund the activity. The county cites State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, 192 Neb. 201, 219 N. W. 2d 454, in support of that position. That case is clearly distinguishable. The statute there, for all practical purposes, required the imposition of a one mill property tax levy in every county in Nebraska for the support of a statewide system of technical community colleges controlled and primarily financed by the State. In essence, the State levied a property tax upon all property in the state for state purposes in violation of the constitutional amendment. In addition, that case involved a new technical community college system completely independent and separate from established educational systems, whether state or local. Because of its new and independent nature, the determination of whether the controlling and predominant purposes were state or local purposes had to be made upon the basis of an analysis of the statute, rather than upon the historical record of state or local tax support. That situation is not this one.

Each of the governmental activities involved here was supported, either in whole or in major part, by local county property tax levies at the time the constitutional amendment became effective, at the time it was adopted, and at all times before that. There is no reason to believe that the people intended to disturb that historical pattern.

Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court; a District Court; prosecuting criminal law violations; and

conducting state and national elections do not contravene Article VIII, section 1A, Constitution of Nebraska, prohibiting the State from levying a property tax for state purposes. The determinations of the District Court in favor of the plaintiff on its petition and in dismissing the defendant's counterclaim and cross-petition were correct.

The judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur fully in the holding that the various statutes challenged in this case are constitutional.

I agree that the Duis amendment only prohibits the state from levying a property tax and then only for state purposes. It did not repeal the rest of the Constitution and it does not affect the use of property taxes by local subdivisions.

This case involves a difficult area, and questions which relate to counties are complicated by the fact that a county has no private character but is governmental only and acts purely as an agent of the state. State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639. Nevertheless, purposes which are substantially local may be financed by a property tax. Historical and traditional patterns are matters to be considered, but in my view they are not controlling. I do not interpret the Duis amendment as a complete restriction upon the power of the Legislature to allocate the functions and activities of government between the state and various local subdivisions.

SPENCER, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. GERALD L. BETTS, APPELLANT.

244 N. W. 2d 195

Filed July 21, 1976. No. 40466.

1. **Criminal Law: New Trial: Time.** The time requirements of

section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day.

2. ———: ———: ———. It is settled law in Nebraska that a motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect.
3. **Criminal Law: Sentences.** In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal.

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

Philip T. Morgan, for appellant.

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

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

WHITE, C. J.

This is a direct appeal from a sentence of 18 months to 3 years in the custody of Director of Corrections, imposed after a plea of guilty to a burglary charge. Prior to the submission of this case and oral argument thereon, the State filed a motion to dismiss the appeal because of lack of jurisdiction in this court, and we reserved ruling thereon pending hearing on the merits. We dismiss the appeal for lack of jurisdiction.

Defendant's guilty plea was accepted on August 14, 1975. He was sentenced by the District Court on September 26, 1975. On October 3, 1975, he filed a motion for a new trial which was overruled on October 17, 1975. He filed his notice of appeal herein on November 10, 1975. To give this court jurisdiction of a direct appeal in a criminal case, notice of appeal must be filed with the clerk of the District Court within 1 month after the overruling of a motion for a new trial or sentencing, whichever is later. § 25-1912, R. R. S.

1943; Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853. In the present case, the defendant filed his notice of appeal within 1 month of the overruling of the motion for a new trial that he filed. But his motion for a new trial was filed more than 10 days after his plea of guilty was accepted and judgment entered thereon. In a very recent case, State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650, we stated as follows: "The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the *verdict* is rendered, *not* within 10 days from the *date of sentencing,* unless the verdict and sentencing occur on the same day." (Emphasis supplied.) See, also, State v. Wood, 195 Neb. 353, 238 N. W. 2d 226 (1976). It is settled law in Nebraska that a motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558. Consequently, since his notice of appeal was filed on November 10, 1975, long after a month had expired subsequent to his sentencing of September 26, 1975, this court has no jurisdiction of the appeal and the motion to dismiss for lack of jurisdiction is sustained.

Since the case on its merits is fully briefed and we permitted full oral argument, we point out that there is no merit to the appeal. The sole issue raised is the excessiveness of the sentence. The sentence of 18 months to 3 years is clearly within the statutory limits of the possible penalties of 1 to 10 years in the Nebraska Penal and Correctional Complex, and it must stand unless there has been an abuse of discretion by the trial judge in imposing the sentence. State v. Flaherty, 193 Neb. 275, 226 N. W. 2d 631. There was an extensive presentence investigation made in this case and the trial judge gave it careful consideration. The defendant is a grown, mature man. He is about 36 years of age. The defendant was a participant with several others in burglaries and thefts in Nance, Merrick, York, Hamilton,

Hall, and Buffalo Counties. He did not act alone in the participation of these crimes, but rather the evidence supports the finding that it was a calculated, concerted, and continuous course of criminal conduct. Nor did the defendant act out of any urgent family or personal necessity. The record shows that he was making in the neighborhood of $1,000 per month in the trucking business during the same period of time of several months that he engaged in the different thefts over the central part of the State of Nebraska. There is evidence that the amount involved in the thefts was around $25,000, but by the defendant's own admission, the amount of the thefts was around $6,000 or $7,000. The record also shows that the court, in a comprehensive statement at the end of the sentencing proceedings, carefully considered all the mitigating factors that were urged by the defendant in imposing the sentence that it did. It is clear that there was no abuse of discretion on the part of the sentencing judge and that the asserted appeal is without merit.

The motion to dismiss the appeal is sustained on the ground of lack of jurisdiction, and the appeal is hereby dismissed.

APPEAL DISMISSED.

LYLE E. DAVID, APPELLEE, V. ERNA TUCKER, APPELLANT.
244 N. W. 2d 197

Filed July 21, 1976. No. 40511.

1. **Joint Tenancy: Homesteads.** Upon the death of one of the joint tenants, the survivor takes the entire title, and any interest that the survivor would otherwise take under the homestead law is merged in the new title of the survivor.
2. **Frauds, Statute of: Contracts.** The memorandum required by the statute of frauds is evidence of the oral contract and must contain the essential terms of the contract. Generally, the memorandum should contain the names of the parties, a

description of the land, the price, the general terms of the agreement, and the signature of the vendor.

3. **Frauds, Statute of: Contracts: Time.** Ordinarily, time for performance is not an essential term of the contract, but it must be included in the memorandum to be enforceable. If omitted from the memorandum, the time for performance is not enforceable but the legal efficacy of the memorandum is not destroyed.
4. **Frauds, Statute of: Contracts: Evidence: Trial.** Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite.
5. **Undue Influence: Trial: Evidence.** A party alleging undue influence has the burden to prove that the party influenced was a person who would be subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence, and that the result was the effect of undue influence.

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

Michael O. Johanns and Edward E. Hannon of Cronin & Hannon, for appellant.

William W. Griffin, for appellee.

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

BOSLAUGH, J.

This is an action for specific performance of an option to purchase real estate. The trial court found generally for the plaintiff, reformed the memorandum of the agreement to state the terms for payment, and granted specific performance.

The defendant has appealed and contends the agreement was invalid because it failed to satisfy the requirements of the homestead law and the statute of frauds and was the result of undue influence. The defendant also counterclaimed for damages for waste and the reasonable rental value of the property.

The land involved is Section 13, except the southwest quarter, in Township 26 North, Range 12, and the northwest quarter of Section 17, Township 26 North, Range 11, all West of the 6th P.M. in Holt County, Nebraska. The land had been owned by the defendant and her late husband, Fred Tucker, as joint tenants with right of survivorship. When Fred Tucker died in 1956, the defendant became the owner in fee simple of the land. Any interest that she might have otherwise received under section 40-117, R. R. S. 1943, became merged in her new title. See Niemann v. Zacharias, 185 Neb. 450, 176 N. W. 2d 671. Section 40-104, R. R. S. 1943, was not applicable to the option agreement and the defendant's claim that the agreement was invalid because not acknowledged was without merit.

The plaintiff had been a tenant upon the property for 19 years. In the fall of 1972 or the winter of 1973, the plaintiff told the defendant he was interested in buying the property. On April 15, 1973, the defendant wrote to the plaintiff stating that she would like to have $100 an acre for the 160-acre meadow and $95 an acre for the rest of the land. She further stated that she hoped this would be "O.K." with the plaintiff, and if not she would rent the land to him again.

In the fall of 1973, on two occasions, the plaintiff asked the defendant to accompany him to the Farmer's Home Administration office in O'Neill, Nebraska, so that he could make arrangements to finance his purchase of the land. On each occasion the defendant stated that she wanted to wait for a while.

On February 11, 1974, the defendant wrote to the plaintiff stating that she was undecided about what to do, but that $100 an acre was too low a price for the land and she could not sell it for that. She further stated that if the plaintiff "can not do that," she would rent it out again.

On February 14, 1974, the plaintiff went to see the defendant to find out why she had changed her mind.

The defendant stated that she had been offered $125 an acre for the land. The plaintiff stated he would pay $125 an acre but would not go above that figure. The defendant said the plaintiff should pay more, but according to the plaintiff, finally said $125 an acre would be satisfactory. The parties discussed terms and, according to the plaintiff, the defendant wanted 29 percent down with the balance on a 10-year installment contract with equal payments and 7 percent interest. The defendant had received a letter from a lawyer, some time previously, in which she had received advice as to how to sell the land. The parties finally arrived at an agreement to lease the land to the plaintiff for another year with an option in the lease for the plaintiff to purchase the land. A memorandum in the handwriting of the defendant was then prepared and signed by both parties. The memorandum, which is exhibit 4, was as follows:

"Febr. 14th 1974, I lease the 640 acres to Lyle David for $2,100-$800. due the first of March, 1974, balance due Nov. 1974, with right to buy the place in 1975, for $125.00 an acre with 7 per cent interest

"Rec'd of Lyle David $1.00 in cash to make this legal,
"on 10 year contract

"Erna Tucker
"Lyle E. David."

On January 14, 1975, the plaintiff wrote to the defendant stating he wished to exercise the option and enclosing a form of a proposed real estate contract stating the terms in greater detail than the memorandum of February 14, 1974. The defendant then consulted local counsel who wrote to the plaintiff on February 13, 1975, stating that the defendant would not perform the option agreement.

The statute of frauds provides that a contract for the sale of any land shall be void unless the contract or a memorandum thereof be in writing and signed by the party by whom the sale is to be made. § 36-105, R. R. S. 1943. The memorandum is not the contract

but only written evidence of an oral contract. Ord v. Benson, 163 Neb. 367, 79 N. W. 2d 713. The memorandum must contain the essential terms of the contract. Heine v. Fleischer, 184 Neb. 379, 167 N. W. 2d 572; Kubicek v. Kubicek, 186 Neb. 802, 186 N. W. 2d 923. Generally, the memorandum should contain the names of the parties, a description of the land, the price, the general terms of the agreement, and the signature of the vendor. Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593. Ordinarily, time for performance is not an essential term of the contract, but it must be included in the memorandum to be enforceable. Heine v. Fleischer, *supra*.

The defendant claims the memorandum involved in this case was invalid because the description was insufficient and the memorandum did not contain the essential terms of the contract in regard to the payments to be made by the plaintiff.

Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite. Holliday v. McWilliams, 76 Neb. 324, 107 N. W. 578. In Wisnieski v. Coufal, 191 Neb. 598, 216 N. W. 2d 736, a memorandum which referred to the "120 acres" was held sufficient and subject to amplification by parol evidence. See, also, Adams v. Thompson, 28 Neb. 53, 44 N. W. 74; Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790; Wright v. Negus, 111 Neb. 260, 196 N. W. 148; Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328.

The option agreement in this case was contained in a lease of land which the plaintiff had been renting for 19 years. The defendant owned no other 640-acre tract of land although she did own an 80-acre farm in Wayne County, Nebraska.

The evidence clearly established that the option agreement had reference to the land which the plaintiff had

rented from the defendant for many years. The description in the memorandum was sufficient to satisfy the statute of frauds and was subject to explanation and amplification by parol evidence.

As to the terms for payment, the memorandum stated only that the price was $125 an acre for 640 acres on a 10-year contract at 7 percent interest. The memorandum failed to state there was to be a 29 percent down-payment with the balance payable in equal annual installments. The omission of these terms from the memorandum made the terms unenforceable, Heine v. Fleischer, *supra*, but did not destroy the legal efficacy of the memorandum otherwise. The plaintiff testified these terms were part of the agreement the parties had made and the defendant did not testify otherwise. The evidence was sufficient to justify reformation of the memorandum so that it would state the terms of the agreement that the parties actually entered into. Schweitz v. State Farm Fire & Cas. Co., 190 Neb. 400, 208 N. W. 2d 664. See 66 Am. Jur. 2d, Reformation of Instruments, § 41, p. 565.

With respect to undue influence, the burden was on the defendant to establish that the defendant was a person who would be subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence, and that the result was the effect of undue influence. Gaeth v. Newman, 188 Neb. 756, 199 N. W. 2d 396.

The evidence established the defendant was a widow, 80 years of age, who had an eighth grade education. She had some physical problems that were not unusual for a person her age, but there was no evidence or claim that she was incompetent. The parties had carried on negotiations for a sale of the property over a period of about 18 months. The only matter which seemed to be in question was the price for the land. During this time the defendant wrote two letters to the plaintiff concerning the property. In the first letter she priced the land

at $95 and $100 per acre. In the second letter she said $100 per acre was not enough. She received an offer of $125 an acre from a broker before the conversation at her home took place on February 14, 1974. When the plaintiff agreed to that price she tried to get more but the plaintiff refused to go over $125 per acre. The defendant testified that she was afraid the plaintiff would go back to $100 per acre. In other words, the defendant agreed to the $125 an acre option price because she was afraid she might have to take less if she did not agree to $125 per acre.

The evidence here failed to establish undue influence. We concur fully in the findings of the trial court on this issue.

It is unnecessary to discuss the other assignments of error. The judgment of the District Court is affirmed.

AFFIRMED.

NATALIE TAYLOR, APPELLANT, V. R. W. KARRER ET AL., APPELLEES.

244 N. W. 2d 201

Filed July 21, 1976. No. 40538.

1. **Malpractice: Limitations of Actions: Physicians and Surgeons.** Section 25-222, R. S. Supp., 1974, provides that an action for professional negligence must be brought within 2 years provided that if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.
2. ———: ———: ———. A cause of action for medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, that an act of malpractice occurred.
3. **Legislature: Statutes: Constitutional Law.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.
4. ———: ———: ———. While it is competent for the Legis-

lature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

5. **Words and Phrases.** A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
6. **Statutes: Constitutional Law.** It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement.

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

Wright & Simmons, for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke and Henry R. Meister, for appellees.

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

NEWTON, J.

This is an action for malpractice against two medical practitioners. Defendants plead the statute of limitations and this issue was presented in a bifurcated trial. The court found that the action was barred by the statute of limitations. We affirm the judgment of the District Court.

On appeal plaintiff asserts that the finding of the court is not supported by the evidence and that section 25-222, R. S. Supp., 1974, is unconstitutional. There is very little conflict in the evidence. The record discloses that in the summer of 1967, Dr. R. W. Karrer ascertained that plaintiff had a thyroid condition and referred her to his codefendant Dr. Gerhard W. Schmitz who advised surgery. Plaintiff was fully advised as to her con-

dition, the various methods of treatment, and all possible consequences, including the fact that hypoparathyroidism sometimes unavoidably resulted. Following surgery on July 24, 1967, her parathyroid tissue failed to function and control the calcium level in her body with the result that she developed hypoparathyroidism and had an abnormally low calcium level. This resulted in her sustaining muscular spasms and at times tetany, which is a severe and widespread form of muscular spasm. The failure of the parathyroid tissue to function is usually transient in nature but sometimes is permanent as was the case with plaintiff. For at least a year the defendant doctors had hopes that she would improve and the parathyroid tissue commence to function. Her condition was treated by administering medicants containing calcium and vitamin D. It is not disputed that the treatment was proper except that it was prescribed in insufficient quantities. Plaintiff was last treated by Dr. Schmitz on January 15, 1968, and told to return in 1 month. She did not do so. Plaintiff was last treated for hypoparathyroidism by Dr. Karrer on April 22, 1969. This action was filed against Dr. Karrer on January 19, 1973, and on February 1, 1974, Dr. Schmitz was made a defendant.

In January 1969, plaintiff consulted Dr. Julian Maier in Denver, Colorado. Dr. Maier informed her that her trouble with tetany and spasms was due to her low calcium count and prescribed for the condition. She improved temporarily. As a result of her low calcium content, she developed cataracts and consulted Dr. John E. Edwards who refused to operate until her blood calcium was brought up to normal range. He referred her to Dr. James Philip Clarke. Dr. Clarke succeeded in restoring her calcium content to a normal level and stabilizing it. Her cataracts were subsequently removed by Dr. Edwards. The medication prescribed by Dr. Clarke was similar to that prescribed by the defendants but given in greatly increased quantities. Plaintiff, after

treatment by Dr. Clarke, never again sustained tetany but continued to have muscular spasms at times. All the doctors advised plaintiff that her condition of hypoparathyroidism and its attendant symptoms, despite the most expert medical care, sometimes followed thyroid surgery. It appears that the primary contention of plaintiff and the basis for this action is that the treatment prescribed and followed by defendants was inadequate.

Section 25-208, R. S. Supp., 1974, provides for a 2-year limitation on the time to bring an action for malpractice. Section 25-222, R. S. Supp., 1974, provides that an action for professional negligence must be brought within 2 years provided that: "* * * if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; * * *." We have held that a cause of action for medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the act of malpractice. See, Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581; Toman v. Creighton Memorial St. Josephs Hosp., Inc., 191 Neb. 751, 217 N. W. 2d 484. When did the plaintiff learn, or when should she have learned, that the post-operative treatment by defendants was, as she alleges, improper or inadequate?

Plaintiff was apprised before her surgery by Dr. Schmitz of the possibility of developing hypoparathyroidism and knew comparatively soon after the operation that she had developed this condition. Both she and the defendants were hopeful of a recovery. She understood the nature and causes of her difficulty and was aware that calcium and vitamin D were required to treat it. She consulted Dr. Edwards on May 22, 1969, and was hospitalized by Dr. Clarke on June 10, 1969.

These doctors informed her that her calcium "was way too low." She was told that she could not have eye surgery until her calcium was built up to normal and stabilized and that this could be done. She concedes that it was done by greatly increasing the dosages to the point that she was receiving 32 calcium and 5 Calciferol pills daily. In view of this experience it is obvious that she then knew that she could receive relief and that the treatment accorded by defendants, though proper, had been inadequate. Notwithstanding this knowledge, she did not institute legal action until more than 4 years later. The statute of limitations has run.

Plaintiff asserts that the statute of limitation above cited is unconstitutional as special legislation in violation of Article III, section 18, Constitution of Nebraska. "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment." State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N. W. 2d 726.

"While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232.

Section 25-222, R. S. Supp., 1974, is a statute dealing with professional negligence. "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." Marx v. Hartford Acc. & Ind. Co., 183

Neb. 12, 157 N. W. 2d 870. There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services. On the other hand, a victim of malpractice is frequently unaware of it, or deceived in regard to it, for long periods of time. Such a person's situation is different from that sustained by persons subjected to ordinary personal or property injury. The situation of professional people and of those to whom they render services is substantially different from the normal situation encountered in the rendering of ordinary services and injuries sustained thereby. Public policy dictates diverse legislation in regard to professional services. We do not find the statute to be unconstitutional as special legislation.

It has also been suggested that the statute is void for vagueness. "It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement." Neeman v. Nebraska Nat. Resources Commission, 191 Neb. 672, 217 N. W. 2d 166. The legislative purpose is clear and although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible. Such questions are faced in regard to many statutes and on occasion require construction.

The judgment of the District Court is affirmed.

AFFIRMED.

FOXLEY CATTLE COMPANY, A NEBRASKA PARTNERSHIP, APPELLANT, V. BANK OF MEAD, A NEBRASKA BANKING CORPORATION, APPELLEE, ST. PAUL FIRE & MARINE INSURANCE COMPANY, GARNISHEE-APPELLEE.

244 N. W. 2d 205

Filed July 21, 1976. No. 40545.

1. **Bonds: Insurance: Words and Phrases.** A fidelity bond is an indemnity insurance contract whereby insurer agrees to indemnify the insured against loss arising from want of integrity, fidelity, or honesty of employees or other persons holding positions of trust.
2. **Bonds: Insurance: Contracts.** For the insurer to be liable to its insured on a contract of employee fidelity insurance, the insured must sustain an actual loss of the nature insured against.
3. **Bonds: Insurance: Damages.** An insurer under a fidelity bond is liable only in event of loss sustained by the insured.
4. **Bonds: Insurance: Contracts.** Legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket honesty bond to such third party.
5. ———: ———: ———. Contracting parties are presumed to act for themselves and an intent to benefit a third person should be clearly expressed in the contract.
6. **Bonds: Insurance: Contracts: Damages.** In contracts of indemnity against loss, an insurer does not become liable until the insured has suffered proven loss.

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

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

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Emil F. Sodoro and Ronald H. Stave, for garnishee-appellee.

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

WHITE, C. J.

This case involves a garnishment action brought by

the plaintiff, Foxley Cattle Company, against the St. Paul Fire and Marine Insurance Company (hereinafter referred to as St. Paul).

Plaintiff is a judgment creditor of the defendant, Bank of Mead, having obtained a judgment in the amount of $227,850.71 against the bank. The basic facts giving rise to plaintiff's cause of action and the resulting judgment in that case were as follows: Kenneth W. Schuette, president and a paid employee of the Bank of Mead, made certain representations to the plaintiff concerning the ownership, clear title, and location of 1,802 head of steers. These representations were in fact untrue. In reliance upon the fraudulent representations of Schuette, plaintiff issued its check, payable to the Bank of Mead and Agri-Land & Beef, Inc. No cattle were ever delivered to plaintiff. The jury verdict in favor of the plaintiff against the Bank of Mead was affirmed by this court on appeal. Foxley Cattle Co. v. Bank of Mead, *ante* p. 1, 241 N. W. 2d 495 (1976).

After obtaining its judgment, plaintiff caused summons and interrogatories in garnishment to be issued to St. Paul. Thereafter, St. Paul filed its answers, admitting that it had issued various bonds to the Bank of Mead (copies of these bonds were attached to the answers), but denying that it was indebted to the defendant at the time of the garnishment summons.

Trial on plaintiff's application for determination of liability of St. Paul was held on September 5, 1975. On October 31, 1975, the District Court found that, at the time of the service of summons in garnishment, St. Paul was indebted to the defendant Bank of Mead under the terms of its bonds and liable to the plaintiff in the amount of $227,850.71, plus $95,808.43 in prejudgment interest, plus $16,457.62 interest to date of judgment, for a total of $340,116.76, plus costs, including reasonable attorneys' fees.

On November 10, 1975, St. Paul filed motions for a

new trial and for a judgment notwithstanding the verdict. On December 5, 1975, the District Court denied the motion for a new trial, but granted the motion for judgment notwithstanding the verdict, finding that its judgment of October 31, 1975, in favor of the plaintiff, should be vacated and set aside and that a judgment for the garnishee should be entered. The District Court vacated and set aside its judgment of October 31, 1975, against St. Paul and entered judgment in favor of St. Paul, finding that St. Paul was not indebted or liable to the plaintiff or the Bank of Mead. Plaintiff appeals. We affirm the judgment of the District Court.

Plaintiff alleges that St. Paul is indebted to the Bank of Mead by virtue of several bonds which St. Paul had issued to the Bank of Mead.

Excess Blanket Employee Dishonesty Bond No. 400 CG 4176, issued by St. Paul to the Bank of Mead provided: "The Underwriter, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond, agrees to indemnify and hold harmless the Insured from and against any loss sustained by the Insured at any time but discovered during the Bond Period, including loss of money, securities or other property held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor, through any dishonest, fraudulent or criminal act committed anywhere by any of the Employees, acting alone or in collusion with others * * *."

Bankers Blanket Bond No. 400 CP 5231, issued by St. Paul to the Bank of Mead provided: "The St. Paul Fire and Marine Insurance Company (herein called Underwriter), in consideration of agreed premiums and subject to these Declarations, the General Conditions of this Bond and the terms and limitations expressed in its Insuring Clauses, agrees to indemnify the Insured * * * from and against any losses sustained by the Insured as

the result of any of the occurrences or events mentioned in the Bond * * * which shall happen at any time but which are discovered by the Insured subsequent to noon of the 16th day of March 1970 * * *. * * *

"(A) Dishonesty

"The Underwriter agrees to indemnify the Insured to any amount not exceeding the amount stated in the Declarations for this Insuring Clause, or endorsement amendatory thereto, from and against any loss, or any loss of Property, by reason of any dishonest, fraudulent or criminal act of any of the Employees, wherever committed and whether acting alone or in collusion with others * * *."

Plaintiff contends on appeal, as it did in the District Court, that the misrepresentations made to it by Schuette, a salaried employee of the Bank of Mead, were fraudulent and dishonest acts within the terms of these bonds, and that the judgment which it obtained against the Bank of Mead, based upon these fraudulent misrepresentations, was a loss sustained by the bank as a result of the fraudulent and dishonest act of one of its employees, and thus within the coverage of these bonds, making St. Paul liable and indebted to the Bank of Mead.

"In order that a surety or insurer may be liable under a fidelity bond, the loss suffered by the insured employer must be caused by acts or defaults within the contemplation of the bond." 35 Am. Jur. 2d, Fidelity Bonds and Insurance, § 18, p. 515. The insurer under a fidelity bond is liable only for losses sustained by the insured and of the type described in the insurance contract. KAMI Kountry Broadcasting Co. v. United States Fidelity & Guaranty Co., 190 Neb. 330, 208 N. W. 2d 254 (1973).

The issue, therefore, in this case is whether or not the judgment obtained against the Bank of Mead by the plaintiff, resulting from the fraudulent misrepresentations to the plaintiff by the former president of the

Bank of Mead, was a loss within the contemplation of these bonds. We hold that it was not.

We find the reasoning of Ronnau v. Caravan International Corp., 205 Kan. 154, 468 P. 2d 118 (1970), applicable to this case. The facts in that case are closely on point with the facts of the case before us.

There, the plaintiff, Ronnau, had obtained a default judgment against Caravan. Plaintiff's petition had alleged two causes of action against Caravan. Count I was based upon breach of contract. Count II sought compensatory and punitive damages against Caravan and one Doyle, a former president of Caravan, for fraudulent representations made by Doyle and other employees of Caravan.

Having obtained a default judgment against Caravan on the two counts, plaintiff then brought garnishment proceedings against the Insurance Company of North America (INA) which had issued an indemnity bond to Caravan. INA denied liability or indebtedness to Caravan. Plaintiff, Ronnau, made two claims against INA, asserting that INA was indebted to Caravan on the basis of each claim. Claim one was based upon the judgment which Ronnau had obtained against Caravan, based upon the fraudulent representations made by Caravan and its employees. Ronnau asserted that his judgment based upon these fraudulent representations was within the coverage of the Blanket Honesty Bond, by which INA had agreed to indemnify Caravan against: "'* * * any loss of money or other property, belonging to the Insured, or in which the Insured has a pecuniary interest, or for which the Insured is legally liable, or held by the Insured in any capacity whether the Insured is legally liable therefor or not, through any fraudulent or dishonest act or acts committed by any of the Employees * * * acting alone or in collusion with others * * * which the Insured shall sustain and discover as provided in Section * * *.'"

The Supreme Court of Kansas upheld the holding of

the District Court denying liability of INA to Caravan under the terms of the Blanket Honesty Bond, stating: "With respect to Claim One, the district court concluded the bond issued to Caravan by INA did not insure Caravan against liability to third parties and imposed no obligation upon INA to indemnify creditors of Caravan, such as the appellant; that the bond was not a third party beneficiary contract, nor a contract of insurance against liability; that the purpose and intent of the bond was to indemnify Caravan against direct losses of money or property through employee dishonesty — not to insure Caravan against liability to third parties; that Caravan had not sustained a direct loss of money or property by reason of appellant's judgment, and that the judgment was not a loss to Caravan within the coverage of the bond. * * *

"The appellant maintains that, in support of Claim One, the focal point of this issue is the fact the Blanket Honesty Bond is, at least in part, a policy of liability insurance, which insures against liability of Caravan to third persons, including himself. He contends that one policy of insurance may indemnify against both direct loss and against liability. He asserts the policy indemnifies or insures against four conditions, and that the third coverage — loss of money or other property for which the insured is legally liable — in consequence of fraudulent and dishonest acts of Caravan's employees, indemnifies against both direct loss and against liability. He argues that INA, as garnishee under the policy, agreed to insure Caravan for any loss of money or other property for which it was 'legally liable'; that Caravan sustained a loss by the fraudulent conduct of its employees and legal liability therefor was established by the judgment below in favor of appellant; that to hold otherwise would be to eliminate the words 'for which the Insured is legally liable' from the policy, which cannot be done; that the words are clear and unmistakable and are to be construed in their natural and ordinary

meaning; that no other provisions of the policy control their meaning, and the indemnity being against liability under the third coverage of the policy, INA became liable to appellant upon determination of Caravan's liability to him by reason of the judgment rendered on Count II of the petition.

"We cannot agree with appellant's construction of the bond. The insuring clause and other pertinent provisions of the bond have been set forth. In clear and unambiguous terms, INA agreed to indemnify Caravan against loss of money or other property caused by 'fraudulent or dishonest' acts of its employees. The category of insurance contracts into which the Blanket Honesty Bond falls is termed fidelity guaranty insurance. A fidelity bond is an indemnity insurance contract whereby one for consideration agrees to indemnify the insured against loss arising from the want of integrity, fidelity or honesty of employees or other persons holding positions of trust. Such a contract is considered to be one on which the insurer is liable only in the event of a loss sustained by the insured. *It is direct insurance procured by him in favor of himself, as contrasted with bonds running to the benefit of members of the public harmed by the misconduct of the covered individual, which bonds are third-party beneficiary contracts.* (13 Couch on Insurance 2d, §§ 446:1, 446:2.)

"For the insurer to be liable to its insured on a contract of employee fidelity insurance, the insured must sustain an actual loss of the nature insured against. The rule is stated in 13 Couch, op. cit., supra, § 46:219, p. 253, as follows:

" 'The contract of fidelity insurance is a contract against loss. It is a contract of indemnity on which the insurer is liable only in the event of loss sustained by the obligee in consequence of conduct of the nature specified in the contract. It has been held that there can be no recovery on a fidelity bond in the absence of loss or damage to the insured, and lack of any pecuniary loss

by the obligee from the wrongful acts constitutes a good defense, since in such case no recovery can be had.' "See, also, 35 Am. Jur., 2d, Fidelity Bonds and Insurance, § 39, p. 530; 41 Am. Jur., 2d, Indemnity, § 29, p. 720. * * *

"Manifestly, it would not seem from the nature of a fidelity bond that uninsured third parties should be allowed to recover. Nowhere in the language of the bond do we find that INA assumed an obligation to respond to liability of Caravan to third persons, such as the appellant here. The obligation expressed is to indemnify Caravan against loss of money or other property of a described class. The obligation of the bond runs to Caravan, to respond to actual loss it sustains, not the loss of third persons. Under no reasonable construction of the bond can it be said to insure against Caravan's liability to third persons, nor can it be considered to be a third-party beneficiary contract. It was a contract designed solely for the benefit of the formal parties thereto, insuring against loss to Caravan of the described money or property due to the fraudulent or dishonest acts of its employees.

"We are of the firm opinion the INA's contract meant exactly what it said, that is, it insured Caravan only against the defalcations of its employees. The protection of the bond was for the protection of Caravan alone. It was in the nature of a personal insurance contract. The appellant was not a party to the contract, was not named or referred to therein, and had no legal rights thereunder. In short, INA's liability does not arise until Caravan has sustained a proven loss." (Emphasis supplied.)

The above-quoted language effectively disposes of plaintiff's contention and argument that its judgment against the Bank of Mead was a loss within the contemplation of these bonds.

Since we hold that plaintiff's judgment was not a loss sustained by the Bank of Mead within the contemplation

of these bonds, no indebtedness or liability existed on the part of St. Paul to the Bank of Mead which could be garnished by the plaintiff. The District Court was correct in finding in favor of St. Paul.

We have examined the other matters raised by the plaintiff and find them to be without merit.

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

AFFIRMED.

FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, APPELLEE, V. OHIO CASUALTY INSURANCE COMPANY, APPELLANT.
244 N. W. 2d 209

Filed July 21, 1976. No. 40598.

1. **Motor Vehicles: Certificate of Title Act.** Under the Nebraska Certificate of Title act, sections 60-102 to 60-117, R. R. S. 1943, a certificate of title is the exclusive method provided by statute for the transfer of title to an automobile, but it is not conclusive of ownership.
2. ———: ———. A certificate of title to a motor vehicle conveys no greater interest than the grantor has.
3. **Motor Vehicles: Larceny: Certificate of Title Act.** A thief can acquire no title to an automobile stolen by him, nor can title to such vehicle be acquired through another's larceny or theft.
4. ———: ———: ———. The Nebraska Certificate of Title Act does not prevent owners of stolen vehicles from reclaiming them; and rights acquired by subsequent bona fide purchasers of the stolen vehicles are subject to those of the true owners.

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

Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha and James E. Gordon, for appellee.

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

BRODKEY, J.

Ohio Casualty Insurance Company, hereinafter referred to as Ohio Casualty or the Insurance Company, appeals a District Court judgment against it in the amount of $5,500 and costs for the alleged conversion of a 1973 Cadillac automobile. The case was tried on the facts as stipulated by the parties. In its order, the District Court found that First National Bank and Trust Company of Lincoln, hereinafter referred to as First National or the Bank, acquired a lien on the automobile by virtue of an installment sales contract noted on the certificate of title, that was "paramount to any interest claimed by the defendant." One of Ohio Casualty's representatives, using self-help, removed the car from Nebraska without First National's consent, and the court found that Ohio Casualty had converted the car. We reverse.

The 1973 Cadillac automobile involved in this case was purchased in Oregon by Joseph J. and E. Joy Fernandez on or about October 26, 1972. On that same date, they applied for an Oregon certificate of title to the car, and received it on November 2, 1972. On or about December 10, 1972, the car was stolen from the Fernandezes in Burbank, California. Ohio Casualty was the Fernandezes' insurance carrier; and on January 9, 1973, it paid $8,400 to the Fernandezes to cover the car's loss, who at that time assigned their title certificate to the car to the insurance company. On July 20, 1973, Ohio Casualty made application to the State of Oregon for a certificate of title in its name, and received it on August 3, 1973.

Meanwhile, the county clerk of Scotts Bluff County, Nebraska, on December 26, 1972, issued a Nebraska certificate of title on the car to one William F. Handy based upon a forged Arizona certificate of title. The

car was subsequently brought to Lincoln, where, on February 28, 1973, a certificate of title from Lancaster County was issued in the name of one Matthew John Brady. Misle Chevrolet Company purchased the Cadillac from a Matthew Brady, and obtained a certificate of title in its name in Lancaster County, on March 1, 1973. Later a Jerry Neva bought the car from Misle Chevrolet and obtained a certificate of title to the car on March 6, 1973. First National acquired a lien on the car by virtue of an installment sales agreement covering this sale. The lien was noted on the Nebraska certificate of title as required by law. Some time later, the Federal Bureau of Investigation which had been searching for the car stolen from the Fernandezes, located the car in Lincoln, Nebraska, and notified an agent of Ohio Casualty, who, on January 24, 1974, using only self-help, removed the vehicle from Lincoln to California, where appellant has its west coast office. The Cadillac was sold by the Insurance Company under sealed bids for $5,500.

The sole issue in this case is whether, under the Nebraska Certificate of Title Act, sections 60-102 to 60-117, R. R. S. 1943, First National, having noted its lien on the Nebraska certificate of title acquired rights superior to Ohio Casualty, in view of the fact First National's chain of title originated in a thief. The District Court answered this question in the affirmative. We disagree and reverse.

The pertinent statute, section 60-105, R. R. S. 1943, provides in part: "(1) No person, except as provided in section 60-110, acquiring a motor vehicle, commercial trailer, semitrailer, or cabin trailer *from the owner thereof,* whether such owner be a manufacturer, importer, dealer, or otherwise, shall acquire any right, title, claim, or interest in or to such motor vehicle, commercial trailer, semitrailer, or cabin trailer until he shall have had delivered to him physical possession of such motor vehicle, commercial trailer, semitrailer, or

cabin trailer and a certificate of title or a manufacturer's or importer's certificate duly executed in accordance with the provisions of this act, * * *." (Emphasis supplied.)

First National urges that since Ohio Casualty has not complied with the provisions of section 60-105, it can have no recognizable claim to the automobile in question. This court has stated that the purpose of the Certificate of Title Act is to provide a means of identifying motor vehicles, ascertaining motor vehicle owners, and preventing theft of motor vehicles and fraud in the transfer of motor vehicles. State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542 (1954); Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483 (1948). To achieve this end, the Legislature has provided that the exclusive means of transferring title was that provided by the statutory scheme. State Farm Mut. Auto. Ins. Co. v. Drawbaugh, *supra*; Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614 (1952). This method of transfer does not, however, create title where none exists, nor does it give a transferee greater title than that of his transferor. In Snyder v. Lincoln, 156 Neb. 190, at 195, we stated: "In Loyal's Auto Exchange, Inc. v. Munch, supra, we said, in effect, that a purchaser who receives possession of an automobile without obtaining a certificate of title thereto, in accordance with the statute, acquires no title or ownership therein. We did not say that the possession of a certificate of title was an absolute muniment of title. A thief with a certificate of title to a stolen automobile does not divest the owner of his right to take it wherever he can find it. A certificate of title is essential to convey the title to an automobile, but it is not conclusive of ownership. It is simply the exclusive method provided by statute for the transfer of title to a motor vehicle. It conveys no greater interest than the grantor actually possesses."

The effect of a certificate of title has been stated in various ways by this court. The certificate has been

found to be "conclusive of ownership" under the circumstances of particular cases. Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361 (1955); Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315 (1952). In other cases, we have stated that the certificate is "generally conclusive of ownership." Forman v. Anderson, 183 Neb. 715, 163 N. W. 2d 894 (1969); Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26 (1959); State Farm Mut. Auto. Ins. Co. v. Drawbaugh, *supra*. Yet, in other cases, the court has stated that the certificate is "not conclusive of ownership." Allstate Ins. Co. v. Enzolera, 164 Neb. 38, 81 N. W. 2d 588 (1957); Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 79 N. W. 2d 563 (1956); Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483, 156 Neb. 190, 55 N. W. 2d 614. We have never stated that the certificate of title is always conclusive of ownership. To hold that a certificate of title procured by theft, forgery, fraud, or misrepresentation is conclusive would defeat the very purpose of the legislation. Burns v. Commonwealth Trailer Sales, *supra*, at 316.

When the property underlying the certificate of title has been obtained by illegal means, a distinction has been made between stolen property and that acquired by fraud. The distinction is set out in the three Snyder cases, 150 Neb. 580, 35 N. W. 2d 483, 153 Neb. 611, 45 N. W. 2d 749, 156 Neb. 190, 55 N. W. 2d 614, and cited in later cases. One obtaining property by larceny cannot convey good title even to an innocent purchaser for value, but one obtaining property by fraud has a voidable title, and may convey that title to a bona fide purchaser who is then protected from claims of others. Enzolera, *supra*, at 41; Snyder, 150 Neb. at 588, 153 Neb. at 620, 156 Neb. at 195. On the other hand, the right of an owner or an assignee of the owner to recover his stolen automobile remains open to him. Snyder, 156 Neb. at 195; Enzolera, *supra*.

State Farm Mut. Auto. Ins. Co. v. Drawbaugh, *supra*,

has left in some question the validity and effect of the rule stated in the Snyder cases. In Drawbaugh the insurance company, as in this case, had paid the owner of a stolen car and taken an assignment of the owner's certificate of title. The company, however, did not obtain a certificate of title in its own name. The defendant had purchased the car and had a Nebraska certificate of title. This court, in affirming the trial court's decision in favor of the defendant in the replevin action, apparently overlooked or ignored the language in the Snyder cases with regard to stolen cars. The case, the court found, fell within the "generally conclusive" certificate category. Instead, the court relied upon Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913 (1951), quoting an Ohio case, Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306 (1939). The court concluded that "A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein." 159 Neb. at 157. We point out that neither the Loyal's Auto nor Crawford cases involved stolen automobiles. As a matter of fact, Ohio follows the rule we enunciated in the Snyder cases in theft cases. In Hardware Mut. Cas. Co. v. Gall, 15 Ohio St. 2d 261, 240 N. E. 2d 502 (1968), the court held that a thief could not convey a valid title to a stolen motor vehicle to a bona fide purchaser for value without notice, although the certificate of title used in the purported transfer appeared valid on its face. See, also, General Motors Acceptance Corp. v. Birkett L. Williams Co., 46 Ohio Op. 311, 243 N. E. 2d 882 (1969). Loyal's Auto and Crawford should not have governed the Drawbaugh case, without specifically overruling the Snyder cases. Ten years later, in Enzolera, *supra*, a case involving an insurance carrier-assignee and a subsequent bona fide purchaser, the court again cited the Snyder cases for the proposition that "generally, a thief can acquire no title to stolen property, nor can title to per-

sonal property be acquired through another's larceny or theft." 164 Neb. at 41. The court did not mention Drawbaugh, but seemed to base its decision in favor of the insurance company on the "duly issued" language of section 60-105, R. R. S. 1943, since the Nebraska certificate of title in Enzolera had been issued on the basis of a duplicate of an Ohio certificate, rather than as enumerated in section 60-106, R. R. S. 1943.

The court in Enzolera did not question the viability of the Snyder cases, but did not apply the rule to Enzolera; nor was the rule actually applied in the Snyder cases. The first Snyder case reversed a judgment for the defendant in the replevin case because the trial court had refused to distinguish between theft and fraud. Snyder, 150 Neb. 580, 35 N. W. 2d 483 (1948). In the later two Snyder cases, the taking had already been determined by retrial to have been by fraud, not theft. Snyder, 153 Neb. 611, 45 N. W. 2d 749 (1951), 156 Neb. 190, 55 N. W. 2d 614 (1952).

The correct rule is that stated in the Snyder cases that, even under the Nebraska Certificate of Title Act, a thief cannot acquire title to stolen property, nor can title to personal property be acquired through another's larceny or theft. We agree with the Ohio Supreme Court, which, in construing its certificate of title statute, which, in pertinent part, is almost identical to Nebraska's, held that a subsequent bona fide purchaser holding a certificate of title on a stolen automobile cannot prevail over the true owner absent some kind of estoppel. Hardware Mut. Cas. Co. v. Gall, *supra*. That court in making its ruling stated: "[w]e apparently must again dispel the erroneous notion that whoever first obtains an apparently valid Ohio certificate of title will be entitled to retain possession of the automobile regardless of whether he is the real owner or a bona fide purchaser without notice, whose title derives from a thief. See Buckeye Union Casualty Co. v. Nichols, 6 Ohio App. 2d 36, 215 N. E. 2d 733."

We also point out that section 60-109, R. R. S. 1943, provides in part: "The department shall prepare a report listing motor vehicles stolen and recovered as disclosed by the reports submitted to it and the report shall be distributed as it may deem advisable. In the event of the receipt from any county clerk of a copy of a certificate of title to such motor vehicle, the department shall immediately notify the rightful owner thereof and the county clerk who issued such certificate of title, and if, upon investigation, it appears that such certificate of title was improperly issued, the department shall immediately cancel the same." It is obvious from this section that the certificate of title was not intended to, and does not, prevent owners from reclaiming motor vehicles stolen from them, and that the rights of the bona fide purchaser are subject to those of the true owner. See Hardware Mut. Cas. Co. v. Gall, *supra,* 240 N. E. 2d at 506.

To the extent that State Farm Mut. Auto. Ins. Co. v. Drawbaugh, *supra,* is inconsistent with this opinion, it is overruled. We hold that the true owner, and his lawful successors in interest, have rights paramount to those of a subsequent bona fide purchaser of a stolen automobile holding a Nebraska certificate of title on the vehicle based upon a chain of ownership originating with the thief of the car.

Appellee argues that the stability of titles to motor vehicles in this state requires a contrary result as a matter of public policy. This may possibly be true, but even if so, the establishment of such a policy should be declared by the Legislature, not this court.

The judgment of the District Court is reversed and the cause is remanded with directions to enter judgment for appellant in accord with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. THE WESTERN TECHNICAL COMMUNITY COLLEGE AREA, APPELLEE, V. KATIE TALLON, COUNTY TREASURER OF SHERIDAN COUNTY, NEBRASKA, ET AL., APPELLANTS.

244 N. W. 2d 183

Filed July 21, 1976. No. 40613.

1. **Constitutional Law.** In construing a constitutional provision, effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions.
2. **Constitutional Law: Colleges and Universities: Taxation.** Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination.
3. **Constitutional Law: Colleges and Universities: Taxation: Statutes.** Chapter 79, article 26, R. S. Supp., 1975, is not unconstitutional on the ground it violates Article VIII, section 1A, of the Constitution of Nebraska.

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

Michael V. Smith of Smith & King, for appellants.

Russell E. Lovell and Russell E. Lovell, II, for appellee.

Tews & Noren and Robert G. Simmons, Jr., of Wright & Simmons, for amici curiae.

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

NEWTON, J.

In this action respondents challenge the constitutionality of the Technical Community College Area Act of 1975 set forth in sections 79-2636 to 79-2662, R. S. Supp., 1975. The District Court upheld the constitutionality of the act and issued a peremptory writ of mandamus di-

recting respondents, members of the Board of County Commissioners and the County Treasurer of Sheridan County, Nebraska, to remit taxes levied for the support of the relator. We affirm the judgment of the District Court.

In State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, 192 Neb. 201, 219 N. W. 2d 454, this court held the former act to be unconstitutional on the ground that the act provided for a property tax to support a state purpose and was in violation of Article VIII, section 1A, of the Constitution of Nebraska. That section, as adopted in 1954 and amended in 1966, prohibits the levy of a property tax for state purposes. The substance of our former decision is embodied in the following: "Under the act with which we are concerned here, the State has assumed the direct control of major policy decisions which affect the operation of each of the seven community college areas, and the statute reflects a purpose to control the operation of all seven areas for the benefit of the residents of the state as a whole. The provisions requiring that the tuition in any technical community college area for any resident of the State of Nebraska shall be the same as for a resident of the particular area is a strong indication of the legislative purpose to benefit residents of the entire state as contrasted to residents of particular local areas. The direct control by the State over capital expenditures, the right to contract for acquisitions and additions, and to control and direct which facilities and training will be available in which area, together with the complete and direct control of the individual budget of each technical community college area, demonstrate the dominance of the State as opposed to the local areas in all major matters of control and operation of the statutory system. It is undoubtedly true that such direct control will result in a more efficient and coordinated operation and avoid expensive and uneconomical duplication of facilities and services. Those particular objectives

in themselves reflect the dominance of a purpose to benefit the state as a whole."

In view of our former holding, the Legislature has repealed the former act and adopted the 1975 version which is now before us. Does the present act do away with objectionable features noted in our former decision, nullify state control, and render the technical community college areas essentially local in character?

Each technical community college area is now a body corporate which may sue and be sued. Each is governed by a board elected from among the local citizenry. These boards determine their local programs and curriculum; employ the required faculty, administrative, and other personnel; construct, lease, or purchase required facilities; do their own accounting, auditing, and budgeting; promulgate administrative rules and regulations; have the power of eminent domain; may lease or sell property; invest their funds; establish tuition rates; issue bonds; and exercise such other powers, duties, and responsibilities as may be necessary to comply with the act. Each area is also empowered to determine and levy property taxes not exceeding 2½ mills unless more be voted by the electors, but this is no longer compulsory.

The act also provides that the Legislature may appropriate state funds for the area colleges and distribute them on the basis of student enrollment. Provision is made for a state commission designated the Nebraska Coordinating Commission for Technical Community Colleges. This commission has general *advisory* supervision, is empowered to accept and equitably distribute federal funds, make recommendations, and provide guidance. It has little, if any, actual authority over the technical community colleges.

State aid to schools necessarily involves a commingling of state and local purposes. The interest of the state in education is evidenced by the constitutional provision for free common schools and the creation of colleges

and universities as well as elementary and high schools. Yet, in every instance where schools are locally controlled and supported, no objection has been found to a provision for state aid. No constitutional objection thereto has been called to our attention and we know of none. The mere granting of state aid does not render a school operation a state function.

We are aware of the fact that when Article VIII, section 1A, of the Constitution of Nebraska, was adopted in its original and amended form, its purpose was to require the state, after the adoption of sales and income taxes, to leave the property-tax field. No state interest or function could then be financed by means of property taxes, but all traditional state interests and functions must be financed by means other than property taxes. In other words, the state Legislature cannot avoid or circumvent the constitutional mandate by converting the traditional state functions into local functions supported by property taxes. At the time of the adoption of this constitutional provision, it was inherent in its adoption that the state would continue to administer its traditional functions and finance them by means other than a property tax. "* * * effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions." 16 Am. Jur. 2d, Constitutional Law, § 64, p. 239. There is no conflicting tradition relating to state support of technical community colleges. The schools and junior colleges taken over by the technical community colleges were, at least generally, local in nature and supported by local property taxes. Those receiving state aid still were required to have local participation as provided for in the present act.

The technical community colleges are no longer dominated by a state board or subject to a compulsory property tax levy of 1 mill. The area boards exercise the same powers and functions as other political subdivisions

and the operation of each respective college is controlled by its area board. The state commission acts only as a conduit for federal funds and in an advisory capacity. It has no real power but is designed to give such assistance and advice as may be helpful in the operation of the colleges, to discourage unnecessary duplication in educational and training fields, and promote uniformity. A properly operated state commission may render it unnecessary for the Legislature to lay down a multiplicity of rules under its plenary authority. The technical community colleges are now in largely the same position as our school districts. They operate on a strictly local basis subject only to guidelines laid down by the Legislature.

"Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination." State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra.*

We conclude that the present legislative act is not violative of Article VIII, section 1A, of the Constitution of Nebraska, and the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. The majority opinion today tells the Legislature that it can avoid the prohibitions of Article VIII, section 1, of the Nebraska Constitution (the Duis amendment), insofar as future state purpose programs are concerned, provided the legislative branch of government acts in two steps. First, establish the state program and purpose and direct that it be funded

at least in part by local property taxation in violation of the amendment. Second, when the unconstitutionality of the act is determined by this court, relinquish some legislative control, but without permitting abolition of the program and purpose. Presto, the judicial wand has been waved and an unconstitutional legislative act (supporting a state purpose program with property tax) has, by legislative sleight of hand and judicial cooperation, become constitutional. Thus the Duis amendment is reduced to mere compliance with a formula or procedure, when in fact the amendment has to do with substance and effect, i.e., the exclusive allocation of the property portion of the tax base to local governments and the prohibition of state programs supported by property taxation.

I agree with the principle relied upon by the majority, to wit, in construing a constitutional provision, effect must be given to the intent of the framers of the organic law and of the people adopting it. But that principle, although stated in the majority opinion, is not given effect. Instead this court substitutes for the substance of the Duis amendment the criteria used by the court in State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, 192 Neb. 201, 219 N. W. 2d 454, in analyzing the purpose of the Nebraska Technical Community College Area Act. The drafters of the amendment and the electors who approved it were not at all concerned with procedures or formulae, they were concerned with substance and effect.

When we seek to determine the intent of the framers of the amendment and of the electors, we must look to the events which led to the adoption of the Duis amendment. This the majority opinion does not do.

As we shall later demonstrate from history, the Duis amendment was intended to accomplish several things. (1) If a state income or sales tax was later authorized by constitutional amendment and implemented by statute, then the Legislature could no longer levy a prop-

erty tax for state purposes. (2) Local governments would then have exclusive call upon the property tax portion of the whole tax base. There were also secondary intended results to be brought about by the Duis amendment. Removing the state from the property tax field would: (a) Ameliorate to a substantial degree the property valuation and equalization problems which had plagued the tax administrators and the courts, and (b) eliminate the inequities in the support of state government which resulted from the wide disparity in property tax valuations among counties and which caused property owners, having exactly the same actual value of property, to contribute vastly unequal amounts to the cost of state government.

The majority opinion pays lip service to a valid principle of constitutional construction, namely, that one must look to the "intent of the framers of the organic law and of the people adopting it," but does not even discuss the intent and purpose that the framers and the people had in mind in approving the Duis amendment. These intents and purposes are embedded in the history of the time. Recent history it is. So recent that every member of this court should easily recall it. So recent that the vast majority of the members of the Legislature which enacted Chapter 79, article 26, R. S. Supp., 1975, and its predecessor statute should remember.

In State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra*, we held the Nebraska Technical Community College Area Act unconstitutional. We there had to determine whether the Legislature was doing indirectly what the Constitution prohibited it from doing directly. We, in that opinion, noted: "The provisions of section 79-2626, R. S. Supp., 1973, do not require the area boards to certify a levy of one mill. Nevertheless, they effectively enforce that result by voiding any state appropriation to an area whose mill levy is less than the maximum one mill. It should be noted here also that an appropriation of state funds has al-

ready been made at the time the area board is required to certify a property tax levy. The Legislature could not and would not approve any budget or make any appropriation to any area which did not show a one mill levy in its budget request. It is wholly unrealistic to assume that any area board will set its property tax levy at any amount less than the maximum one mill when the effect of that decision is to eliminate all state financial support. For all practical purposes the statute is mandatory in requiring a one mill levy. The result is to provide for a one mill property tax levy in every county in Nebraska to support a statewide system of technical community colleges."

The new act no longer makes the state appropriation contingent upon the property tax levy, but as a practical matter this makes no difference. The original "state purpose" still remains. The system is established. The authorized property tax levy has been raised to 2.5 mills. The maximum or near the maximum levy is being made in every college area. A statewide levy is, as a practical matter, mandated just as much as it was under the previous act and in greater amount. The record establishes that the technical college program cannot be supported on the established scale by the funds which the Legislature is willing to appropriate for the purpose, therefore, the levy of the property tax is, in effect, mandated.

The majority opinion devotes a large paragraph to listing the characteristics which make the "area essentially local in character." All such characteristics are listed. Eight of these so-called characteristics existed under the statute held unconstitutional. One of these is the amount authorized to be levied. These characteristics then can hardly be relied upon in support of holding the statute constitutional. The remaining three characteristics are: (1) Each area is expressly declared to be a corporate body and may sue and be sued; (2) each area does its own accounting and budgeting; and (3) it has power of eminent domain. I

would suggest that item (1) may have been true before, even without express declaration. Items (2) and (3) have no significance on the question in issue. The only real change in substance of the new act is the substitution of the commission for the board and the substantial restriction of the commission's powers. This alone is not enough in the light of the purpose of the Duis amendment, as I will show.

The purpose of the Duis amendment is met only if this system of state colleges is supported wholly by a state appropriation from state income and sales tax. That would have been the proper legislative response to State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra*. The Legislature and this court now combine to effectively destroy the intended substantive effect of the Duis amendment.

Before looking at the events which led to the adoption of the amendment, let us state a perspective which has been partly stated in our opinion in State ex rel. Meyer v. County of Banner, *ante* p. 565, 244 N. W. 2d 179. I joined and heartily concur in that opinion where it is held that the Duis amendment was not intended to disturb traditional and historical property tax support from counties or other local taxing subdivisions for continuing governmental activities commingling state and local purposes. The framers and electors clearly did not intend to disturb those programs historically supported by local tax levies. Equally as clear is the fact they did not intend to allow the state government to thrust upon the local governments the cost of programs previously supported by the now prohibited state property tax levy. Thus far there has apparently been no attempt to evade this second purpose. Neither, of course, does the Duis amendment prohibit state support of local government and programs.

The problem arises when the Legislature mandates new programs. In such cases, since the amendment itself does not define "state purpose" and since previous

court definitions of seemingly similar phrases such as "state concern" announced in wholly different contexts (see, for example, Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87), can have no application, we must necessarily look to some such criteria as were set forth in State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra*. That case did not say to the Legislature, "If you comply with a certain formula, the Duis amendment is not violated." In Tallon we were looking to the substance of what the Legislature had done. What the Legislature did and the effect thereof on local property taxation has not been changed by the new act.

In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, we said: "The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it. . . . It is permissible in determining the meaning of language of a Constitution to consider the facts of history, the evil intended to be overcome, the objects sought to be accomplished, and the scope of the remedy its terms include." See, also, First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762; State ex rel. Sorensen v. Chicago, B. & Q. R.R. Co., 112 Neb. 248, 199 N. W. 534.

Let us now examine the events which surrounded the adoption of the Duis amendment in 1954 and the change in that constitutional provision in 1966. As amended in the latter year, it provides: "The state shall be prohibited from levying a property tax for state purposes." Art. VIII, § 1A, Constitution of Nebraska.

The Duis amendment was proposed to the people by the Sixty-Sixth Extraordinary Session of the Nebraska Legislature in 1954. Previous to that time and continuing long thereafter there occurred extensive litigation which had its genesis in the lack of uniformity of valuation and assessment of tangible property, real and per-

sonal, between counties and among individuals. On January 9, 1953, this court handed down its opinion in Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469. In Laflin, a property owner in Johnson County appealed from an action of the State Board of Equalization and Assessment, contending that the board had refused to properly equalize the assessment of farmlands in various counties of the state for the taxable year 1952 in accordance with existing statutes requiring assessment at actual valuation and the constitutional provisions requiring uniformity of valuations.

Property in Nebraska, at the time of the Laflin case, was not being assessed at its actual value as required by statute. "The figures also showed that real estate in 19 counties were [sic] assessed at less than 50% of the 20-year average selling price, and that one county, Johnson County, was assessed at 82% of the 20-year average." Nebraska State Bar Association Proceedings, 1954, 34 Neb. L. Rev. 161, 342 (1954).

The 19 counties were notified to appear before a meeting of the board to show cause why their assessments should not be raised to 50 percent. Appearances were also made by Johnson County as well as by Laflin, both protesting the valuations and assessments made in Johnson County as being excessive. Laflin also argued that the excessive valuations and assessments "had the effect of requiring [him] . . . to pay a disproportionate share of the state property tax." Laflin v. State Board of Equalization & Assessment, *supra*.

The board increased the valuations of the 19 counties called before it, but " 'decided to take no action towards reducing the assessed value of farm lands and improvements in Johnson County.' " Laflin v. State Board of Equalization & Assessment, *supra*. Laflin appealed the board's determination to this court.

This court concluded, among other things, "that there was a failure to equalize between Johnson County and the remaining counties of the state," in violation of the

provisions for uniform and proportionate valuations as required by Article VIII, section 1, of the Constitution of Nebraska. The board was required by the court to "reconvene for the purpose of entering an order complying" with the court's findings, noting that it might be that "the valuations of Johnson County [could not] be properly equalized and assessed without compensating corrections in the remaining counties of the state." Laflin v. Board of Equalization & Assessment, *supra*.

Governor Crosby, on the day the Laflin decision was handed down, indicated that he had been keenly aware of the equalization problem in Nebraska. " 'This opinion points up the problem to which I devoted a section of my inaugural message when I said on the assessment of property: "We are permitting serious injustices". . . . The handing down of this opinion comes at an opportune time. A clear definition of the duty of the State Board of Equalization and Assessment is provided. The board must insist on assessments at actual value with real uniformity among counties.' " Omaha World-Herald (Morn. Ed.), Jan. 10, 1953, p. 1, col. 5. See, also, Lincoln Star, Jan. 10, 1953, p. 1, col. 8.

The Legislature reacted quickly, amending section 77-201, R. R. S. 1943 (R. S. Supp., 1953), Laws 1953, c. 265, § 1, to require that property need only be assessed at "fifty per cent of actual value" rather than a hundred percent of its actual value. Nebraska State Bar Association Proceedings, 34 Neb. L. Rev. at 343. The Governor initiated a program titled "Operation Honesty," "as a sincere effort to obtain voluntary compliance with the law [requiring persons to self-assess their personal property] and to achieve some lightening of the real estate taxes." Governor's Message to Legislature, Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 9.

There also ensued a series of political battles in which the Governor and local taxing authorities attempted to blame each other for increases in taxes resulting from

equalization requirements. See, for example, the recital in the Omaha World-Herald (Morn. Ed.), Mar. 17, 1954, p. 1, col. 7, dealing with the argument between the Governor and the Omaha school board over who was responsible for the increase in property taxes. The Governor, 5 days later on March 22, 1954, announced the need for constitutional revisions to resolve the tax problem. As the Omaha World-Herald (Morn. Ed.), Apr. 21, 1954, p. 42, col. 1, noted, the Governor's efforts to obtain constitutional changes "represent[ed] Governor Crosby's reaction to the public outcry against what had been called 'the tax mess'—meaning the higher taxes which most Nebraska property owners had to pay this spring."

Governor Crosby, on March 22, 1954, noted that problems arose "from a conscientious effort to administer the present tax laws" and determined that those problems could only be resolved by constitutional amendments. Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 10. He had noted earlier that the "Nebraska Legislature [was] working under a 'constitutional straitjacket' in writing tax legislation." Grand Island Independent, Mar. 30, 1954, p. 1, col. 5. To achieve the constitutional changes required, Governor Crosby proposed to circulate petitions to place six amendments on the November ballot. Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 154, p. 10; Omaha World-Herald (Morn. Ed.), Mar. 23, 1954, p. 1, col. 8. On April 5, 1954, the Governor announced that he had chosen to call a special session to handle the tax problem, rather than seeking constitutional change through the petition procedure. Omaha World-Herald (Morn. Ed.), Apr. 6, 1954, p. 1, col. 2. The Governor decided to call a special session because he and the Legislative Council Tax Committee, formed to study Nebraska's tax problem, basically agreed on five out of the six amendments he had proposed to resolve the tax problem. Lincoln Star,

Apr. 10, 1954, p. 1, col. 1; Omaha World-Herald (Morn. Ed.), Apr. 20, 1954, p. 1, col. 6.

Six proposals were given to the Legislature when it convened on April 20, 1954. One exempted household furnishings from taxation; a second permitted a homestead exemption; a third provided that county assessors should not be elected; and the fourth, which was labeled "the 'heart' of the [Governor's] tax reform program" throughout the special session (see Lincoln Star, May 4, 1954, p. 1, col. 1), sought to amend Article VIII, section 1, of the Nebraska Constitution, to allow the Legislature a greater latitude in classifying property for assessment purposes. Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, pp. 11 to 13.

One proposed amendment, endorsed by both the Governor and the tax committee, provided for the appointment of a nonelected board to replace the elected officials serving on the State Board of Equalization and Assessment. The Governor noted that "elected officials . . . are not likely to be aggressive in equalizing assessments among the counties from year to year. It is inescapably unpopular to adjust assessments notwithstanding that the law and principles of fairness may require it to be done." Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 11.

The sixth proposition, apparently endorsed by both the Governor and the tax committee, provided the manner in which the proceeds from a sales tax were to be expended by the state government if a sales tax ever became law. The Governor specifically noted that the sales tax "would not do more than supplant a small part of the property tax burden and would do nothing toward solving the task of equalizing property taxes." Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 12.

Governor Crosby himself stated that he felt "his proposed constitutional amendments would not end the need for the State Government to equalize property tax as-

sessments." Omaha World-Herald (Morn. Ed.), Mar. 23, 1954, p. 1, col. 8. He further noted that he saw no "virtue in taking the state out of the property tax field, because I feel we need statewide equalization." Lincoln Star, Apr. 26, 1954, p. 2, col. 5.

What had happened was that because of the outcry over what was deemed an unfair and excessive tax load on property, the Legislature and the Governor sought to make the burden more palatable by constitutional change authorizing exemptions from taxation of certain classes of property as to which the most obvious inequities existed. This political process continued thereafter and it still continues. The obvious and inevitable consequence was a smaller tax base. While the tax base was being eroded, the need for tax revenue was not lessening. The new exemptions would not, of course, solve the problem of equalization. What would help would be an increased tax base such as a sales and/or income tax and a division of the tax base between the state and local governments. This is what did occur. A new and enlarged tax base was not created until the income and sales tax was adopted in 1967, but the groundwork for the division of the tax base was laid in the Duis amendment.

The Duis amendment, introduced on the first day of the special session by Senator Duis as L.B. 7 (Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 18), had the effect of taking the state out of the "statewide equalization" problem. It provided "that when a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue for the State of Nebraska for state purposes, the state shall be prohibited from levying a property tax for state purposes." Laws 1954, c. 5, § 2, p. 65. The obvious result of eliminating a statewide property tax would be to lessen the need to equalize the imposition of that tax

between the 93 counties. Thus, a major portion of the equalization problem would be eliminated.

The floor debate on the Duis amendment, found at Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, pp. 101 to 104, covering only a small portion of the total debate on L.B. 7, is enlightening. The discussion centered around a proposed amendment to L.B. 7 which would have permitted the state to continue to levy a property tax for "special levies." Senator Duis argued against the amendment. He noted that L.B. 7 as he proposed it put the state "entirely out" of the property tax field if a state sales and/or income tax were adopted, while the amendment to L.B. 7 would put the state "half in and half out of the property tax field should a sales tax be enacted." The amendment lost on a voice vote. Neb. Leg. Jour., Sixty-Sixth (Extraordinary) Session, 1954, p. 104.

The newspapers also defined the import of the Duis amendment in the same manner. The Omaha World-Herald defined the Duis amendment as "prohibiting all state government property taxes if the Legislature ever enacts sales and/or income taxes." Omaha World-Herald (Morn. Ed.), Apr. 25, 1954, Sec. B, p. 1, col. 1. See, also, Omaha World-Herald (Morn. Ed.) Apr. 28, 1954, p. 1, col. 8; April 29, 1954, p. 1, col. 6; May 1, 1954, p. 2, col. 8; May 3, 1954, p. 6, col. 1; May 6, 1954, p. 1, col. 2; May 7, 1954, p. 1, col. 8. The Lincoln Star stated that the Duis amendment provided that "if a sales or income tax is made law it must replace property taxes for state functions and the state would be prohibited from levying any property taxes." May 6, 1954, p. 1, col. 5. See, also, Omaha World-Herald (Morn. Ed.), Apr. 28, 1954, p. p. 1 col. 6; May 7, 1954, p. 1, col. 2; May 8, 1954, p. 3, col. 1; Nov. 4, 1954, p. 4, col. 2. The Grand Island Daily Independent defined L.B. 7 as requiring "that the state would have to step out of the property tax field in the event of enactment of a state sales or income tax." Apr. 22, 1954, p. 1, col. 2; Apr. 30, 1954, p. 1, col. 2; May

4, 1954, p. 1, col. 5; Oct. 22, 1954, p. 10, col. 1. The Norfolk Daily News described the Duis amendment as providing "that when a sales tax or income tax is adopted, the state shall be barred from levying a property tax for state purposes." Apr. 27, 1954, p. 10, col. 2; May 3, 1954, p. 8, col. 1. The Scottsbluff Star-Herald noted that the Duis amendment was "compulsive in nature. It states specifically that the state shall cease levying property taxes if and when it approves a state sales tax or a state income tax." Oct. 23, 1954, p. 2, col. 1; Apr. 21, 1954, p. 1, col. 8; Apr. 22, 1954, p. 1, col. 4. The Hastings Daily Tribune defined L.B. 7 as "taking the state out of the property tax field should [a] sales or income tax ever be enacted." Apr. 28, 1954, p. 1, col. 3; Apr. 30, 1954, p. 1, col. 1; Nov. 11, 1954, p. 14, col. 2.

Several newspapers commented on the effect of the Duis amendment on the matter of equalization. The Lincoln Star, in an article published shortly after the Laflin decision and before the 1954 special session noted that if the state were "taken out of the property tax field and another souce of revenue [was] found" the result would be that "equalization would then become merely one between individuals in a county" rather than between the 93 counties. Lincoln Star, Jan. 10, 1953, p. 1, col. 7. That, of course, was not totally correct because some taxing districts overlap county lines. A second statement made by a newspaper with respect to the relationship between the Duis amendment and the equalization problem was made by the Scottsbluff Star-Herald while the special session was debating the amendment. "[I]t opens the way for elimination of the state's annual and fruitless effort to equalize assessment values among the 93 counties, if the 1955 Legislature decides to broaden the tax base. Has this last mentioned idea been forgotten in the welter of new proposals? We had thought all along that this possible by-product of the sales tax was one of its principal virtues." Scottsbluff Star-Herald, Apr. 27, 1954, p. 2, col. 1. A third comment

by a newspaper on the equalization problem was made shortly before the November 2, 1954, election in which the Duis amendment was approved by the voters. The Grand Island Daily Independent, in discussing the pros and cons of the Duis amendment, noted that an argument "in favor of the amendment" was "that with the state [property tax] levy out of the picture, the difference in assessments between counties will not bring iniustices." Grand Island Daily Independent, Oct. 22, 1954, p. 10, col. 1.

The Duis amendment as approved by the voters in 1954 read as follows: "When a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue, the state shall be prohibited from levying a property tax for state purposes." Art. VIII, § 1A, Constitution of Nebraska. Article VIII, section 1A, was amended in 1966 to read: "The state shall be prohibited from levying a property tax for state purposes." The 1954 amendment prohibited a statewide property tax only if a sales and/or income tax was enacted, while the 1966 amended version prohibited a statewide property tax, period, no matter whether or not the Legislature had enacted a replacement tax.

A quick look at the history of the 1966 amendment will explain the reason for the change in language. In 1965 the Legislature enacted a statewide income tax to take effect January 1, 1967. Laws 1965, L.B. 797, c. 465, § 1 et seq., p. 1476, codified at § 77-2701 et seq., R. R. S. 1943 (Reissue 1966). The tax was imposed as a "flat rate irrespective of income." § 77-2703(2), R. R. S. 1943 (Reissue 1966). Before the law could take effect, the people successfully initiated a statewide referendum petition drive to place the income tax law on the November 1966, ballot. Omaha World-Herald (Morn. Ed.), Jan. 15, 1966, p. 2, col. 7. The income tax enactment was overwhelmingly rejected by the voters in the No-

vember election. Nebraska Blue Book, 1974-75, Table: Initiated and Referred Laws, p. 107.

Also in 1965, the same year the above income tax was enacted, the Legislature approved a proposal to amend the 1954 version of the Duis amendment: "When a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue, the state shall be prohibited from levying a property tax for state purposes, except for funds to be used for capital building improvements of the state, and the Legislature shall allocate not less than twenty per cent of the proceeds from such tax to the common schools which are exclusively owned and controlled by the state or an educational governmental subdivision thereof." Laws 1965, L.B. 341, c. 295, § 1, p. 838.

The Legislature undoubtedly realized that its passage of a state income tax would completely remove the state from the property tax field unless there was a change in the Duis amendment. Senator Warner realized this when he sponsored L.B. 341 to amend the Duis amendment, and he recognized as well his amendment to the Duis amendment would require a continuing equalization between counties. He testified that his "amendment would keep the state in the property tax business at a . . . state mill levy which would be levied and all the various counties thereby requiring the equalization of taxes in their enforcement at the state level." Hearings before the Education Committee, Seventy-Fifth Session, Apr. 13, 1965, p. 7.

Many Senators, during the floor debate on L.B. 341, expressed the idea that it had been proposed with the specific purpose of keeping the state in the equalization business. Senator Carpenter: "And I might say, Senator, that the main reason, at least one of the reasons [for L.B. 341], is to see that the state does not get out of the area of equalizing between counties." Floor Debate on L.B. 341, Seventy-Fifth Session, Aug. 9, 1965,

p. 3049. The reasons Senators wanted to retain statewide equalization was best set out by Senator Warner, the sponsor of L.B. 341: "[I]n visiting with students of taxation it is their most unanimous opinion that unless the state is in the property tax field, even to or though at a low amount, you are going to have equalization deteriorating very rapidly and with many subdivisions of government crossing over county lines, I don't think this is a situation with which we can put up with." Id., Aug. 10, 1965, p. 3065. Senator Ruhnke expressed the same sentiment at page 3065.

The above discussion would indicate that a major impetus behind the legislative approval of L.B. 341 was the fact the proposal would keep the state via its State Board of Equalization and Assessment in the equalization field. In the November 1966 election, L.B. 341 was rejected by the people. Nebraska Blue Book, 1974-75, Table: Vote on Constitutional Amendments, p. 105.

In its place, the people adopted a proposal placed on the ballot by an initiative petition after the Legislature had approved L.B. 341. The petition drive commenced on January 14, 1966 (Omaha World-Herald (Morn. Ed.), Jan. 15, 1966, p. 2, col. 7), and obtained the requisite signatures on July 20, 1966, to allow its placement on the November 1966 ballot where it was approved by the people. Nebraska Blue Book, 1974-75, Table: Vote on Constitutional Amendments, p. 105.

The petition drive was spearheaded by the Nebraska Farm Bureau which "had the position for many years that the cost of state government ought not to be provided by property owners." Omaha World-Herald (Morn. Ed.), Jan. 15, 1966, p. 2, col. 7. Newspaper articles indicated that the petition effort was aimed as much against the efforts to repeal the state income tax (referendum vote on L.B. 797) as it was aimed at the legislative amendment (L.B. 341) to the Duis amendment. Lincoln Star, Jan. 15, 1966, p. 1, cols. 4 to 6;

Omaha World-Herald (Morn. Ed.), Jan. 15, 1966, p. 2, col. 7.

The people of Nebraska applied to the fullest the maxim that given a chance, a citizen will vote against any tax. They approved the referendum voiding the state income tax and at the same time adopted the petition-sponsored amendment barring the state from imposing a property tax. The end result was that when the Legislature met in 1967, there was no effective state tax upon which it could draw for state revenue. The Legislature passed a combination sales/income tax package with an emergency clause which was approved by the Governor on April 12, 1967. Laws 1967, L.B. 377, c. 487, § 1 et seq., p. 1533, codified at § 77-2701 et seq., R. R. S. 1943.

The foregoing history would seem to make clear that the purpose of the Duis amendment was primarily to accomplish a division of the tax base between state and local governments. It was secondarily concerned with the problem of equalization of valuation among the counties. It is directed to matters of substance and not form or procedure. The two-step legislative process which the majority opinion approves permits the Legislature to defeat in part the principal purpose of Article VIII, section 1A, of the Nebraska Constitution. Further, it will resurrect and aggravate the problems relative to the equalization of valuation of property for tax purposes which the Duis amendment was intended to lessen. The majority opinion, in my judgment, amounts simply to a reversal of our holding in State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra*. I do not, of course, suggest that the majority of the court so regard it, or that it is a deliberate but veiled overruling. Unfortunately the majority has confused form with substance. State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, *supra*, was correctly decided under the Constitution and we should adhere to its result.

WHITE, C. J., joins in this dissent.

BOSLAUGH, J., dissenting in part.

I concur fully in the holding of the majority opinion that the 1975 Technical Community College Area Act is constitutional. I also concur in the holding that if the predominant purpose of a legislative act is local the activity may be financed by a property tax. The fact that a previous act in the same area was invalid is totally irrelevant so far as consideration of the 1975 act is concerned.

I do not agree that the Duis amendment is a complete restriction upon legislative discretion to convert traditional state functions into local functions. In my view the Legislature still has the power to allocate the various functions and activities of government between the state and local subdivisions as it may see fit. Functions and activities that are in fact local may be financed from sources of revenue that are available to local subdivisions.

SPENCER, J., joins in the concurrence and dissent.

MELVIN J. WASHINGTON, APPELLEE, V. AMERICAN COMMUNITY STORES CORPORATION, A TEXAS CORPORATION, DOING BUSINESS AS HINKY DINKY STORES, APPELLANT.

244 N. W. 2d 286

Filed July 28, 1976. No. 40043.

1. **Damages.** Loss of earning capacity, as distinct from loss of wages, salary, or earnings is a separate element of damage.
2. **Damages: Pleadings: Trial.** A loss of past earnings is an item of special damage and must be specifically pleaded and proved.
3. ———: ———: ———. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage.
4. **Damages: Evidence: Trial.** Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity.
5. ———: ———: ———. Recovery for loss or diminution of

the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.

6. **Damages: Jury: Trial.** It is within the province of the jury to weigh all the elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings.
7. **Judgments: Evidence: Trial.** A party who objects to the evidence and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded.

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

Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Warren C. Schrempp, Thomas G. McQuade, and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and MORAN, District Judge.

WHITE, C. J.

This is an appeal from a jury verdict and judgment in the sum of $76,000 arising out of a motor vehicle collision. The trial court directed a verdict against the defendant on the issue of liability but this is not assigned as error. The defendant, asserting that the evidence is insufficient to support the verdict, that the verdict was excessive, and error in instructions, appeals. We affirm the judgment of the District Court.

The accident took place April 11, 1972. The plaintiff was then 24 years old and had been actually employed by the state as an adult parole officer since he was graduated from college in December 1971. At the outset we point out that there is no dispute concerning the permanency of the plaintiff's injury nor the fact that the injury disabled the plaintiff from pursuing the wrestling sport. Two days after the accident the plaintiff

came under the care of an orthopedic surgeon who treated him until the time of the trial. Since these injuries are undisputed, we refer to them only briefly by way of background. The evidence supports the finding that he suffered injury to his back and to the posterior rib cage, that he has continuously suffered from pain and disability in the muscles on either side of the spine, and that this pain exists not only in the rib area, but also in the lower back area. Continuously to the time of trial, the plaintiff suffered these disabilities, which increased whenever he engaged in heavy lifting or bending. The orthopedist testified that these injuries were such that he would not have been able to compete and participate in the sport of wrestling, and that his disability was directly attributable to the injuries suffered in the April 11, 1972, accident. This evidence is undisputed and the defendant did not choose to call a qualified orthopedic surgeon of its choice to dispute the permanency, the causation, or the fact that the physical injury ended the plaintiff's sports career.

Summarizing the assignments of error in this case, the basic thrust of the defendant's contention in this appeal is that the court should not have submitted the plaintiff's loss of earning capacity to the jury. It is argued that the evidence is based upon speculation and conjecture, that evidence of contingent, uncertain future possibilities, and uncertain future happenings, is speculative and conjectural and therefore incompetent, and the verdict is excessive. It is further contended that there was prejudicial error in the giving of instructions Nos. 10, 14, and 15, for the reasons that incompetent evidence was received and more importantly, that there was no proof of past earnings as a wrestler, or from plaintiff's wrestling ability, and therefore the submission of such issue was in error.

From what we have said it is clear that there is no issue of liability in the case — no issue as to the consequential and permanent personal injuries to the back

and the muscles of the plaintiff's body. The only issues presented to this court are the sufficiency of the evidence and the correctness of the instructions in submitting the issue of loss of earning capacity resulting from the impairment of the plaintiff's ability to pursue a career in the wrestling sport, either by way of a teacher, or as a professional. We review the evidence in light of the familiar rule that requires us to resolve the conflicts in the evidence and the inferences to be drawn therefrom in favor of the plaintiff. The plaintiff had attended the University of Nebraska at Omaha and he had compiled an outstanding record as an intercollegiate wrestler. He won first place in his weight division in the NAIA wrestling tournament his sophomore and senior years, was second once, and placed third in his freshman year. His collegiate record was 103 wins and 4 losses. He was the best wrestler in the history of UNO. Expert testimony on his behalf was that before his injury he was a prime candidate for the 1972 United States Olympic team and had the qualifications to become a great international wrestler and to win a medal. There was evidence that those who compete in the Olympics and win a medal have a much better opportunity to secure employment in the coaching or professional wrestling fields. The plaintiff had continued to train regularly prior to the accident. At the time of the injury he was in excellent physical condition and had consistently demonstrated the training habits required to successfully compete in the Olympic trials. The plaintiff testified that prior to the accident he intended to try to make the United States Olympic team. The plaintiff offered no evidence of his earnings at the time of the injury or at the time of the trial that were derived from his wrestling skills. Upon cross-examination of one of the defendant's experts the plaintiff elicited testimony of the earnings of collegiate coaches. The plaintiff's medical expenses were stipulated to, and he testified that he had soreness in his back at the time of the trial and

could no longer wrestle because his back would not stand up. The evidence, without further recitation, fully supports a conclusion that because of injuries to his back that his career as a wrestler or in the wrestling sport was ended. The undisputed medical testimony is that the plaintiff had a permanent disability which will remain with him the rest of his life and eliminate his career as an outstanding athlete in the wrestling profession. The plaintiff was 26 years of age at the time of the trial and had a life expectancy of 44.90 years. His health prior to the accident was excellent. His habits of work were excellent and had included daily workouts to keep in condition. There was evidence offered and rejected that supports a finding that as a coach he could have received earnings in the range of $16,000 to $20,000 per year. The evidence shows that the plaintiff began competing in organized athletics, including football, basketball, wrestling, and track and devoted an average of 3 to 4 hours a day to athletics. He received football and wrestling scholarships to the University of Nebraska at Omaha. In high school he had wrestled competitively in organized high school wrestling, and his record was 200 wins and 7 losses. In September of 1967, he entered the University of Nebraska at Omaha and played 4 years of varsity football, as well as 4 years of varsity wrestling. He competed in the National Association of Intercollegiate Athletics and won the national championship in his sophomore and senior years. In his first year he took third place in the National Association of Intercollegiate Athletics. In his sophomore year he won the national championship in the NAIA. Outside the national championships during his collegiate years, he was state champion in the State of Nebraska, won the Colorado University tournament, was Great Plains tournament champion, was University of Nebraska at Omaha invitational tournament champion, and won the Iowa University Big Ten tournament championship. He was Rocky Mountain champion two times. We conclude from this

rather extensive recitation of the undisputed facts in the case that the evidence strongly supports the inference, apparently accepted and demonstrated in the jury verdict, that the plaintiff, besides his bodily disability, had suffered a permanent impairment of his earning capacity in a professional or coaching career in the wrestling sport. There is no merit to the contention that the evidence is insufficient to support the verdict.

The defendant nevertheless argues that the evidence is insufficient and that the instructions submitting the issue are in error because there was no evidence of his earnings from the wrestling sport or profession at the time of the injury or at the time of trial. This argument has been rejected by this court ever since Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, in which this court held that a married woman could recover for her diminished earning capacity, and that it was not necessary that she had actually engaged in business on her own account, or intended to do so before her injury. We have recently rejected the defendant's contention in this respect in Wortman v. Northwestern Bell Tel. Co., 195 Neb. 637, 240 N. W. 2d 15. It is settled law in Nebraska that loss of earning capacity, as distinct from loss of wages, salary, or earnings, is a separate element of damage. It is equally well settled that a loss of past earnings is an item of special damage and must be specifically pleaded and proved. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393; Siciunas v. Checker Cab Co., Inc., 191 Neb. 766, 217 N. W. 2d 824. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Baylor v. Tyrrell, *supra*; Wortman v. Northwestern Bell Tel. Co., *supra*. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.

Baylor v. Tyrrell, *supra*; Wortman v. Northwestern Bell Tel. Co., *supra;* Siciunas v. Checker Cab Co., Inc., *supra;* Lake v. Southwick, 188 Neb. 533, 198 N. W. 2d 319. From our quite detailed review of the facts, it is clear that there was ample evidence to sustain the findings of the jury as to the talents, skill, experience, training, and industry in the pursuit of the wrestling sport and preparation for professional occupation and career in this area. The other evidence as to plaintiff's age, life expectancy, health, and habits sustains the presence of all these elements required as to the proof of loss of earning capacity. As we stated in Baylor v. Tyrrell, *supra,* it is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings. We, therefore, hold that loss of earning capacity was properly submitted; that loss of earnings was not necessary to be pleaded or proved; and that the proof was sufficient as to the required factors establishing loss of earning capacity.

The defendant complains that the proof of prospective earnings of a coach or a professional wrestler fell short of adequacy and was insufficient to support the verdict. As we have pointed out such specific evidence is unnecessary for the plaintiff to recover under a general allegation of damage. But, more importantly, in this case the plaintiff offered evidence of the earning capacity of coaches and wrestlers. He specifically offered to prove that the average starting salary of a collegiate wrestling coach was approximately $20,000 per year, and that a good professional wrestler would average $500 to $1,000 per week. The defendant objected to this testimony and it was excluded by the court. The defendant is now in no position to complain of the insufficiency of the evidence. A party who objects to the evidence and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so

excluded. Knudson v. Parker, 70 Neb. 21, 96 N. W. 1010. There is no merit to this contention.

The defendant specifically attacks instruction No. 14 and urges that it is erroneous because it assumes the truth of controverted facts. The instruction is as follows: "You are instructed that where a person, a competitor in a sporting or athletic event, because of his superior ability in that field, has an opportunity of being awarded, with reasonable certainty or probability, a substantial benefit to him which may be of value to him in the future, and that he is deprived of this opportunity by another, through the other's negligence, then the person so deprived thereof, may recover such damages which the evidence shows with reasonable certainty that he has suffered therefrom." It is clear from an examination of this instruction that it is stated in the abstract. Perhaps it would have been better to use the word "if" rather than the word "where." But the meaning is clear and requires the jury to find that the plaintiff is a "person" who has the abilities and requirements as set out in the instruction. Moreover, the evidence is conclusive that the plaintiff had at least superior ability in the wrestling sport, as his record, previously recited, demonstrates. The fact that the expert witnesses differed as to the description of the plaintiff as being number one does not alter the undisputed testimony that he was a person of at least superior ability. There is no merit to this contention.

Interwoven in the defendant's argument in its brief there are other contentions directly relating to the main thrust of its assignments of error, which we have dealt with. We have examined them and find they are without merit.

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

AFFIRMED.

MORAN, District Judge.

I respectfully dissent. There was no evidence of plain-

tiff's earnings from any source at the time of the injury or at the trial. I contend that the plaintiff had the duty to produce this evidence and I do not believe the prior decisions of this court cited in the majority opinion hold otherwise when the facts of the cases are analyzed.

In Conte v. Flota Mercante del Estado, 277 F. 2d 664, at page 669, Judge Friendly articulated much better than I can what loss of earning capacity is and what the trier of fact must do to compute damages resulting from its loss or diminution. See, also, Restatement, Torts 2d, T. D. No. 19, § 924, comment d.

Our adversary system requires an injured party to prove his damages. The plaintiff failed to prove an essential element of loss of earning capacity, and it should not have been submitted to the jury as part of his claim for damages.

STATE OF NEBRASKA, APPELLEE, V. JOE SCHRADER, ALSO KNOWN AS MARLYN D. SCHRADER, APPELLANT.
244 N. W. 2d 498

Filed July 28, 1976. No. 40299.

1. **Criminal Law: Constitutional Law: Standing: Searches and Seizures.** Where an element of the crime charged is possession of the property seized, "ownership in or right to possession of the premises" or the interests of a "lessee" or "licensee" is not necessary to confer standing to challenge the legality under the Fourth Amendment of a search and seizure.
2. **Criminal Law: Constitutional Law: Searches and Seizures.** Open fields outside the curtilage are not within the protection of the Fourth Amendment.
3. **Criminal Law: Trial: Evidence: Searches and Seizures.** When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
4. **Criminal Law: Constitutional Law: Searches and Seizures.** Where a seizure invades no right of privacy of the person

or premises of the accused, his Fourth Amendment rights have not been violated.

5. **Criminal Law: Exclusionary Rule: Searches and Seizures.** The exclusionary rule ought not be applied where its deterrent purpose to discourage illegal police conduct will not be served.

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

Herbert M. Sampson, III, for appellant.

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

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

CLINTON, J.

The defendant was convicted of receiving property stolen from the Sloan Irrigation Company and sentenced to 2 years probation. Upon appeal he contends that the trial court erred in failing to sustain his motion to suppress and that the evidence is not sufficient to sustain the verdict and judgment.

This appeal was first heard on March 4, 1976, by a division of this court sitting under the provisions of Article V, section 2, of the Constitution of Nebraska. Following the adoption of an opinion by the division, the Judges of the Supreme Court, acting under their constitutional power to review "any decision rendered by a division of the court," directed that the matter be reargued before the full court. The cause was reargued on May 3, 1976. We affirm.

The record of the suppression hearing shows that on October 21, 1974, Sheriff Underwood of Box Butte County, Nebraska, received from one Paul Kittelman, a farmer with whom he was well acquainted, a message from a retired farmer, Frank Krejci, age 84, who lived north and west of Alliance in Sheridan County, that Krejci had found some items that were not his property in a shed on his farm and that one of the items

found was a fuel tank. Previously on October 8, 1974, the sheriff had been informed of a theft of a fuel tank from a man by the name of Fasseler. Pursuant to the message from Krejci, the sheriff, on October 21, 1974, went to the Krejci farm. Because it was in the neighboring county outside his jurisdiction, he asked Max Ibach, State Patrol criminal investigator, to accompany him. The sheriff stated that his purpose in going to the Krejci farm was to see if the tank matched the description of the one stolen from Fasseler.

At the farm the two officers met Krejci. Krejci lived in the residence on the farm. He leased the agricultural ground to another farmer and the pasture to the defendant, Joe Schrader. Underwood's testimony was that Krejci told him: ". . . there is a bunch of stuff down there in the shed that I do not know how it got there, and it don't belong to me, and I want you to get it out of here. Remove it."

Krejci's testimony confirmed that of the sheriff. Krejci testified: "I ordered him [the sheriff] out there. . . . Somebody put it in there and I did not want it there."

The sheriff and the criminal investigator, in the company of Krejci, went to the shed in question. Outside the shed was a fuel tank stand. The shed had no door, but someone (later determined to be the defendant) had placed barbed wire across the entryway in such a fashion that a person could not gain entry without removing the barbed wire. The wire, however, did not obstruct the view of one standing at the doorway. Through the opening the officers saw a fuel tank and a number of other items, including various parts of a pivot irrigation system. In compliance with Krejci's request, the officers removed all the items, including the fuel tank and stand and the irrigation system parts found in the shed. The sheriff testified that Krejci "insisted that we get the stuff off of his place. He did not want it there because he did not know who it belonged to and

had no knowledge of how it got there. And he asked us to get it all out of there."

The officers procured no warrant to seize the property and at the time it was removed they did not know or have any reason to believe, except for the fuel tank and stand, that any of the property was stolen. They had received no report of thefts of irrigation parts. The following day, however, Ibach determined that some parts had been stolen earlier from the Sloan Irrigation Company. An official of the company identified the seized parts as belonging to Sloan Irrigation Company and as having been stolen from a site where a center pivot system was being installed.

The lease arrangement between Krejci and Schrader and the relation of the shed to the lease are significant. The shed in which the property was found is one of about eight or nine buildings on the Krejci farm. This particular building was located about 60 or 70 yards southwest of the house in which Krejci resided. There had been a fence between the house and shed at one time, but only remnants of the fence remained on October 21, 1974. Cattle pastured by Schrader could move freely about the buildings including the house. Schrader sometimes kept cattle in a corral located on the premises.

Krejci testified that he "leased the grass" to Joe Schrader for $1.65 per acre. He further testified: ". . . there never was anything said about the buildings. He asked for the lease, yeah. But buildings, I do not remember anything being said about that." He stated that Schrader kept nothing in the buildings that he knew of.

Schrader testified that nothing was said about the buildings when the lease was made. He testified he paid $1.65 per acre for the grassland but nothing for the buildings. "But I got the ground leased around here." He further stated that he sometimes put fencing tools in the shed. He stated that some of the stuff taken by the officers belonged to him, but not the irrigation

parts. The cattle could enter the buildings. He testified he had placed the wire across the entrance so the cows would not go into the shed. He rented the property "for the grass."

The above evidence properly permitted the trial court to conclude: (1) The officers took the Sloan Irrigation property solely to comply with the request of the landowner and not as part of an investigation of crime. (2) The seizure of the property was not directed at the defendant Schrader because he did not, under the arrangement with Krejci, have any right to possession of the building, nor did the officers have any reason to suspect him of crime. (3) The lease between Schrader and Krejci was of the "grass" only and did not include use of the buildings for storage, that Krejci could have prohibited their use, that he had retained the right to use the buildings himself, and that he had legal access to them. (4) Schrader simply presumed permission to use the building in question.

Schrader apparently was not prosecuted for any crime in connection with the alleged theft from Fasseler and the fuel tank and stand were not received in evidence at trial.

We conclude, for reasons which we hereafter elucidate, that Schrader's rights under the Fourth Amendment were not violated in this case; further, that the policy behind the exclusionary rule, to wit, that of a sanction applied against unlawful police conduct, does not apply under the circumstances of this case; and that therefore the exclusionary rule of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, is not applicable.

Even though under the facts Schrader had no property interest in the building from which the property was seized, he nonetheless had standing to challenge the seizure because the crime with which he is charged includes as an element thereof "possession" of the stolen property. In Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the United States Supreme

Court held that where an element of the crime charged is possession of the property seized, " 'ownership in or right to possession of the premises' " or the interests of a " 'lessee' or 'licensee' " is not necessary to confer standing. The court there said: "(1) The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the . . . property seized, which ordinarily is required when standing is challenged." In this case Schrader may at least raise the question of the lawfulness of the seizure. Under the facts in this case, however, he suffered no invasion of his right of privacy.

Although a seizure is usually accompanied by a search, this is not always so. See, United States v. Molkenbur, 430 F. 2d 563; United States v. McDonnell, 315 F. Supp. 152. There was, first of all, no search within the meaning of the Fourth Amendment. Access to the shed was without the curtilage and the application of the Fourth Amendment. Open fields are not within the protection of the Fourth Amendment. State v. Poulson, 194 Neb. 601, 234 N. W. 2d 214; Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898; McDowell v. United States, 383 F. 2d 599. Krejci, having retained the building had a right of access to the shed and through him so also did the officers who were there at his invitation.

When Krejci and the officers reached the shed, the officers could then, without any trespass, see the property within the shed. It was in plain view. They then entered the shed with the consent of the owner thereof. Even if we were to characterize the entry of the building as a search, it was with permission received from a person who had the right to give such consent, namely, the owner of the building who had the right of possession. "When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained

from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210.

The validity of a search, of course, is not sufficient to justify an actual seizure as part of the criminal investigation unless probable cause existed. The facts here, however, show: (1) The seizure was not directed at Schrader. He was not then suspected of any crime. (2) The property was taken as an accommodation to Krejci who had exclusive right to the shed. (3) Schrader, having leased only the "grass," had no reasonable expectation of privacy in the interior of the shed. Where a seizure invades no right of privacy of the person or premises of the accused, his Fourth Amendment rights have not been violated. Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441; Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176.

A seizure may sometimes be justified by circumstances even though probable cause does not exist. United States v. Van Leeuwen, 397 U. S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282. In that case there was a detention for a period of 29 hours of certain packages passing in the United States mail. The packages were detained while an investigation was made. At the end of that time investigation was completed and probable cause found. The detention of the packages while an investigation was accomplished was held not unreasonable under the Fourth Amendment, the court saying: "No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained."

The facts in this case support no inference of an ex-

pectation of privacy by Schrader in the property which was open to plain view and in a shed to which he had no legal claim of possession. Where, as here, the removal was at the request of a person who had the right to make the request and if he chose to remove the property himself, the seizure by the officers was not a Fourth Amendment violation.

We find no case precisely on point and reason by analogy. If a sheriff finds on or adjacent to a highway an apparently abandoned car, certainly, even though there is no statutory authority, he may remove the car while an investigation is made even though it may be that he could then search it no further than for the purpose of obtaining clues as to its ownership. There is in the above example a seizure, but no unreasonable invasion of privacy.

Another hypothetical analogy. Assume a sheriff has in his hands for levy an execution on a money judgment. He executes on personal property in the possession of, and which he believes to belong to, the debtor. Later, while the property is in custodia legis he discovers that it is stolen property and that there is reasonable cause to believe that the judgment debtor is the receiver of the property. Is it reasonably arguable that the evidence must be excluded because there was no warrant and no probable cause at the time the sheriff took possession?

It seems to us that under the facts in this case the policy behind the exclusionary rule is not served by excluding the evidence.

Let us briefly trace the origin and purpose of the exclusionary rule. The policy was first applied by the United States Supreme Court in Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, which involved a prosecution in the federal courts and a search and seizure made by federal officers. The court said that because the evidence was illegally obtained, the defendant had a constitutional right to have the evidence

excluded. Thirty-five years later, however, in Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782, the Supreme Court held that the doctrine of Weeks v. United States, *supra,* was not applicable in state prosecutions to exclude evidence illegally received by state officers. Exclusion was not founded on a constitutional principle, but was a federal sanction against federal officers to deter unreasonable searches. In 1961, in Mapp v. Ohio, *supra,* the Supreme Court overruled Wolf v. Colorado, *supra,* and made the exclusionary rule applicable in state criminal prosecutions, holding that while its purpose was to deter illegal police action, it was nonetheless a violation of the constitutional right of the accused if the state used the evidence. Earlier in Elkins v. United States, 364 U. S. 206, 80 S. Ct. 1437, 80 S. Ct. 1453, 4 L. Ed. 2d 1669, 4 L. Ed. 2d 1688, in overruling the "silver platter" doctrine, the court emphasized that the theory of the rule was to deter police misconduct rather than to protect the rights of an individual. In United States v. Calandra, 414 U. S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561, the court called the exclusionary rule a remedial device, saying: "The purpose of the exclusionary rule is not to redress the injury to the privacy of the searched victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Realizing that the exclusionary rule "has no bearing on guilt" or "fairness of the trial" (Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601), the Supreme Court has "declined to extend the court-made exclusionary rule to cases where the deterrent purpose would not be served." Desist v. United States, 394 U. S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248. We stated recently

in State v. Barajas, 195 Neb. 502, 238 N. W. 2d 913, that the exclusionary rule has no application where its deterrent purpose is not served. That case involved a search and seizure by officers of the Nation of Mexico. We there noted: " '. . . no prophylactic purpose is served by applying an exclusionary rule . . . since what we do will not alter the search policies of the sovereign Nation of Mexico.' "

We find and hold that the deterrent purpose of the exclusionary rule would not be served by applying it under the facts of this case.

As to the defendant's second assignment, we have examined the record and find the evidence is sufficient to support the finding of guilt.

AFFIRMED.

BOSLAUGH, J., dissenting.

The controlling issue in this case, as I view the record, is whether the seizure of the property, admittedly in the defendant's possession, by the Sheriff of Box Butte County and a State Patrol criminal investigator was lawful.

The Constitution of the United States, and the Constitution of this state, protect against both unreasonable searches and unreasonable seizures. It is undisputed that the officers had no warrant and there was no probable cause for the seizure of the property at the farm in Sheridan County on October 21, 1974. The determination in the majority opinion that the seizure was lawful rests upon several factual conclusions that in my opinion are not supported by the record.

The record will not support a finding that the defendant had no right to possession or use of the shed in the Krejci pasture that contained the property seized. It is undisputed that the defendant had rented the land where the shed was located. In the absence of a reservation of the buildings, a lease of the land included the structures on the land. At the hearing on the motion to suppress, Krejci himself testified as follows: "Q And

Joe (Schrader) leases all of that land around this shed where you saw these items? A Yeah. Q And that is part of the pasture? A Yeah. Q And Joe can use the shed if he wants to? A Well, there was nothing said about it. Q But he could use it if he wants to? A Yeah."

On the other hand, the evidence is nearly conclusive that the seizure was directed at the defendant. The sheriff said he went to the Krejci farm to see if the fuel tank reported to be there matched the description of one that had been stolen in Box Butte County about 2 weeks earlier. When the sheriff arrived at the farm he learned from Krejci that the defendant had leased the pasture. The sheriff further testified that he had seen some of the same or similar property as that found in the shed at another farm rented by the defendant while trying to levy an execution against the defendant on October 11, 1974.

The officers had no information that any of the items in the shed, other than the fuel tank, might be stolen property. None of the items seized were contraband or otherwise unlawful. In order for the seizure without a warrant to be lawful the officers had to have knowledge of facts which would create a reasonable belief that the articles seized offended against the law. There had to be a nexus between the items seized and criminal behavior. Warden v. Hayden, 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782.

I agree with Judge McCown that nothing Krejci said or did could excuse or justify the unlawful seizure.

There was no probable cause for the seizure of all items found in the shed. See Kremen v. United States, 353 U. S. 346, 77 S. Ct. 828, 1 L. Ed. 2d 876. In my opinion the motion to suppress should have been sustained as to all items except the fuel tank.

McCOWN, J., dissenting.

I join in the dissent of Boslaugh, J. While the record is somewhat confusing, it establishes without contradic-

tion that the State Patrol investigator was aware that Schrader rented the pasture on which the shed was located. The officer thought that the lease also included the building, and that the defendant Schrader had a valid claim to the shed. The State Patrol officer was the only one with territorial jurisdiction to act.

The majority opinion takes the position that officers may seize property without any probable cause for the seizure of that property simply because someone tells them to do so, and even though the person requesting the seizure claims no interest in the property and no right to dispose of it. The opinion implies that officers may seize property without probable cause simply because they are requested to do so by a stranger, and that the officers have no duty to determine what interest or ownership the stranger may have. The opinion assumes that any person who might have authority to consent to a search of premises also has the right to consent to a seizure without probable cause of any property on the premises, whatever its nature. It also assumes that such a consent cures a complete lack of probable cause, in spite of a lack of ownership or right of control in the person giving the consent.

Everyone involved in the seizure here knew that Krejci claimed no right, title, or ownership in the property seized and had no authority to dispose of it. Everyone involved proceeded on the assumption that the property to be seized had been placed in the shed by the defendant Schrader. Those facts should be enough to invalidate a warrantless seizure without probable cause and without any valid permission or consent for the seizure. On the facts here the majority opinion makes the Fourth Amendment protection against unreasonable seizures disappear without a trace in a maze of judicial interpretation. The inside of a rented shed becomes an "open field," and all expectations of privacy vanish because the only entrance to the shed is protected by barbed wire rather than a door, and the shed was lo-

cated outside "the curtilage." George III would have thoroughly approved such an interpretation, but to many Americans that concept of individual rights is as unacceptable now as it was 200 years ago.

"The Fourth Amendment protects people, not places." Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. The seizure here was unlawful and unreasonable. The evidence seized should have been excluded.

STATE OF NEBRASKA, APPELLEE, V. JAMES MICHAEL FOUTCH, APPELLANT.
244 N. W. 2d 291

Filed July 28, 1976. No. 40500.

1. **Criminal Law: Sentences.** A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant.
2. ———: ———. Section 29-2308, R. R. S. 1943, gives this court the authority to reduce a sentence rendered by the District Court when it appears to be excessive.
3. ———: ———. The punishment for a criminal act should in all circumstances be commensurate with the offense.

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

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

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

SPENCER, J.

Defendant, James Michael Foutch, pled guilty to a charge of assault with intent to inflict great bodily injury on a 4-year-old child. He appeals as excessive and unduly harsh a 3 to 9 year sentence in the Nebraska

Penal and Correctional Complex. We affirm as modified.

The charge stems from an incident in which Foutch kicked a child when the child refused to obey him. The kick either knocked the child into a window fan sitting on the floor, or the child fell against a chair on which the fan was resting, causing it to fall on him, injuring his left leg. The child was unable to stand up and defendant packed his leg in ice. Defendant had been babysitting with the child while his mother was shopping. When the mother returned, she and defendant took the boy to the hospital where X-rays revealed the fractured leg.

Defendant, who had been dating the child's mother for about 1 year before the incident, had developed a rapport with the child. During that period he had taken the child and a sister to various places of amusement. As described by the mother, he had become a surrogate father to the child.

The penalty provided for this offense is imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 year nor more than 20 years. § 28-413, R. S. Supp., 1974. The penalty imposed is well within the range of the statute. The question is whether it is excessive on the facts in this case.

Defendant, who is 26 years of age, was single and had no previous criminal record, either misdemeanor or felony. He was cooperative and readily admitted his guilt. In a moment of anger, he gave vent to an emotional outburst which resulted in the injury.

On the motion for a new trial the mother of the boy testified that the defendant and her son had always gotten along well. She confirmed the fact that the defendant had been a father figure toward the child and had taken him to various places of amusement. The boy's leg had completely healed by that time.

At the oral argument, the State's attorney commented that he felt the sentence in this case was difficult to de-

fend, but since defendant had pled guilty to the charge of assault with intent to do great bodily injury, the sentence could not be said to be an abuse of discretion. On the record, we feel, however, it is excessive under the circumstances.

A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Sturm (1972), 189 Neb. 299, 202 N. W. 2d 381.

Defendant, who was a sober, industrious individual, was self-employed as a supervisor of a maintenance crew at an Omaha condominium. He quit school in the 10th grade to enlist in the army. He served in Vietnam and was honorably discharged in October 1969. He lived at home with his father. The child's mother professes to be in love with him. He visited the child in the hospital and appears to be very concerned about the unfortunate incident.

Section 29-2308, R. R. S. 1943, gives this court the authority to reduce a sentence rendered by the District Court when it appears to be excessive. Under the circumstances of this case, probation cannot be justified because of the seriousness of the offense, which was after all a crime of violence directed toward a child. A reduction in sentence, however, is appropriate given the defendant's lack of any prior record, the absence of any showing that defendant himself represents a threat to the public, and his cooperation. The punishment for a criminal act should in all circumstances be commensurate with the offense. State v. Williams (1974), 191 Neb. 57, 213 N. W. 2d 727.

On the record, the interest of justice would be better served by a sentence of 1 to 3 years in the Nebraska Penal and Correctional Complex. We therefore reduce the sentence imposed to 1 to 3 years, and affirm the judgment as modified.

AFFIRMED AS MODIFIED.

CLINTON, J., dissenting.

I respectfully dissent. The reduction in sentence in this case can be justified only by looking behind the plea of guilty and concluding that the defendant did not actually have the specific intention "to inflict great bodily injury," but was in fact guilty only of simple assault and battery accompanied by unexpected injury. This is what the majority opinion does. I doubt that the rather meager record justifies this conclusion.

The conclusion is founded wholly upon the testimony of the child's mother who was not a witness to the incident and who gave her testimony after sentence was imposed and during a motion for new trial. Her version of how the injury occurred is itself only a conclusion.

No motion for leave to withdraw the plea of guilty was made by the defendant. The defendant himself did not testify that his plea was inadvertent or that he had no actual intention to inflict great bodily injury. To the writer of this dissent, the mother's testimony seems self-serving and designed to keep her friend out of the penitentiary.

The prosecutor, at the time the plea was entered, informed the court that medical records of the child showed that between August 5, 1972, and July 27, 1975, the child was treated for "bruises on his arms and legs, lacerations and bruises over eyes and numerous cuts and abrasions, bruises over his back and buttocks and he's got numerous medical reports of injuries—injuries according to the medical record were a result of falling down stairs." The prosecutor had not changed his mind when the motion for new trial was acted upon. He then said, referring to the mother's testimony: ". . . she describes this as a freak accident; that's certainly not what the defendant says it was, and that's not what the medical history of the victim shows."

I do not believe the record before us justifies a finding that the trial judge abused his discretion in the imposition of sentence.

BILL L. HULL, APPELLEE, V. CLINTON R. BAHENSKY, APPELLANT.
244 N. W. 2d 293

Filed July 28, 1976. No. 40614.

1. **Judgments: Res Judicata.** The rules of res judicata are not applicable where the judgment is not a final judgment.
2. **Judgments: Trial.** An order or judgment of a court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination.
3. **Judgments: Equity: Trial.** A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
4. **Judgments: Trial.** The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.

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

Dixon G. Adams, for appellant.

D. L. Pelton, for appellee.

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

MCCOWN, J.

This is an action for rescission of a contract to purchase a laundromat business. The District Court first determined that rescission in equity should be denied but the cause retained for trial as an action at law. Upon later trial as an action at law, the District Court entered judgment against the defendant in the sum of $14,308.90; rescinded the contract; and ordered an accounting for the period of operation by the purchaser. The seller has appealed.

In the fall of 1972, the defendant, Clinton R. Bahensky, listed his laundromat business in Bellevue, Nebraska, with a realty company for sale for $60,000. The plaintiff, Bill L. Hull, made an offer of $40,000 which

was refused. Bahensky reopened the negotiations in the spring of 1973, and on May 19, 1973, Bahensky and Hull executed a written agreement in which Bahensky agreed to sell and Hull agreed to buy the laundromat business. The total purchase price was $45,000. The sum of $13,500 was payable on or before the closing date of June 15, 1973. An additional sum of $11,500 was payable on or before February 15, 1974, and the balance of $20,000 was payable in successive equal monthly installments of $185.41 each, commencing March 15, 1974, with unpaid balances to draw interest at the rate of 7½ percent.

The agreement provided that all equipment used in connection with the operation of the business should be in reasonably good working condition and the critical paragraph in the contract provided: "Seller has made representations during the calendar year of 1972 that the business operation grossed $26,000.00; that the business operation had a taxable income derived therefrom was (sic) $16,000.00 and that the business has been growing. Accordingly, buyer shall be given an opportunity to examine the books or to have the same examined by his bookkeeper for the years 1970, 1971, 1972 for the purpose of verifying the correctness of the aforementioned representations. In the event said representations are incorrect, buyer may, at his discretion, rescind this agreement."

On June 8, 1973, Hull paid the $13,500 due on the date of closing, plus approximately $800 for supplies on hand and took possession of the business. No further payments were ever made.

Hull's evidence is that almost immediately after taking possession, he discovered that many pieces of equipment did not work properly and needed repairs, and that he also soon discovered that the laundromat business did not earn the amounts which had been represented to him. By letter of September 6, 1973, Hull notified Bahensky that he was rescinding the contract and that

Bahensky should pick up his keys. Bahensky's evidence contradicted the evidence of Hull as to the condition of the machines and equipment. Bahensky also testified that Hull had been given a chance to inspect the equipment before he purchased the business. There was a conflict in the testimony as to whether Bahensky's tax returns and records had been inspected by Hull, and there was some dispute as to what specific representations as to income had been made aside from those set out in the agreement. There was no dispute that the tax returns reflected the correct income or profit from the business. Those returns showed gross receipts of $25,761 and a net profit of $4,060 for 1970; $23,510 gross receipts and $5,924 net profit for 1971; and gross receipts of $25,215 and net profit of $8,774 for 1972.

Following a hearing on April 1, 1975, the District Court entered its order and found: "That the plaintiff has failed to prove the requisite requirements for recission (sic) of the agreement and that recission (sic) under equity should be denied, that a court of equity which has denied equitable relief is without authority to determine the issue of personal liability and that the matter should be retained by the Court to be tried as an action at law." The District Court then ordered "that said matter be held over by the Court to be tried as a law action at the next docket call or as soon thereafter as the same may be tried."

In October 1975, the matter was tried as an action at law and on December 15, 1975, the court entered its judgment finding that false representations as to gross and taxable income were made by Bahensky; that the representations were substantial and material; that the demand for rescission was timely made; and that Hull was entitled to rescission as a matter of law. The court then entered judgment against the defendant Bahensky in the sum of $14,308.90, with interest and costs; rescinded the agreement; and ordered an accounting and

settlement for the period of operation of the business by Hull. Bahensky has appealed.

Bahensky contends that the District Court's order of April 1, 1975, denying rescission in equity was res judicata as to any right to rescission, and that the court was therefore without authority to enter its later judgment in the law action. We disagree.

Whatever the understanding of the District Court may have been as to the distinctions between law and equity, there can be no doubt but that the court's order retained the entire matter to be tried as a law action at a later time. That order was not a final order or judgment. Restatement, Judgments, § 41, p. 161, provides: "The rules of res judicata are not applicable where the judgment is not a final judgment." Comment a to that section states: "For the purposes of the rules stated in this Subject a judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated; and a decree in equity is not a final judgment if further action by the court is required beyond the supervision of the carrying out of the decree."

The same comment also states: "An order or judgment of a court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination."

Restatement, Judgments 2d, T.D. No. 1, § 41, p. 2, now states the rule of old section 41 even more forcefully. The first sentence of the revised section is: "The rules of res judicata are applicable only when a final judgment is rendered." Comment a of T.D. No. 1 states the rationale for the requirement of finality. "The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there, whether by way of bar, merger, or issue preclusion. This Section makes the general common-sense point that such conclusive carry-over effect should not be accorded a judgment which is con-

sidered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court—a 'final' judgment."

In Agnew v. Omaha National Bank, 69 Neb. 654, 96 N. W. 189, we said: "It has * * * been the uniform holding of this court, that an adjudication, to be binding as res judicata, must dispose of the whole merits of the case on trial, and leave nothing for the further determination of the trial court." A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp., 192 Neb. 588, 22 3N. W. 2d 425. Gillespie v. Hynes, 168 Neb. 49, 95 N. W. 2d 457, and kindred cases, are overruled.

Restatement, Judgments, § 67, p. 286, provides: "Where in an action the court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

Whether the order of April 1, 1975, was or was not erroneous, it was not a final order or judgment and was not res judicata.

The defendant also contends that the evidence was insufficient to grant rescission on the ground of misrepresentation because the evidence failed to establish that the plaintiff relied upon any representation contained in the contract.

This action was tried as an action at law and a jury was waived. The contract specifically provided for rescission in the event specified representations were incorrect. The trial court found that the specified representations had been made and that they were sub-

stantial and material. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Johnson v. Roueche, 188 Neb. 716, 199 N. W. 2d 1.

The evidence here was more than sufficient to sustain the judgment of the District Court.

AFFIRMED.

RICHARD HAYES ET AL., APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 194 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH DAIN, KALMAN & QUAIL, INC., A CORPORATION, ET AL., APPELLANTS, RAYMOND F. BACKMAN, INTERVENER-APPELLEE.

244 N. W. 2d 505

Filed August 4, 1976. No. 40481.

1. **Bonds: Judgments: Political Subdivisions.** In a special proceeding to determine the legality and validity of a bond issue of a sanitary and improvement district, a decree approving and confirming the proceedings for the issuance of the bonds validates the bonds and forecloses any question as to the right to issue the bonds and of compliance with any conditions precedent required by law. It is conclusive so as to protect the bonds in the hands of anyone insofar as the validity of any proceedings relating to the issuance of the bonds is concerned.
2. **Bonds: Judgments: Contracts: Political Subdivisions.** The decree confirming the legality and validity of a bond issue does not determine the validity or invalidity of all contracts made by the sanitary and improvement district in connection with the project which the bond issue was designed to finance.
3. **Municipalities: Estoppel.** Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation as to the exercise of governmental functions, but the doctrine will be held to apply where right and justice demand it.
4. **Corporations.** A corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears. The corporate fiction may be disregarded when its retention would produce injustice and inequitable consequences.

5. ———. The separate corporate existence of parent and subsidiary or affiliated corporations will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation.
6. **Bonds: Agents: Fees: Municipalities.** The power to sell bonds includes the power to employ a broker or agent to effect the sale for a customary commission or fee.
7. ———: ———: ———: ———. Where a fiscal agent for the sale of bonds of a sanitary and improvement district purchases the bonds privately from the district at par, payment of a fee for fiscal services to such purchaser constitutes a sale of the bonds at less than par in violation of section 31-755, R. R. S. 1943.
8. **Bonds: Agents: Fees: Municipalities: Contracts.** Ordinarily contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statute to the contrary.
9. ———: ———: ———: ———: ———. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district.

Appeal from he District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed as modified.

Warren S. Zweiback and Ray G. Breeling of Zweiback & Laughlin, for appellants.

August Ross, Daniel Dolan, and Kent Whinnery, for appellees Hayes et al.

John A. Rickerson of Rickerson & Welch, and John W. Delehant of Delehant, Croker & Huck, for amici curiae.

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

MCCOWN, J.

This is a suit to recover money alleged to have been

wrongfully paid an underwriter of warrants and bonds of a sanitary and improvement district. The District Court entered judgment against the defendants Dain, Kalman & Quail, Inc., and Dain, Kalman & Quail Municipal-Nebraska, Inc., in the sum of $114,389.61, and this appeal followed.

On December 29, 1967, Sanitary and Improvement District No. 194 of Douglas County, Nebraska, was duly organized and declared to be a public corporation of this state. Sanitary and Improvement District No. 194 will be referred to hereafter as the district.

Major construction by the district included a golf course, streets, sewers, and related projects. From time to time bids were taken and contracts let for various portions of the work. As the work progressed the district paid its obligations by issuing warrants to those who performed labor or services or provided supplies. It is customary for such districts, prior to seeking bids for the construction of improvements, to contract with a financial institution to serve as fiscal agents and financial consultants.

In 1968, the district entered into such an agreement with the firm of J. Cliff Rahel and Company. That agreement provided that Rahel and Company, as agents of the district, would purchase or place at par construction fund warrants issued to contractors in connection with the installation of public improvements in the district. The warrants were to bear interest at the rate of 6 percent per annum. Rahel and Company also agreed to "purchase for our own account or sell the general obligation bonds of the District at par and accrued interest." The district agreed to pay Rahel and Company a fee equal to 5 percent of all warrants issued, and a fee of 1½ percent of all bonds issued.

During 1968 and into 1969, Rahel and Company performed services under the agreement with respect to warrants. During that time interest rates in general were climbing and the district's 6 percent warrants be-

came more and more difficult to sell. On March 4, 1969, Rahel and Company advised the district that it would no longer purchase warrants from contractors for its own account but would continue to try to place warrants elsewhere. As of June 30, 1969, J. Cliff Rahel and Company sold its assets to Dain, Kalman & Quail, Inc., of Minneapolis, Minnesota, which will be referred to hereafter as Dain-Minnesota. Rahel and Company advised the district that the contract would be assumed by Dain-Minnesota; rescinded the Rahel and Company contract with the district; and went out of business. Rahel and Company has been dismissed in this action and the amounts paid to it are not involved here.

Dain, Kalman & Quail Municipal-Nebraska, Inc., a wholly owned subsidiary of Dain-Minnesota, was formed May 26, 1969. It will hereafter be referred to as Dain-Nebraska. William J. Gourley, president of Dain-Nebraska, who had formerly been vice president of J. Cliff Rahel and Company, submitted a proposal to the district on behalf of Dain-Nebraska which was basically similar to the former agreement between the district and Rahel and Company. The proposal was dated June 9, 1969, and by its terms became effective on July 1, 1969. It was approved and accepted by the district on July 22, 1969. The agreement provided that Dain-Nebraska "will purchase or place at par as agents of your District, within 30 days after presentation to us, construction fund warrants issued in connection with the installation of public improvements in the above District. Said warrants shall bear interest at the rate of 8% per annum * * *.

"We will purchase for our own account or sell the general obligation bonds of the District at par and accrued interest."

The agreement also provided: "For services rendered and to be rendered and to defray our expenses and any discount incurred in connection with the issuance and sale or placement of warrants, the District agrees to

pay Dain, Kalman & Quail Municipal-Nebraska, Inc. a fee equal to 5% of all warrants issued after date hereof, said fee to be paid at the time of issuance of said warrants. For services to be rendered and to defray our expenses in connection with the issuance and sale of bonds, the District agrees to pay Dain, Kalman & Quail Municipal-Nebraska, Inc. a fee equal to 1½% of the amount of all bonds issued, to be paid at the time said bonds are delivered to us."

Dain-Nebraska thereafter purchased from the contractors warrants issued to the contractors and was paid $53,957.76 in warrants of the district for its fee in handling these warrants. Dain-Nebraska in turn resold the warrants to its customers. In almost all cases the sales were at par and accrued interest. The evidence does not show any profit on the resale, other than accrued interest, but Dain-Nebraska paid commissions of $25,720.06 to salesmen for the sale of the warrants.

In 1971, the district began preparing for the issuance of bonds and William J. Gourley, representing Dain-Nebraska, began conferring with representatives of the district and of the City of Omaha. On March 30, 1971, the Omaha city council had passed an ordinance annexing a major part of the district to the City of Omaha. The annexation was to take place as of July 1, 1971, and the City of Omaha agreed to assume all the district's liabilities, including the bonds to be issued by the district. In May 1971, it was agreed that the district would issue bonds in the amount of 3.7 million dollars to be dated July 1, 1971. The maturity dates ranged from July 1, 1972, to July 1, 1991, and the basic interest rates ranged from 5 to 5.6 percent. Supplemental interest coupons were also provided for, which could be detached and sold separately. The principal amount of the bonds included the $55,500 bond fee to Dain-Nebraska, which was 1½ percent of the amount of all bonds to be issued. It was also agreed that the bonds were to be sold to Dain-Minnesota at par and accrued interest. On June

15, 1971, the board of trustees of the district, by resolution, confirmed issuance of the bonds and the sale to Dain-Minnesota.

The City of Omaha approved the proposed bond issue and on June 25, 1971, the board of trustees of the district filed its petition for approval of proceedings for issuance and sale of the bonds in the District Court for Douglas County, Nebraska. On July 12, 1971, the District Court entered its decree that all proceedings required by law for the issuance of bonds in the principal amount of 3.7 million dollars by the district were legal, valid, approved, and confirmed.

Dain-Nebraska was paid the $55,500 fee as fiscal agent in connection with the sale of the bonds. Dain-Minnesota purchased the bonds and made payment, including accrued interest, on July 12, 1971, in the amount of $3,708,358.31. Dain-Minnesota sold the supplemental interest coupons from the bonds and also resold the bonds. It received $89,687.19 from the sale of the supplemental coupons and profit from the sale of the bonds themselves in the sum of $73,913.61, a total of $163,600.80.

On September 1, 1971, plaintiff Richard Hayes filed a motion to vacate and set aside the decree of July 12, 1971, validating the issuance of the bonds. The motion to vacate was overruled. Hayes then brought a separate action challenging the bond issue. After extensive pleadings, amendments, and shuffling of parties, the action reached its present form. Richard Hayes and the City of Omaha, as plaintiffs, sought an accounting to determine sums due the City of Omaha from the defendants, Dain-Minnesota and Dain-Nebraska, and J. Cliff Rahel and Company. The claims were based upon allegations that all commissions paid to the defendants under the district's agreements with them were void. The plaintiffs moved for summary judgment. The court granted partial summary judgment finding that numerous facts were established. Among those findings material here the court found that Dain-Nebraska is wholly

owned by Dain-Minnesota. There is a substantial, if not total, interlocking of officers and directors between Dain-Minnesota and Dain-Nebraska. The bonds were all purchased by Dain-Minnesota. Dain-Nebraska is a corporate shell through which Dain-Minnesota, in fact, conducted the business so that Dain-Minnesota's liability is to be measured by that of Dain-Nebraska. The commission fee of 5 percent paid to Dain-Nebraska on warrants was mutually intended to, and did, compensate Dain-Minnesota and Dain-Nebraska not only for the costs of doing business and earned profits, but also for their lending of their credit to the district.

The trial court also determined generally that without the involvement of financial institutions such as Dain-Minnesota and Dain-Nebraska, improvement district construction warrants are not worth their par value, either to the contractor entitled thereto or to prospective investors. While the district has power to tax, nevertheless, in the original development stage prospective investors will not pay par without the involvement and contribution of its credit by an outside securities firm.

Trial was held on the remaining issues in April and May of 1975. Judgment was entered October 10, 1975. Rahel and Company was dismissed on the ground that the action was barred by the statute of limitations. The court found for the plaintiffs and entered judgment in favor of the City of Omaha and against Dain-Minnesota and Dain-Nebraska in the sum of $114,389.61, with interest from July 15, 1971. This represents the combined fees for handling of both warrants and bonds. These two defendants have appealed.

The appellants and some of the amici curiae contend that the District Court proceeding which resulted in the approval of the bond issue was a final determination which precludes any collateral attack on the contract between the district and its fiscal agent. That contention rests in part upon the argument that if the fees

were illegal, then the bonds were invalid, and that issue is no longer open to challenge.

Sections 31-756 to 31-759, R. R. S. 1943, provide for the special proceedings for bond approval involved here. Those sections provide for notice and hearing and permit any person interested in the district or in the issuance or sale of the bonds to move to dismiss the petition or to answer. The statutes, in substance, provide a special proceeding in which the District Court has the power and jurisdiction to examine and determine the legality and validity of all the proceedings for the organization of the district and "all other proceedings which may affect the legality or validity of the bonds and the order of the sale and the sale thereof." The court may approve and confirm the proceedings in whole or in part or declare them illegal or invalid. In the case before us, the District Court specifically found: "The District has taken all steps and proceedings required by law for the issuance of said bonds and all of said proceedings were regularly had and are valid and should be approved and confirmed by this Court." The decree declared that all proceedings required by law for the issuance of the bonds "have been had and all required proceedings are legal and valid and are hereby approved and confirmed."

The decree also provided that after filing a transcript of the proceedings with the Auditor of Public Accounts of the State of Nebraska, and registering the bonds with the auditor and county clerk of Douglas County, the district "may issue its said bonds in the principal amount of $3,700,000, payable and bearing interest as set forth in the Resolution of the Board of Trustees adopted June 15, 1971."

The only contract between the district and either of the appellants that was referred to in the bond approval proceedings was the sale of the bonds to Dain-Minnesota at par and accrued interest. A decree in a special proceeding to determine the legality and validity of a bond

issue of a sanitary and improvement district validates the bonds and forecloses any question as to the right to issue the bonds and of compliance with any conditions precedent. See 15 McQuillin (3d Ed.), Municipal Corporations, § 43.148, p. 750.

The crux of the appellants' argument is that the decree approving the validity of the bond issue at the same time affirmed the legality and validity of any contracts with a fiscal agent or agents as to fees in connection with the issuance of any warrants which were to be paid from proceeds of the bond sale, as well as contracts for fees in connection with the sale of the bonds. The appellants' conclusion is that if the fee agreements are invalid, then the bond issue is invalid, and since the bond issue cannot be attacked because of the approval proceedings, therefore the contract for fiscal agents' fees also cannot be attacked. The conclusion does not follow.

Under the provisions of section 31-756, R. R. S. 1943, et seq., a judgment approving and confirming the legality and validity of the bond issue here is conclusive so as to protect the bonds in the hands of anyone insofar as the validity of any proceedings relating to the issuance of the bonds is concerned. See 15 McQuillin (3d Ed.), Municipal Corporations, § 43.148, p. 750. The statutes refer only to bonds, or "proceedings" which may affect the legality or validity of the bonds. The court decree confirming the legality and validity of the bond issue does not determine the validity or invalidity of every contract made by the district in connection with the project which the bond issue was designed to finance. Neither does it adjudicate collateral matters nor the validity or invalidity of fiscal agents' fees for services simply because they are to be paid from proceeds of the bond issue. See, 15 McQuillin (3d Ed.), Municipal Corporations, § 43.147, p. 747; Penn v. Pensacola-Escambia Governmental Center Authority, 311 So. 2d 97 (Fla., 1975).

The appellants also contend that the City of Omaha

is estopped from proceeding against the appellants because of its own acquiescence and actions, and because of the fact that it stands in the same position as the district because of the annexation and its assumption of liability.

The foundation of appellants' claim rests on the doctrine of equitable estoppel. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation as to the exercise of governmental functions but the doctrine will be held to apply where right and justice demand it. Talbott v. City of Lyons, 171 Neb. 186, 105 N. W. 2d 918; May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448. Where issues of public policy are involved and where statutory requirements have been circumvented, those factors tend to outweigh possible inequitable consequences. The doctrine of equitable estoppel is not applicable here.

The appellants contend that the District Court erred in disregarding the separate corporate entities of the two appellants. Dain-Nebraska was organized May 26, 1969, and commenced business July 1, 1969. Dain-Nebraska was a wholly owned subsidiary of Dain-Minnesota. Dain-Nebraska had a total capital of $50,000, and a $500,000 line of credit with a bank. There is evidence that the main source of credit for a period of about 2 years was through the parent company. The principal business of Dain-Nebraska was to serve as a financial consultant and fiscal agent to municipalities. Dain-Nebraska technically conducted any sanitary and improvement district business of either of the two corporations in Nebraska up to and including the issuance of the bonds involved in this case. The employees of Dain-Nebraska were paid out of a payroll account of Dain-Minnesota, and Dain-Nebraska then reimbursed the parent company. The same practice was followed whenever Dain-Minnesota paid one of its salesmen for selling a security for Dain-Nebraska. Dain-Nebraska would then reimburse the parent company. There was almost

a total interlocking of officers and directors between Dain-Minnesota and Dain-Nebraska. The two corporations maintained separate books and filed separate income tax returns. For several years Dain-Nebraska was technically inactive for failure to pay occupation taxes which were insignificant in amount.

The agreement of the district for fiscal agent's services was with Dain-Nebraska. Dain-Nebraska purchased all the warrants and Dain-Minnesota purchased the entire bond issue. There is no evidence to show how Dain-Nebraska arranged for the sale of the entire bond issue to Dain-Minnesota. Neither is there any evidence as to whether any other prospective purchasers were contacted, nor is there any indication of how Dain-Minnesota entered any negotiations for the sale of the bond issue, if at all. The District Court specifically found that Dain-Nebraska was a corporate shell through which Dain-Minnesota had, in fact, conducted the business so that Dain-Minnesota's liability was to be measured by that of Dain-Nebraska.

While the general rule is that a corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears, there is sufficient evidence in the record here to pierce the corporate shell and dissipate the separate legal identities. In such cases the law has no compunction in holding a corporation liable for the acts of its owner or vice versa. In Massachusetts Bonding & Ins. Co. v. Master Laboratories, Inc., 143 Neb. 617, 10 N. W. 2d 501, we said: "The supreme court of the United States has laid down the rule which has the sanction of the authorities generally, that, where the difference between corporations is reduced to mere matter of bookkeeping, such corporations cease to have separate legal entities and will, in the interest of justice, be treated as one." The corporate fiction may be disregarded when its retention would produce injustices and inequitable consequences. Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287.

"(A)ccording to a number of cases, the notion of separate corporate existence of parent and subsidiary or affiliated corporations will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation. The fiction of separate corporate identity of two corporations will not be extended to permit one of the corporations to evade its just obligations or to promote fraud or illegality or injustice." 18 Am. Jur. 2d, Corporations, § 17, p. 565. The evidence in the case before us is amply sufficient to support the determination of the District Court disregarding the separate corporate entities of the appellants here.

The appellants also contend that the payment by the district of a fiscal agent's fee to Dain-Nebraska for selling the general obligation bonds of the district does not constitutute a violation of the statutory restriction against the sale of such bonds at less than par value.

Section 31-755, R. R. S. 1943, dealing with the issuance and sale of such bonds provides in part: "Such bonds may either be sold by the district or delivered to the contractor in payment for the work, but in either case for not less than their par value." Dain-Nebraska's fiscal agency agreement with the district provided: "We will purchase for our own account or sell the general obligation bonds of the District at par and accrued interest." The fee was 1½ percent of the amount of all bonds issued, to be paid at the time the bonds were delivered. The fee of $55,500 was paid to Dain-Nebraska from the proceeds of the sale of the bonds to Dain-Minnesota. There is little dispute on this record that the amount of the fee constituted a reasonable amount for services rendered. The critical issue here is whether the fiscal agent to whom the fee was paid occupied the position of a bona fide agent or was, instead, a purchaser. It is generally held that the power to sell bonds includes the power to employ a broker

or agent to effect the sale for a customary commission or fee. 15 McQuillin (3d Ed.), Municipal Corporations, § 43.64, p. 594.

Many states have statutes which, in varying language, forbid the sale of bonds at less than par. Section 31-755, R. R. S. 1943, is not unique. Generally, where the bonds are not sold to the person to whom the commission or fee is paid, the payment of such fees to one who performs fiscal services is not regarded as a sale of the bonds below par. The critical problem arises when the fiscal agent is the purchaser of the bonds. See, Annotation, Sale of municipal or other public bonds at less than par or face value, 91 A. L. R. 7. See, also, 64 Am. Jur. 2d, Public Securities and Obligations, § 244, p. 283.

15 McQuillin (3d Ed.), Municipal Corporations, § 43.67, p. 602, states: "(S)ome statutes or charters expressly or impliedly forbid the sale of municipal bonds at less than par. * * * However, such a statute does not prevent paying a broker a commission for his services in selling bonds at par, although the *purchaser* cannot be allowed a direct commission where the bonds are sold at par." (Emphasis ours.) While courts have been liberal in permitting municipal corporations to pay reasonable fees to bona fide fiscal agents, they have almost invariably treated an allowance of commissions and fees to a purchaser as a violation of the statutory prohibition against a sale at less than par. See Annotation, 91 A. L. R. 7, *supra*.

Under statutes requiring bonds to be sold at not less than par, fees and commissions paid to a purchaser have generally been held to constitute, in substance and effect, a discount in violation of law. See 15 McQuillin (3d Ed.), Municipal Corporations, § 43.67, p. 602.

In Deming v. Board of Supervisors, 237 Iowa 11, 21 N. W. 2d 19, 162 A. L. R. 391, the Iowa Supreme Court, in dealing with a similar factual situation said: "Nevertheless, the statement to the effect that a sale of bonds with a 'deduction' for a fiscal agent's fee is not a sale

at par is sound law. And the same is true of a sale of bonds with an agreement to pay the buyer such a fiscal agent's fee." See, also, City of Bay City v. Lumbermen's State Bank, 193 Mich. 533, 160 N. W. 425.

The rationale for the rule generally is that a commission paid to a buyer of the bonds is a sale at a discount. A buyer receiving a fee or commission may also keep any profit he may make on a resale while if he is an agent, the municipality is entitled to the benefit of the profit on any sale he may make. See County of Koochiching v. Elder, 145 Minn. 77, 176 N. W. 195.

In this case, Dain-Minnesota received a total profit of $163,600.80 from the sale of the bonds and the supplemental coupons. Dain-Nebraska received a $55,500 fiscal agent's fee on the bonds. The real problem stems from the obvious conflict of interest. Where a fiscal agent, acting on behalf of a municipal corporation in the issuance and sale of bonds also purchases those bonds from the municipal corporation privately, the conflict of interest is apparent. It is contrary to public policy to permit a fiscal agent who purchases bonds privately from his principal to collect, in addition, a fiscal agent's fee for sale of the bonds unless specifically authorized by statute. See, City of Miami v. Benson, 63 So. 2d 916 (Fla., 1953); 15 Business Lawyer, "Municipal Bond Buying by Fiscal Advisers," p. 393 (Jan., 1960). The record here supports that portion of the judgment dealing with the fiscal agent's bond fee.

The appellants finally contend that the fees paid by the district for purchasing and handling the construction warrants did not constitute interest payments and were not illegal. Some additional background facts are appropriate here. The evidence is quite clear that it is reasonably necessary for a sanitary and improvement district to have an agreement with a financial institution before bids on a construction project are called for in order to obtain reasonable competition and bids from prospective contractors. Contractors, in most instances,

need assurance that construction warrants can be promptly converted to cash at par before they prepare and submit bids. Many contractors will not bid without such assurance and those who are still willing to bid increase the amounts of their bids to compensate for the financial problems which may result. It is undisputed that without such financial arrangements, the cost of the improvements to the district and the public would ordinarily be greater.

The trial court in its order on partial summary judgment specifically found that without the involvement of investment firms such as the appellants, improvement district construction warrants are not worth their par value to the contractor entitled to them. The court also found that while sanitary and improvement districts have the power to tax, nevertheless, in the original development stage prospective investors will not pay par for such warrants without the involvement and contribution of its credit by an outside securities firm. Those findings are fully supported by the evidence.

In the case before us the construction fund warrants were purchased by Dain-Nebraska *from the contractors* at par. The evidence shows that almost all the warrants were then resold by Dain-Nebraska to investors at par, plus accrued interest. Warrants issued by the district to Dain-Nebraska for its 5 percent fiscal agency fee for handling warrants amounted to $53,957.76, and those warrants were also sold by Dain-Nebraska. Dain-Nebraska paid commissions of $25,720.06 to salesmen for the sale of warrants and obviously had other expenses in connection with such sales. The evidence does not establish whether any profit was made from the purchase and sale of warrants.

Section 31-755, R. S. Supp., 1969, in effect at the time of the agreement involved here, authorized the issuance of warrants by the board of trustees of the district for work completed on the project and provided: "Such warrants shall draw interest at such rate as fixed by

the board of trustees and endorsed on the warrants, but not to exceed eight per cent per annum, * * *." In 1971, the interest limitation was removed and since that time the statute has provided: "Such warrants shall draw interest at such rate as fixed by the board of trustees and endorsed on the warrants, * * *." § 31-755, R. R. S. 1943.

The District Court found that the 5 percent fee for handling warrants in the sum of $53,957.76 paid to appellants in warrants constituted interest and was illegal. The appellees contend that regardless of whether or not it be called interest, the payment of a fiscal agent's fee in connection with the handling of warrants was, in effect, the issuance of warrants at a discount and therefore illegal. The argument is that the district has no power to discount its warrants, and that the same principles which prevent bond purchasers from receiving fiscal agent's fees also prevent payment of fiscal agent's fees for the handling of warrants. We disagree.

The critical distinction between bonds and warrants here is that the bonds were purchased by the fiscal agent *from the district* while the warrants were purchased by the fiscal agent exclusively *from the contractors* to whom the district had issued the warrants. None of those warrants were discounted in any sense. The only warrants which could possibly be claimed to have been issued at a discount were the warrants issued directly to the fiscal agent in payment of its fee. The appellees' contention is that those warrants constituted an indirect discounting of contractors' warrants rather than a payment for reasonable financial services. The evidence destroys the argument.

The authorities cited by the appellees in support of the discount theory are not only ancient but they involve cases in which warrants were issued to contractors or other creditors in excess of the actual amount of indebtedness due. We find no modern precedent which logically supports the appellees' contention. The com-

paratively simple financial arrangements of the 19th century have long since been supplanted by more complicated and sophisticated financial arrangements created by the demands of a modern economic society. Generally speaking, courts have had no difficulty in finding that contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities or the carrying out of its governmental functions are proper, at least where the fees are reasonable.

Under the fiscal arrangements for warrants involved here, the appellants agreed to place their credit on the line for the benefit of the district and of any warrant holder who chose to take advantage of it. Such arrangements generally result in increased competitive bidding and substantially reduce the overall cost of the project. The benefit accrues to the district and to the taxpaying public. It should be noted here that warrants issued by the district to a contractor may be retained by the contractor or sold to anyone he wishes. Normally they are sold to the fiscal agent. See 5 Creighton Law Rev., p. 269. The agreement of the fiscal agent financial institution simply guarantees to all contractors an immediate cash market for such warrants without any discount, if they wish to take advantage of it.

While this court has not directly passed upon the legality of financial arrangements of the sort involved here, it has noted its disapproval of a refusal to accept them. In Ledwith v. City of Lincoln, 110 Neb. 425, 193 N. W. 763, this court held: "A provision in a notice to contractors that a city reserves the option to make payment in warrants or city bonds is unenforceable, except with the consent of the contractor, and if such provision prevented competition to such an extent that it increased the cost of the work, the city should be enjoined from entering into the contract." The limitation of competitive bidding and the probable increase in

the cost of the work stemming from the possibility of contractors having to discount warrants or bonds for cash furnish the foundation for that holding.

Under section 31-733, R. R. S. 1943, the board of trustees of a sanitary and improvement district has power to carry into effect the objects for which the district was formed. That power necessarily includes the power to make contracts for the furnishing of fiscal and financial services in connection with the issuance or sale of its securities, whether those securities are bonds or warrants. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. There may, of course, be circumstances under which such an agreement is neither necessary nor advisable, or there may be occasions when the amount of the fee may be unreasonable. Neither of those situations is present here.

The judgment of the District Court in the sum of $114,389.61 included fiscal agent's fees for both bonds and warrants. That judgment should be and hereby is modified to limit the judgment to the amount paid for handling bonds. Judgment is therefore directed to be entered in the sum of $55,500 against the defendants Dain-Minnesota and Dain-Nebraska, and each of them, with interest thereon from July 15, 1971, as by law provided. The remaining portion of the original judgment with respect to the handling of warrants is reversed and the cause dismissed. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

VANTAGE ENTERPRISES, INC., APPELLANT, V. STANLEY CALDWELL, APPELLEE.
244 N. W. 2d 678

Filed August 4, 1976. No. 40519.

1. **Res Judicata: Actions.** For the doctrine of res judicata to be applicable, the former suit must be based on the same cause of action as the latter.
2. **Res Judicata: Contracts: Actions.** For purposes of application of res judicata, a petition in quantum meruit is a restatement of the same cause of action as that in a petition on express contract, where both petitions are based on the same services; and as such, an earlier judgment in a case on express contract acts as a bar to a later action in quantum meruit.
3. **Res Judicata: Actions.** Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not.
4. **Res Judicata.** The rule of res judicata is grounded, first on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause.

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

Gordon C. Gobel, for appellant.

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellee.

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

BRODKEY, J.

This case involves two separate consecutive lawsuits brought by the plaintiff, Vantage Enterprises, Inc., against the defendant, Stanley Caldwell, with whom Vantage had a written contract to construct a house. In its first action, Doc. 65, No. 22202, Vantage sued upon

the express written contract, and sought to recover payments allegedly due under the contract. In his answer and cross-petition, Caldwell alleged that Vantage had substantially breached the contract, and was not entitled to payment under the contract. He also cross-petitioned for damages allegedly caused by Vantage's breach of contract. The case was submitted to the jury under the court's instructions to find for Vantage if it found from a preponderance of the evidence that Vantage had substantially performed the contract. The jury returned a verdict for the defendant, Caldwell, but awarded him no damages on his cross-petition. Vantage did not appeal from the judgment.

Shortly thereafter, Vantage filed its second action, Doc. 66, No. 22516, to recover damages from Caldwell based upon the theory of quantum meruit. In his answer and cross-petition in the second action, defendant again alleged as a defense the lack of substantial performance by the plaintiff, and also specifically pleaded the defense of res judicata based upon the entry of the final judgment in the first action. In his cross-petition, Caldwell again claimed damages against the plaintiff as a result of the breach of the contract by the plaintiff. Defendant thereafter filed a motion for summary judgment; and after a hearing on October 28, 1975, the court sustained defendant's motion for summary judgment and dismissed plaintiff's petition and defendant's cross-petition. The record clearly establishes that the parties, the subject matter, and the materials and services involved in the two cases were the same. In answer to interrogatories served upon it prior to the hearing on the motion for a summary judgment, Vantage conceded that both cases would be proved by substantially the same evidence, but contended that the second suit was on the theory of quantum meruit, and not on the theory of express contract. Plaintiff's motion for a new trial was overruled, and Vantage then perfected its appeal to this court. We affirm.

At the outset, we point out that although Vantage conceded that the evidence in the second action based upon the theory of quantum meruit would be substantially the same as that introduced in the jury trial of the first action, we are not informed of what that evidence was. In the hearing on defendant's motion for summary judgment, counsel for defendant, Caldwell, requested the court to take judicial notice of the evidence and testimony in the first trial, and the court stated it would do so. However the record in the case now on appeal to this court does not reflect the evidence given at the former trial, and we must draw our conclusions as to the nature of such evidence by the pleadings in the former case, the court's instructions, and the general verdict returned by the jury. The identity of the parties in the two actions and the existence of the written contract for the construction of the house is admitted; and it is clear from the court's instructions to the jury that the issues tried related principally to the question of whether the plaintiff substantially performed its contract, and also as to the amount of damages sustained by the respective parties. The rule is well-established that the verdict of a jury finding generally in favor of a party to the suit is equivalent to a finding in favor of such party upon all the issues and evidence submitted to them. Dore v. Omaha & C. B. St. Ry. Co., 97 Neb. 250, 149 N. W. 792 (1914); Rosenfield v. Bee Publishing Co., 55 Neb. 388, 75 N .W. 845 (1898); Slater v. Skirving, 51 Neb. 108, 70 N. W. 493 (1897).

The issue for decision in this appeal is whether the verdict and judgment in the first case, based on express contract which resulted in a verdict in favor of the defendant, is res judicata and a bar to plaintiff's subsequent action on the theory of quantum meruit based upon the same facts and evidence.

It is clear that plaintiff was in possession of all the relevant and material facts before the trial in its first action. Under Nebraska law, it could have, and we be-

lieve should have, joined its two theories of recovery in its original petition. Section 25-701, R. R. S. 1943, specifically provides: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in any of the following classes: (1) The same transaction or transactions connected with the same subject of action; (2) contracts, express or implied; * * *." This court has consistently held that an action in quantum meruit may be joined in a petition with an action on an express contract, and a judgment based on either will satisfy the liability as to both claims where they have their origin in the same transaction. Rodgers v. Jorgensen, 159 Neb. 485, 67 N. W. 2d 770 (1954); Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346 (1951); Stout v. Omaha, L. & B. Ry. Co., 97 Neb. 816, 151 N. W. 295 (1915). Vantage did not do so. Although its original petition filed in the first action may possibly be interpreted as being based upon the theory of quantum meruit, it chose to file an amended petition in the first action clearly based upon the theory of a breach of an express contract. We think it is clear that plaintiff was aware of both theories of recovery when it filed its original petition.

The doctrine of res judicata operates on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. This court has stated the doctrine as follows: "'"Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not."'" Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551 (1959). See, also, Hickman v. South-

west Dairy Suppliers, Inc., 194 Neb. 17, 230 N. W. 2d 99 (1975); Knapp v. City of Omaha, 175 Neb. 576, 122 N. W. 2d 513 (1963). We have stated that the rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466 (1965); Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119 (1970).

While we have frequently held that an action on an express contract may be joined with an action for quantum meruit where the facts arise out of the same transaction, we do not appear to have previously ruled whether they are the same cause of action, or separate causes of action, at least so far as the application of the doctrine of res judicata is concerned. We have held that to constitute res judicata the former suit must be founded on the same cause of action as the latter. Neslund v. Kinnan, 129 Neb. 339, 261 N. W. 832 (1935). The term "cause of action" is not easily defined, and the authorities have laid down no thoroughly satisfactory and all-embracing definition. It may mean one thing for one purpose and something different for another, depending, for example, on the questions whether a pleading is good upon demurrer, whether an amendment of a pleading is permissible, and whether the principle of res judicata applies. 1 Am. Jur. 2d, Actions, § 1, p. 540. See, also, definition "cause of action" in Black's Law Dictionary (4th Ed.). For examples of definitions in Nebraska cases, see, City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N. W. 2d 349 (1951); Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252 (1961); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971); Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129 (1960). This court, however, has stated the general test to determine identity of causes of action is whether the same evidence will sustain both the present

and former action, and when it appears that different proof is required, a judgment in one of them is no bar to the other. Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507 (1943); Gayer v. H. W. Parker & Son, 24 Neb. 643, 39 N. W. 845 (1888). These cases, however, did not involve the problem of express contracts and quasi-contracts or quantum meruit actions. It is clear that plaintiff intended to, and did use, the same evidence and testimony in an attempt to substantiate both its causes of action or theories of recovery, even as to damages.

Authorities from other jurisdictions are divided upon the question of whether an action on an express contract constitutes a bar to a subsequent or concurrent action on quantum meruit. See, Annotation, "Judgment in Action on Express Contract for Labor or Services as Precluding, as a Matter of Res Judicata, Subsequent Action on Implied Contract (Quantum Meruit) or Vice Versa," 35 A. L. R. 3d 874, et seq.; 28 C. J. S., Election of Remedies, § 6, p. 1072. Numerically, a preponderance of the cases appear to hold that the doctrine of res judicata does not bar the subsequent suit on quantum meruit. However, the more recent, and we believe better reasoned, cases hold to the contrary.

In Dean v. Exotic Veneers, Inc., 531 P. 2d 266 (Ore., 1975), the Supreme Court of Oregon, faced with the identical problem, overruled two prior decisions and held that for the purposes of the application of the doctrine of res judicata, a complaint based upon quantum meruit was a restatement of the same cause of action as that in a complaint on express contract for the same services. That case was an action at law to recover the amount alleged to be due plaintiff for services as the general manager of a corporation. The defendant Thompson was a court-appointed receiver for liquidation of the corporation. After a hearing on the merits, the court directed the receiver to deny plaintiff's claim. No appeal was taken from this determination. Plaintiff subsequently filed an action for the reasonable value

of his services, contending that even if his first count on a specific contract could not be litigated, he was not precluded from litigating a claim based on the reasonable value of his services. We quote from the opinion: " 'In applying the doctrine of res judicata it is necessary first to determine whether the second cause of action is upon the same cause of action as the first or whether the two actions are upon different causes of action. If the second action is upon the same cause of action the judgment in the first action is conclusive as to all matters which were litigated or which might have been litigated in the first action. If the second action is upon a different cause of action, the judgment in the first action is conclusive only as to the matters essential to the judgment which were actually litigated and determined therein. * * *.'

"Plaintiff contends his claim upon quantum meruit is a different cause of action than his claim on the express contract. This brings into issue the definition of the term 'cause of action' as it relates to the law of res judicata. 'Cause of action' is a 'slippery' term which is used to express different concepts in different contexts.

"The principal purposes of res judicata are prevention of harassment of defendants by successive legal proceedings as well as economy of judicial resources. Its scope is related to the limits upon the various forms of relief which may be requested in one proceeding and the limitations upon amendments to pleadings during trial. As permissible joinder of requests for various forms of relief and amendments during trial become broader and more liberal, the reasons behind res judicata dictate that parties to actions be required to make use of such liberal procedures and not be permitted to protract litigation through a multiplicity of suits or actions which can be disposed of in one proceeding. See Clark on Code Pleading, 472-78 (2d ed 1947); also, Jarvy v. Mowrey, 235 Or. 579, 583, 385 P. 2d 336 (1963). Therefore, with the advent of code pleading and the abandonment of

rigid common law forms, the definition of 'cause of action' has tended to expand. As pointed out in Clark, supra, at 127:

" 'At common law the number and extent of the grievances for which the plaintiff might seek redress in a single suit were arbitrarily limited by forms of action. In equity, principles of trial convenience alone applied. The codes adopted the equity rule in substance, but attempted to give it precision by the concept "cause of action," denoting a single occasion for judicial relief.'

"Having in mind the purposes to be served by the application of the doctrine of res judicata, we agree with Clark in the following:

" 'Various more or less conflicting views of the nature of a single cause of action are expressed by courts and authors. The most convenient one is to consider a cause of action as an aggregate of operative facts giving rise to a right or rights termed "right" or "rights of action" which will be enforced by the courts. The number and extent of operative facts included within a single cause of action are to be determined pragmatically, mainly by considerations of practical trial convenience. There is no absolute or arbitrary test.' Clark on Code Pleading at 127.

"Clark further states at 137:

" 'The codifiers seem to have had in mind the cause of action as consisting of facts which should afford ground or occasion for the court to give judicial relief of some kind, but as not limiting the form or amount of such relief. This is shown by their emphasis upon "the facts" as "constituting the cause of action" and upon their attempt to get away from the legal subdivisions of the previous systems and to keep legal theories of recovery out of the pleadings proper. * * *.' (Footnote omitted.)

"If in the present case we apply Clark's concept of 'cause of action' for res judicata purposes, it becomes apparent that there is but a single occasion for judicial relief, even though there are alternative contentions

concerning the circumstances under which they were rendered and thus alternative grounds or theories for recovery. To the extent that a given state of facts is susceptible to alternative interpretation and analysis, plaintiff must seek and exhaust all alternative grounds or theories for recovery in one action.

"Plaintiff claims to have rendered only one set of services. Nothing prevented him from presenting his claim against the receiver on the alternative theories of express contract and quantum meruit and from having them both adjudicated at the same time. Having once litigated his claim against defendant, he should be foreclosed from further litigation on all grounds or theories of recovery which could have been litigated in the first instance. The public policy to be served by the doctrine of res judicata prevents him from having two bites at the apple. In Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 826 (1952), the following statement is found:

" '* * *[T]here are recent decisions allowing successive suits on theories of express and implied contract, or even alternative theories of express contract. Decisions such as these seem to undermine an important aspect of the reformed procedure.' (Footnotes omitted.)

"For a case which holds that an adverse judgment on an action on an express contract is a bar to a subsequent action on quantum meruit, see Golden v. Mascari, 63 Ohio App. 139, 25 N. E. 2d 462 (1939). For the purposes of the application of the statute of limitations we have held that an amended complaint on quantum meruit is a restatement of the same cause of action as that in the original complaint on an express contract. Richardson v. Investment Co., 124 Or. 569, 571-572, 264 P. 458, 265 P. 1117 (1928). * * *.

"Although the vast majority of the cases in the United States hold * * * that an adverse judgment on an action upon an express contract is not a bar to a subsequent action for a reasonable value of one's services, it is sub-

mitted that, when the rationales behind res judicata are taken into consideration, such holdings are out of step with the freedoms of modern practice and procedure."

We agree with the court in Dean v. Exotic Veneers, Inc., *supra,* and believe that the contrary holding contended for by plaintiff would be out of step with the freedoms of modern practice and procedure.

In another recent case, Purification Systems, Inc. v. Mastan Co., Inc., 40 Mich. App. 308, 198 N. W. 2d 807 (1972), the court held that where a claim asserted by the plaintiff arose out of one transaction or occurrence and recovery could be claimed under express or implied contract, and the plaintiff chose to proceed on express contract only, and the cause proceeded to final adjudication against him, his recovery was barred by the rule of res judicata. See, also, Golden v. Mascari, 63 Ohio App. 139, 25 N. E. 2d 462 (1939), holding that a mere change in the theory of a cause of action is not sufficient to prevent the application of the doctrine of res judicata; La Vasser v. Chesbrough Lumber Co., 190 Mich. 403, 157 N. W. 74 (1916), holding that a judgment in an action in quantum meruit for services rendered under a contract is a bar to another action by plaintiff for damages for breach of contract.

In the instant case, it is clear that plaintiff had knowledge of all the facts, and, apparently, also of the possible remedies. Under our statutes, it could have joined them in one action. It chose not to do so, but elected to take a chance on a favorable verdict, reserving to itself another "bite of the apple" in the event it failed in the first suit. In the interests of the economy of judicial time and talent, and as a matter of public policy, it should not be permitted to do this. We believe the rationale in Dean v. Exotic Veneers, Inc., *supra,* is sound and should be applied to the instant case. See, also, Schopflocher, "What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?" 21 Ore. L. Rev., 319 at 363, 364, where that author advocates the imposition

of a procedural penalty in such situations.

We conclude that the trial court was correct in sustaining defendant's motion for a summary judgment based on the ground of res judicata, and therefore affirm its decision.

AFFIRMED.

HAZEL SCOTT, APPELLEE, V. STATE OF NEBRASKA EX REL. BOARD OF NURSING OF THE STATE OF NEBRASKA, APPELLANT.
244 N. W. 2d 683

Filed August 4, 1976. No. 40546.

1. **Administrative Law: Health: Nurses: Licenses and Permits.** Section 71-1,132.29, R. R. S. 1943, provides that the Board of Nursing of the State of Nebraska "shall have power to deny . . . any license . . . applied for . . . upon proof that the person . . . (6) is guilty of unprofessional conduct."
2. **Legislature: Health: Licenses and Permits.** The licensing and regulation of the health profession and other matters dealing with health is a legislative function which that branch of government ordinarily carries out through administrative agencies created by it.
3. **Legislature: Courts: Statutes: Administrative Law: Constitutional Law.** A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional.
4. **Statutes: Constitutional Law.** In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done.
5. **Statutes: Constitutional Law: Administrative Law.** Section 71-1,132.34, R. R. S. 1943, as so construed does not provide for a de novo review in the District Court in the sense that the court may substitute its own judgment for that of the Board of Nursing.
6. **Appeal and Error: Constitutional Law: Administrative Law.** The appropriate constitutional standard of review is restricted to considering whether the order of the board is supported by substantial evidence justifying the order made, whether it acted

within the scope of it statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

7. **Words and Phrases: Health: Nurses.** "Unprofessional conduct" is conduct which violates those standards of professional behavior which through professional experience have become established, by the concensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest and includes acts of a nature likely to jeopardize the interests of the public.
8. **Trial: Witnesses.** Whether certain acts constitute unprofesional conduct may be established by the testimony of qualified experts.
9. **Appeal and Error: Health: Administrative Law.** Section 71-1,132.34, R. R. S. 1943, provides a specific method of appeal to the District Court from orders of the Board of Nursing of the State of Nebraska.

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

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

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

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

CLINTON, J.

This is an appeal by the Board of Nursing of the State of Nebraska from a judgment of the District Court for Lancaster County reversing the board's denial of a professional nursing license to the appellee, Hazel Scott.

The issues which we find it necessary to decide on this appeal are: (1) What is the appropriate scope and standard of review to be applied by the District Court to appeals from the Board of Nursing? (2) Did the trial court err in finding that the order of the board denying the license was not sustained by the evidence?

We reverse and remand with directions.

Appellee had filed with the board, on an application form provided by it and verified under oath, a request

for a Nebraska professional nursing license. After investigation the board notified the appellee that on January 9, 1975, her application had been denied and informed her that she was entitled to a hearing if she desired. She requested a hearing which was held in April of 1975. She was represented by counsel and both the board and the appellee presented evidence. Following the hearing the board again denied the application and an appeal to District Court followed. That court tried the case de novo under the provisions of section 71-1,132.34, R. R. S. 1943, and directed that a license be issued to the appellee.

A preliminary reference to some of the background facts and pertinent statutory provisions will aid clarity. Appellee held a license as a registered nurse issued by the State of New York. The record shows that she meets the technical qualifications required for a nurse' license in Nebraska as provided by section 71-1,132.13, R. S. Supp., 1974, to wit: ". . . (1) Is of good moral character; (2) has completed four years of high school study or its equivalent as determined by the board; and (3) has completed the basic professional curriculum in an accredited school of professional nursing approved by the board and holds a diploma therefrom." Section 71-1,132.15, R. R. S. 1943, provides that when a person has been duly licensed as a registered nurse under the law of another state, the board may issue a Nebraska license if the applicant meets the requirements of section 71-1,132.13, R. S. Supp., 1974, which we have earlier quoted. Section 71-1,132.29, R. R. S. 1943, provides in part: "The board shall have power to deny . . . any license . . . applied for . . . upon proof that the person . . . (6) is guilty of unprofessional conduct . . .."

Appellee takes the position in this court and apparently did in the proceedings below that so long as she met the requirements of section 71-1,132.13, R. S. Supp., 1974, the board could not, under the provisions of section 71-1,132.15, R. R. S. 1943, deny her a license. Such an

interpretation would, of course, preclude the board from considering appellee's unprofessional conduct under section 71-1,132.29, R. R. S. 1943, before issuing a license. Appellee's position is not supported by the language of section 71-1,132.29, R. R. S. 1943, which specifically provides that the board shall have the "power to deny . . . any license to practice nursing . . . applied for in accordance with the provisions of sections 71-1,132.04 to 71-1,132.36 . . ." if found guilty of unprofessional conduct. Clearly, the Legislature intended that section 71-1,132.29, R. R. S. 1943, should apply to a section 71-1,132.15, R. R. S. 1943, application for a license. The issue of appellee's unprofessional conduct was properly before the board.

When the appellee filed her application the board issued to her a temporary license under the provisions of section 71-1,132.16, R. R. S. 1943. While holding such temporary license she worked at two institutions in the city of Lincoln. Previously she had worked as a nurse for a short time in a federal hospital in Pine Ridge, South Dakota, and also briefly at several institutions in Buffalo, New York.

Following the request of the appellee for a hearing, she was given written notice of the time and place of the hearing and was advised that during the hearing the board would review "reported statements relative to your previous practice of nursing." She was informed that the statements covered her unsafe nursing practices, her unsatisfactory work attendance, and her failure to utilize satisfactory judgment in administering nursing practices.

After the hearing the board entered an order in writing which found: "14. That applicant had not rechecked the temperature of a seven-month-old child who was admitted who reportedly had a temperature of 105° prior to admission, nor did she notify the physician.

"15. That, without notifying a supervisor, applicant deserted patients by leaving an assigned area after com-

ing on duty and accepting responsibility for patients.

"16. That applicant refused to give a revised procedure instituted to improve patient safety.

"17. That applicant refused to follow-through on procedures for admitting a patient.

"18. That applicant refused to attend inservice education programs.

"19. That applicant refused to follow employment policies, such as wearing designated uniform, appearing for duty at the designated time, notifying employer ahead of time if unable to report for duty, and by refusing to accept and follow orders.

"20. That applicant failed to cooperate with patients, and in patient's presence conversed in such an insensitive manner that the patient's anxiety level was increased.

"21. That applicant was unwilling to accept supervision and guidance and to cooperate with other nursing personnel." The board further concluded as a matter of law: "2. That the applicant is guilty of unprofessional conduct as evidenced by unsafe and unsatisfactory nursing practices."

On appeal the District Court reversed the board's denial of the license, finding: "That the evidence may show that plaintiff is an employee who cannot follow orders and cannot get along with her fellow employees, but it fails to show that the conduct of the plaintiff constituted unprofessional conduct as it is generally defined," and cited text authority in part as follows: " 'Thus a statute authorizing revocation for . . . "unprofessional" acts or conduct contemplates conduct which shows that the person guilty of it either is intellectually or morally incompetent to practice the profession or has committed an act or acts of a nature likely to jeopardize the interest of the public; it does not authorize revocation for trivial reasons or for a mere breach of the generally accepted ethics of the profession.' "

An examination of the record indicates that the evi-

dence presented before the board and, with the exceptions hereinafter noted, to the District Court on appeal is clearly sufficient to support factual findings Nos. 14 through 21, of the board's order. The evidence supporting those findings was not contradicted by the appellee in her own testimony, and she offered no other contradicting evidence. The board was presented opinion testimony of several nurses of long experience and appropriate educational qualifications that the acts charged, including those of which the board found the appellee guilty, did constitute unprofessional conduct.

The evidence introduced to the board included affidavits of the personnel officer and a nurse consultant of the South Dakota institution in which the appellee had worked. Both affidavits were founded upon written and oral information and complaints relayed to the affiants by those charged with supervisory responsibility for the nursing activities of the appellee at that institution. These affidavits offer the foundation for findings Nos. 14 and 18 of the board. The affidavits of the nurse consultant further indicated that the appellee's employment was terminated during the probationary period "due to poor work performance, work attitude, and conduct on the job which did not meet the standards of a professional nurse."

In the District Court the board offered the record of the evidence presented to it, viz., the exhibits including the affidavits above described and the testimony of the witnesses. The court sustained objections to these offers. The same witnesses heard by the board, however, did testify in person at the trial in the District Court and substantially reiterated the testimony given before the board. This testimony affords the support for the other specific findings of the board. Information in the excluded affidavits also supports some of those findings.

The statutes of Nebraska which regulate the issuance of professional nurses' licenses do not define unprofes-

sional conduct. The Board of Nursing has adopted general standards as to what is included in the term unprofessional conduct. The exhibit containing these standards bears the notation: "Accepted by the Nebraska State Board of Nursing Reviewed January, 1975." The evidence shows that these standards were not adopted until January 8, 1975, the day previous to the time the appellee's temporary license expired. Also introduced before the trial court for the seeming purpose of establishing criteria of unprofessional conduct were standards of nursing practice of the American Nurses' Association and a booklet containing the American Nurses' Association code with interpretations.

The trial court viewed the matter de novo and apparently concluded that as a matter of law the acts and omissions on which the board founded its denial did not constitute unprofessional conduct and substituted its own judgment for that of the board. The question is, May it properly do so? As we have already noted, section 71-1,132.34, R. R. S. 1943, provides for trial de novo in the District Court. The specific provision of the statute is: "The trial in the district court upon such appeal shall be de novo and shall be upon the issues joined before the board, except as the judge of the district court may allow amendments thereto, which shall be governed by the usual rules of pleading in that court." Section 71-1,132.32, R. R. S. 1943, provides in part: "The board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings, but the determination shall be based *upon sufficient legal evidence to sustain it.*" (Emphasis supplied.)

We first consider the scope of judicial review in this type of proceeding. Our determination in this regard rests on constitutional principles arising from the doctrine of separation of powers. The licensing and regulation of the health profession and other matters dealing with health is a legislative function which that branch of government ordinarily carries out through

administrative agencies created by it. Kansas State Board of Healing Arts v. Foote, 200 Kan. 447, 436 P. 2d 828; Lilly v. Commissioner, 343 U. S. 90, 72 S. Ct. 497, 96 L. Ed. 769, 27 A. L. R. 2d 492; Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869; Grosso v. Commonwealth of Virginia, 180 Va. 70, 21 S. E. 2d 728; Louisiana State Board of Medical Examiners v. Arton (La. App.), 130 S. 2d 666; Munk v. Frink, 81 Neb. 631, 116 N. W. 525.

Article II, section 1, of the Constitution of Nebraska, provides: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Kansas State Board of Healing Arts v. Foote, *supra*; Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731; Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246; Moran v. State Board of Medical Examiners, 32 Cal. 2d 301, 196 P. 2d 20 (dissent by Traynor, J.); Marburg v. Cole, 286 N. Y. 202, 36 N. E. 2d 113; 16 C. J. S., Constitutional Law, §§ 104, 105, pp. 483, 486 et seq.

However, in construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Stahmer v. State, 192 Neb. 63, 218 N. W. 2d 893. We have had occasion to point out that de novo review as used in Nebraska statutes does not always import the same meaning. The 20's, Inc. v. Nebraska Liquor Control Commission, 190 Neb. 761, 212 N. W. 2d 344. In the case before us we note that portion of section 71-1,132.32, R. R. S. 1943, which provides that the board's

determination "shall be based upon sufficient legal evidence to sustain it." This provision must be considered by us in determining what the Legislature intended by de novo review in this instance. It is anomalous that the Legislature would, in section 71-1,132.32, R. R. S. 1943, establish a standard that "the board's determination shall be based upon sufficient legal evidence to sustain it," and then adopt for court review a de novo standard permitting the court to substitute its own judgment for that of the administrative agency. This is particularly true where the board itself must by statute consist of professional nurses, § 71-1,132.08, R. R. S. 1943, who have professional expert knowledge in the area being regulated. We further note in this connection that the statutes provide that the trial in the District Court is required to be upon the issues joined before the board unless amendment is allowed by the District Judge. § 71-1,132.34, R. R. S. 1943. Taking into consideration the above provisions in accordance with our duty to construe the statute to give it a constitutional interpretation if that can be reasonably done, we conclude that the Legislature did not intend to use the term de novo in the sense that the reviewing court could substitute its own judgment for the expert judgment of the board.

The appropriate constitutional standard of review is restricted to considering whether the order of the board is supported by substantial evidence justifying the order made whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Kansas State Board of Healing Arts v. Foote, *supra*; The 20's, Inc. v. Nebraska Liquor Control Commission, *supra*. See, also, Coil v. Department of Health, 189 Neb. 606, 204 N. W. 2d 167; Bartlett v. State Real Estate Commission, 188 Neb. 828, 199 N. W. 2d 709; Munk v. Frink, *supra*.

In connection with the board's acceptance of the affidavits which were excluded in the District Court, we

point out that by legislative act the board is not bound by the laws of evidence, § 71-1,132.32, R. R. S. 1943, unless a party so requests. § 84-914(1), R. R. S. 1943. Appellee made no such request. This rule is continued in the new code of evidence effective January 1, 1976. § 27-1101(4)(c), R. R. S. 1943. The evidence before the board supported its factual findings. Its findings were not unreasonable or arbitrary. It acted within the scope of its statutory authority.

One position of the appellee merits further comment. She takes the position that "With the well-defined standard of 'unprofessional conduct' before the District Court, the appellant was obligated to present evidence showing 'grossly immoral, dishonorable or disreputable acts'. The appellant failing to do so cannot and must not prevail." This position overlooks the fact that even the definition relied upon by the District Court includes " 'act or acts of a nature likely to jeopardize the interest of the public.' " It seems clear enough that the board concluded that the interests of the public were jeopardized for it found as a matter of law the applicant guilty of "unprofessional conduct, *as evidenced by unsafe and unsatisfactory nursing practices.*" (Emphasis supplied.) Those words certainly constitute an implicit finding that the appellee's acts did "jeopardize the interest of the public."

It may be argued that the finding of the board cannot be justified because the acts of which the board found the appellee guilty are no where specifically defined as unprofessional conduct. The Kansas Supreme Court answered a similar contention in Kansas State Board of Healing Arts v. Foote, *supra,* saying: "Considering the entire policy expressed in the act, we believe the legislature, by enumerating certain acts and classifying them as unprofessional conduct, did not thereby intend to exclude all other acts or conduct in the practice of the healing arts which by common understanding render the holder of a license unfit to practice. It would in-

deed be difficult, not to say impractical, in carrying out the purpose of the act, for the legislature to list each and every specific act or course of conduct which might constitute such unprofessional conduct of a disqualifying nature. Nor does any such failure leave the statute subject to attack on grounds of vagueness or indefiniteness. Our statute makes no attempt to delineate what acts are included in the terms immoral or dishonorable conduct, which are also made grounds for revocation. The determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board.

"Other courts have construed the term professional conduct as used in licensure acts. In Reyburn v. Minnesota State Board of Optometry, 247 Minn. 520, 78 N. W. 2d 351, the court stated:

" ' "Unprofessional conduct" is conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest.' "

It thus appears that whether certain acts constitute unprofessional conduct may be established by the testimony of qualified experts. That was done in this case.

One additional matter must be decided. In the District Court the board moved to dismiss the appellee's appeal on the ground that the District Court never acquired jurisdiction because the appellee did not perfect her appeal in the manner specified by section 84-917(2), R. R. S. 1943. We must confront this contention because if the District Court did not acquire jurisdiction then neither did this court. The section just referred to provides in part: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the pro-

ceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons." A petition was filed but no summons was served.

The answer to the board's position is that section 71-1,132.34, R. R. S. 1943, provides a specific method of appeal from decisions of the Board of Nursing. It provides that an appeal may be taken within 30 days. It requires "The filing of a notice in writing of the intention of taking such appeal with the director within ten days after the entry of the order" and that this "shall be sufficient notice to the adverse party of the intention of taking such appeal." It requires that "A transcript of all pleadings upon which the cause was tried before the board, duly certified, shall be filed in the office of the clerk of the district court, and such filing shall complete the appeal." The record establishes that the appellee filed her notice of appeal within the time and in the manner called for by section 71-1,132.34, R. R. S. 1943. The record further shows that a petition for a review and a copy of the proceedings before the board were filed within the 30 days from the date of the order of the board. The board's claim that the District Court did not acquire jurisdiction is without merit. We need not decide in this case whether the appeal procedure provided for in section 71-1,132.34, R. R. S. 1943, is the exclusive method of appeal from orders of the Board of Nursing, or whether section 84-917(2), R. R. S. 1943, affords an alternative method of appeal.

REVERSED AND REMANDED.

LOCAL UNION NO. 647, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, APPELLEE AND CROSS-APPELLANT, V. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

244 N. W. 2d 515

Filed August 4, 1976. No. 40606.

1. **Labor and Labor Relations: Municipalities: Public Officers and Employees: Constitutional Law.** Section 48-816, R. R. S. 1943, in classifying officers of municipal police and fire departments differently in regard to membership in bargaining units from officers of other public departments is not thereby rendered unconstitutional as special legislation.
2. **Labor and Labor Relations: Time:** The provision in section 48-813, R. S. Supp., 1974, that the Court of Industrial Relations should hear each case within 60 days from the date of filing the petition and enter an order thereon within 30 days after the hearing is directory and not mandatory.
3. **Labor and Labor Relations: Master and Servant.** It is unlawful for the employer of a public employee to exert pressure upon him to refrain from joining a recognized bargaining unit.

Appeal from the Court of Industrial Relations. Affirmed.

Earl D. Ahlschwede, for appellant.

James A. Beltzer of Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

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

NEWTON, J.

Local Union No. 647, International Association of Fire Fighters, instituted this action in the Court of Industrial Relations praying that officers of the Grand Island Fire Department, below and including the rank of captain, be found eligible for union membership and a determination made relative to the scale of wages, benefits, and conditions of employment.

The previous contract between the union and the city expired in June 1975, and an attempt was made to

negotiate a new contract. The captains and lieutenants in the fire department expressed an intent to join the union. The city objected on the ground that they were supervisory personnel and hinted that union membership would be considered in regard to future promotions. The officers withdrew their union membership applications. Under such circumstances the issue is not moot as an element of duress is involved. We have previously held that these officers are supervisory personnel and because of a conflict of interest between their public duties and their union obligations they should not be included in a bargaining unit with subordinate employees. See City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860. Since that decision was rendered the Legislature has amended section 48-816, R. R. S. 1943, to permit firemen and policemen who are "subordinate to the chief of the department and his immediate assistant or assistants holding authority subordinate only to the chief" to be included in a bargaining unit with subordinate employees. Grand Island has a deputy chief and fire marshal who are subordinate only to the chief thus leaving captains and lieutenants free under the statute to join with subordinate employees in a bargaining unit. The city challenges this statute on constitutional grounds asserting that it is special legislation and makes an erroneous classification. The statutes of Nebraska do not prohibit other types of public employees acting in supervisory capacities from membership in bargaining units although the reasoning in the former Grand Island case would appear to do so. In a majority of the states which have adopted labor relations acts, they have failed to follow the federal example and bar supervisory employees from membership in bargaining units. We know of no instance in which statutes sanctioning or barring supervisory personnel as regards entry into bargaining units has been ruled unconstitutional.

Our present statute appears to espouse an interme-

diary stance as to firemen and policemen. It recognizes the conflict of interest which can result when supervisory personnel assume labor union obligations. The statute consequently bars the higher echelon of officers in these departments from entering into bargaining units but leaves the lower echelons free to do so. May the Legislature lawfully classify firemen and policemen differently than other public employees? Basically these two groups have duties, obligations, and responsibilities totally different from those of other public employee groups. They are primarily responsible for the protection of life and property. They are on a perpetual emergency basis. Their memberships are closely knit and in working together their lives are often dependent on fellow members. A close kinship between the members and their officers develops. This closeness and a recognition of the elements mentioned promotes efficiency and a willingness to work together. The development of these traits is in the public interest and the Legislature, in its discretion, has refrained from interfering with departmental relationships except where it deemed it to be essential to the interest of the employer that it do so. "It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." Stahmer v. State, 192 Neb. 63, 218 N. W. 2d 893.

"The constitutional prohibition against special legislation does not prevent the Legislature from dividing a subject into classes, and a classification made pursuant to a public purpose which has a rational basis is not invalid." State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577.

"In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitution-

ality." Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236.

Section 48-813, R. S. Supp., 1974, directs the Court of Industrial Relations to hear any petition filed with it within 60 days and enter an order thereon within 30 days after the hearing. In the present case, due to press of business, the court failed to comply with the limits set and the city asserts the court thereby lost jurisdiction. We disagree. The statutory provision is directory not mandatory. We have consistently held that a party will not be penalized because of a failure of a court to perform its proper function. See, Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230; Omaha P. P. Dist. v. Nebraska P. P. Project, *ante* p. 477, 243 N. W. 2d 770.

The city asserts that its action in meeting with the captains and lieutenants and pressuring them not to join the local bargaining unit was permissible. Section 48-837, R. R. S. 1943, grants to public employees the right to join any employee organization they choose. In Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College, 189 Neb. 37, 199 N. W. 2d 747, it is stated: "If the employee can demonstrate that adverse action against him was motivated by a desire to discourage or retaliate for union membership or activity, the action is unlawful."

The sufficiency of the evidence to sustain the order of the Court of Industrial Relations with reference to wages and fringe benefits is challenged by both parties. The evidence sustains the order of the Court of Industrial Relations.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. I agree that supervisory employees have a right to organize and to be members of a union. I disagree, however, that supervisory employees should be permitted to join a union composed of all other employees. To

permit this action is to deny the city the control that can and should be exercised by supervisory employees.

In my opinion, the action of the Court of Industrial Relations permits too great a conflict of interest. What is the position of a captain or a lieutenant who recommends disciplinary action against an employee, in this case a firefighter, when both are members of the same union and the union decides, rightly or wrongly, to support the employee? I don't see under this situation how the interest of the city can be protected. The interest of the public is subordinated to the interest of the union. It seems to me the action is absurd when by the simple expedient of permitting the supervisory employees to organize their own union this conflict could be avoided.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1976

FARMER'S UNION CO-OP COMPANY OF MEAD, NEBRASKA, APPELLEE, V. FLAMME BROTHERS, A NEBRASKA PARTNERSHIP, APPELLANT.

245 N. W. 2d 464

Filed September 22, 1976. No. 40348.

1. **Appeal and Error: Judgments: Trial.** In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous.
2. **Contracts: Tender.** In a contract calling for delivery of goods by a seller at a specified place, tender ordinarily requires physical delivery of the goods at the destination specified in the contract.
3. **Contracts: Cover: Damages.** Where a seller fails to make delivery of goods under a contract to sell, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for the goods due from seller, and in such event the buyer may recover from seller, as damages, the difference between the cost of cover and the contract price.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellant.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

GRANT, District Judge.

This is an action for damages for the breach of three contracts for the sale of corn by appellant, Flamme Brothers, a Nebraska partnership, to appellee, Farmer's Union Co-op Company of Mead, Nebraska (hereinafter referred to as "Mead Elevator"). The parties entered into two written contracts - one on May 2, 1973, calling for the sale and delivery by Flamme Brothers to Mead Elevator of 100,000 bushels of No. 2 corn at a price of $1.34 per bushel; and one on May 22, 1973, calling for sale and delivery of 30,000 bushels of No. 2 corn at a price of $1.50 per bushel. Each of these contracts contained the provision that "Seller shall deliver the above described grain within O-N-D days to Buyer's elevator in Mead, Nebraska," and a provision calling for a "2¢ Moist Disc." As agreed by the parties, "O-N-D" means delivery during October, November, and December.

Additionally on October 15, 1973, the parties entered into an oral contract for the sale and delivery of 10,000 bushels of No. 2 corn at a price of $2.15 per bushel.

Flamme Brothers delivered 25,613.76 bushels of corn pursuant to the May 2 contract; no corn under the May 22 contract; and 2,732 bushels pursuant to the oral contract of October 15. Mead Elevator paid for all corn delivered, and sued for damages in the amount of $148,978.48 for the difference between the contract price and the market price of the undelivered corn.

Both parties waived jury trial. The evidence submitted to the trial court was undisputed as to the existence of the contracts, the deliveries made, and the correctness of the payments made by Mead Elevator for corn actually delivered. The trial court after hearing all the evidence found generally in favor of Mead Elevator and determined its damages to be $106,423.09.

Flamme Brothers appeals from the overruling of its timely filed motion for new trial. We affirm.

Flamme Brothers is a Nebraska partnership consisting of Vernon Flamme, Donald Flamme, and Velma L. Flamme (the mother of Vernon and Donald). All transactions which are the subject matter of this litigation were conducted by Donald or Vernon or both such brothers.

In late April 1973, the brothers had discussions with Mead Elevator concerning the sale of 100,000 bushels of No. 2 corn. On April 23, 1973, a form of contract was signed by Mead Elevator and sent to Flamme Brothers. This contract called for the delivery of 100,000 bushels of No. 2 corn at a price of $1.34 per bushel with a "Market discount" on moisture content of the corn. The "Market discount" is a fluctuating figure stated in terms of cents per bushel. This proposed contract was not signed by Flamme Brothers, but on May 2 a meeting was held and, at the request of Vernon and Donald Flamme, the phrase "market discount" was changed to "two cents moist disc," meaning there would be a deduction of two cents from the agreed price of $1.34 for each single percentage point of moisture in excess of 15½ percent moisture.

Other than this change, the original form of contract was accepted by the brothers, and on May 2, 1973, the parties executed a contract providing, in relevant part, that: "Buyer agrees to purchase from Seller approximately *100,000* bushels of *corn* at the agreed price of *$1.34 #2, 2¢ moist disc.* per bushel under the following terms and conditions to wit: Seller shall deliver the above described grain within *O-N-D* days to Buyer's elevator in Mead, Nebraska." The italicized words were those inserted in a printed form of contract.

At this meeting of May 2, 1973, discussions were had concerning the acceptable moisture content of the corn. Donald and Vernon Flamme testified that Mead Elevator agreed to accept any corn with a moisture con-

tent of 28 percent or less. The Mead Elevator manager testified he refused to deviate from his general rule of not accepting corn with a moisture content of more than 25 percent. Where there is such a conflict in evidence, this court will presume the controverted facts were decided by the trial court in favor of the successful party, and such findings will not be disturbed unless clearly erroneous. Stauffer v. Wilson, 182 Neb. 129, 153 N. W. 2d 454.

Subsequently, about May 22, 1973, Flamme Brothers again called the Mead Elevator and requested another contract for the sale and delivery of 30,000 bushels of No. 2 corn. This contract was executed in identical form with the May 2 contract, except for an agreed price of $1.50 per bushel, and also called for delivery of the corn at the elevator "within O-N-D days."

Flamme Brothers began its harvest in September 1973, and made its first delivery to the Mead Elevator on September 18, 1973, and continued intermittent deliveries until October 29, 1973. During this time a total of 25,613.76 bushels of corn was delivered, all of which were credited by the Mead Elevator to the May 2 (100,000 bushels) contract, leaving a balance due on that contract of 74,386.24 bushels. No corn was delivered pursuant to the May 22, 1973, contract for 30,000 bushels.

On or about October 2, 1973, the parties entered into an oral contract for 10,000 bushels of No. 2 dry corn at a price of $2.20 per bushel. This contract was completely fulfilled by deliveries between October 3 and October 13, and was paid for and is not the subject of this litigation. Again on October 15, 1973, a second oral contract was entered into between the parties calling for the sale and delivery of 10,000 bushels of No. 2 dry corn at a price of $2.15 per bushel. A total of 2,732 bushels of corn was delivered under this contract between October 15 and October 18, 1973, and fully paid for by the elevator at this $2.15 price, but no further

corn was delivered, leaving a balance due of 7,268 bushels of corn on that oral contract.

It should be noted that each price quoted in the various oral and written contracts was modified by an agreement executed by Flamme Brothers on October 2, 1973. This agreement authorized the Mead Elevator to deduct 2¢ per bushel for each bushel bought and to retain this sum for the purpose of financing capital improvements at the elevator. The net result meant a 2¢ lower cash price was received by Flamme Brothers than that set out in the contract.

The primary thrust of the defense to the action on these contracts is that Flamme Brothers contends that the Mead Elevator wrongfully restricted the amount of corn that could be delivered by Flamme Brothers. Appellant adduced evidence showing that the partnership harvested over 300,000 bushels of corn in 1973 and contracted in advance for 210,000 bushels to appellee and other elevators. The remainder of the corn harvested was placed in the partnership home storage. Appellant's position is that the term "O-N-D" in each of the written contracts means that the elevator must take delivery of the corn at any time during the months of October, November, and December that such corn is tendered to the elevator by the farmer. Appellee's position, as supported by its evidence, is that the custom of the trade with regard to the operation of co-operative elevators requires that the elevator take corn as delivered by farmers to the elevator and, if the elevator is full, the farmers must store the grain for delivery as soon as the elevator can take it.

Appellant introduced evidence tending to show that appellant did actually deliver corn to appellee and that appellee restricted deliveries sometimes on the basis of the moisture content of the corn and sometimes on the basis that the elevator was full. Appellee introduced testimony which specifically controverted the appellant's evidence. The court, in finding for appellee, de-

cided this factual issue in favor of appellee and this finding has ample support in the testimony and will not be disturbed on appeal. See Stauffer v. Wilson, *supra*.

It is not contended by appellant that actual attempts to make deliveries of corn were refused by the appellee, but that appellant was somehow restricted in its deliveries and that a sufficient tender of delivery under an O-N-D contract is made "when the seller actually produces sufficient corn to fulfill a contract and has the actual ability accompanied by immediate physical possibility of reaching out and laying hold of the corn to be delivered * * * and seller offers delivery thereof." The court, by its judgment, decided that no tender was made and that no corn was refused by appellee after being tendered. We hold that in a contract calling for the delivery of goods by the seller at a specified place, tender ordinarily requires physical delivery of the goods at the destination specified in the contract. The trial court could properly find that Flamme Brothers did not so tender any corn that was not accepted. Absent a proper tender of delivery, the appellant Flamme Brothers is liable for breach of the contracts, and there is sufficient evidence to support the trial court's entry of judgment against appellant.

With regard to the issue of damages, the evidence indicates that on December 11 or 12, 1973, Donald Flamme, one of the partners, called Robert Wiegand, manager of Mead Elevator. The contents of the conversation are in some dispute, but Donald Flamme did testify that at that time he did not specifically inform Mr. Wiegand that Flamme Brothers was not going to deliver the corn due under the contracts. Later, on December 17, 18, and 19, 1973, Flamme Brothers did bring into the Mead Elevator several loads of corn for one of its landlords. These deliveries were not credited against the contracts in question, and there is no dispute between the parties that such deliveries should have

been credited, but Mr. Wiegand testified he assumed that Flamme Brothers was going to start fulfilling its own contracts. On December 19, 1973, the Mead Elevator sent an agreement to Flamme Brothers extending the final date of delivery of the contracted corn to January 31, 1974. This extension agreement was not executed by Flamme Brothers.

We note the contradiction in the testimony as to the date that Mead Elevator became aware that Flamme Brothers was not going to fulfill its contracts, as well as the other conflicts in the evidence as set out above with regard to the questions of tender and wrongful rejection of corn deliveries, and we adhere to the oft-stated rulings of this court as set out in H. D. Fager Oil Co., Inc. v. Vanice, 192 Neb. 789, 224 N. W. 2d 372, when the court quoted with approval from Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211, to the effect: "The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. * * *

"It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. * * *

"In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it."

Determining the controverted facts in favor of appellee, the trial court found that it was not until the conclusion of business on December 31, 1973, that appellee knew Flamme Brothers was not going to fulfill its contracts. On January 2, 1974, appellee began to purchase corn from its regular customers to cover the contracts of Flamme Brothers. As agreed by the parties in their statements in their briefs, from January 2 to

January 15, 1974, appellee purchased 111,654.24 bushels of corn in quantities as available from 1,741.43 bushels on one day to 26,222.23 on another, at the prices actually posted each day, ranging from $2.31 to $2.45.

Mead Elevator paid a total of $264,493.77 for these purchases. The prices set out in the three contracts on the quantities of corn promised to be delivered by Flamme Brothers, and not delivered, would result in totals of 74,386.24 bushels not delivered on the May 2, 1973, contract at an agreed price of $1.32 (the contract price less 2¢ per bushel patronage refund) or $98,189.84; 30,000 bushels not delivered on the May 22, 1973, contract at a price of $1.48 ($1.50 less 2¢) or $44,400; and 7,268 bushels on the October 15, 1973, oral contract at a price of $2.13 ($2.15 less 2¢) $15,480.80; or a total contract price for corn not delivered of $158,070.68. The prices actually paid to cover the purchases necessary to cover the contracts resulted therefore, as calculated above, in a deficiency of $106,423.09, and judgment was entered by the trial court in that amount.

Section 2-711, U.C.C., provides in part: "(1) Where the seller fails to make delivery * * * then with respect to any goods involved * * * the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (a) 'cover' and have damages under the next section as to all the goods affected * * *."

Section 2-712, U.C.C., provides in part: "(1) After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."

In the case at bar, the appellee did not go into the market and buy corn specifically to cover the contracts, but appellee did continue buying corn from its members, as was its normal practice until the three contracts were fulfilled. The trial court determined, as inherent in

its verdict and judgment for appellee, that appellee did "cover" the contract "without unreasonable delay," and under all the circumstances of this case, we affirm the trial court's judgment. Appellee did between the dates of January 2 and January 15, 1974, purchase over 111,000 bushels of corn and applied such purchases to the unfulfilled contracts. The comment following section 2-712, U.C.C., is particularly applicable to this case. That comments states, in part: "2. The definition of 'cover' under subsection (1) envisages a series of contracts or sales, as well as a single contract or sale; * * * and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective."

The offended party is not bound by hindsight, and the practice used by appellee might have resulted in lower damages if the price over the time period had declined. Instead, the price fluctuated and the net result was that the damages were slightly higher than if the entire volume of corn had been purchased on January 2, 1974, at the $2.32 price. Appellee acted in good faith and made the "cover" purchases without unreasonable delay, within the meaning of the Uniform Commercial Code.

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

AFFIRMED.

IN RE INTEREST OF CHRISTOPHER O'TOOL, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RONALD O'TOOL, NATURAL FATHER, APPELLEE, IMPLEADED WITH DIANE O'TOOL, NATURAL MOTHER, APPELLANT.
246 N. W. 2d 198

Filed October 13, 1976. No. 40403.

Parent and Child: Infants: Courts. The juvenile court may terminate the parental rights of a parent who is unable to discharge parental responsibility because of mental illness or mental deficiency, if there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. § 43-209(5), R. S. Supp., 1976.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Michael C. Washburn of Leahy, Washburn, Render & Cavanaugh, for appellant.

John J. Reefe, Jr., and Donald L. Knowles, for appellee State.

Duane J. Dowd, for appellee O'Tool.

Bruce Pauley, guardian ad litem of Christopher O'Tool.

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

BOSLAUGH, J.

This is an appeal in an action which was commenced in the Separate Juvenile Court of Douglas County, Nebraska, to terminate the parental rights of Dianne O'Tool and Ronald O'Tool to Christopher O'Tool who was born October 22, 1973. The petition alleged the parents were unable to discharge parental responsibilities because of mental illness or mental deficiency. Later the petition was amended to allege only that the mother, Dianne, was unable to discharge parental responsibilities because of mental illness or deficiency.

After a lengthy evidentiary hearing, which was continued from time to time, the juvenile court found that

the child was dependent and neglected and continued the cause for a disposition hearing. There was no appeal from the adjudication on October 1, 1974, that the child was dependent and neglected. See State v. Loomis, 195 Neb. 552, 239 N. W. 2d 266.

On July 14, 1975, the juvenile court terminated the parental rights of Dianne O'Tool and placed the child in the custody of Ronald O'Tool under the supervision of Douglas County social services. Dianne has appealed and contends the evidence was insufficient to support the order terminating her parental rights to the child. That is the sole issue on this appeal.

The appellant has a long history of mental illness. Sometime prior to the birth of Christopher she was hospitalized at the Clarinda Mental State Hospital in Iowa. Her first child was placed in a foster home and later placed for adoption. The record indicates that on one occasion the appellant had thrown the first child across the room. The child was taken from her because the authorities were concerned over the child's health and safety.

While the appellant was pregnant with Christopher the appellant sought psychiatric help because she felt that she might not be able to care for Christopher and was afraid that she might harm him. On October 30, 1973, approximately 1 week after birth, Christopher was hospitalized with conjunctivitis and remained in the hospital for 12 days. On November 25, 1973, he was again hospitalized for conjunctivitis and remained in the hospital until November 30, 1973. On December 8, 1973, he was hospitalized for the third time. His illnesses at that time included an upper respiratory infection, diarrhea, and seborrheic dermatitis. In each instance Christopher was not seriously ill and, ordinarily, would have been treated at home. In this case it was necessary to place Christopher in the hospital because the parents were unable to care for him.

This action was filed on December 14, 1973. On De-

cember 17, 1973, the appellant admitted herself to Immanuel Hospital for psychiatric care. On December 21, 1973, temporary custody of Christopher, who was then 2 months old, was given to the Douglas County welfare department for placement in a foster home. Christopher remained in the custody of the welfare department throughout the litigation and until July 14, 1975, when he was placed in the custody of his father under the supervision of the Douglas County social services.

The appellant and Ronald O'Tool are now divorced. Since about July 1, 1974, she has been living in a halfway house in Lincoln, Nebraska. At the time of the final hearing on June 26, 1975, she had not visited Christopher for a year.

The juvenile court may terminate the parental rights of a parent who is unable to discharge parental responsibility because of mental illness or mental deficiency, if there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. § 43-209(5), R. S. Supp., 1976.

The appellant has been diagnosed as a chronic schizophrenic or paranoid schizophrenic. The duration of her illness indicates that she will remain in this condition indefinitely.

The appellant has been unable to care for Christopher since his birth. At the time of the final hearing it was clear that she was then unable to discharge parental responsibilities and there was no indication that she would be able to do so in the future. The record fully supports a finding that it is in the best interests of Christopher that the parental rights of the appellant be terminated.

The judgment is affirmed.

AFFIRMED.

C. G. SMITH CONSTRUCTION CO., A CORPORATION, ET AL., APPELLEES, V. COBLEIGH ELECTRIC COMPANY, A CORPORATION, DOING BUSINESS AS SOUTHEAST ELECTRIC COMPANY, ET AL., APPELLEES, IMPLEADED WITH WESTINGHOUSE ELECTRIC SUPPLY COMPANY, A CORPORATION, APPELLANT.

246 N. W. 2d 55

Filed October 13, 1976. No. 40508.

Contracts. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents.

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

Charles A. Nye of Garvey, Nye, Crawford, Kirchner & Moylan, for appellant.

Richard E. O'Toole of Walsh, Walentine & Miles, for appellees C. G. Smith Constr. Co. et al.

Ronald Rosenberg and John F. Akin, for appellees Cobleigh Electric Co. et al.

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

SPENCER, J.

This action was brought under the Uniform Declaratory Judgments Act to determine the amount due to various defendants and the status of certain liens arising out of the construction of an apartment complex. This appeal concerns only the portion of the trial court's decree determining that there was no contract of guaranty between the defendant Westinghouse and the plaintiff, Construction Sciences, Inc., as well as the fact that the trial court failed to make a finding that certain material was delivered to the site or used in the con-

struction of the apartments and had not been paid for.

On July 12, 1972, plaintiff C. G. Smith Construction Co. entered into a labor and material subcontract with Southeast Electric Company for $217,200, to perform electrical work in the construction of Ruskin Place Apartments. This contract was assigned shortly thereafter to plaintiff, Construction Sciences, Inc.

Wendell Cobleigh, owner of Southeast Electric, asked Theodore Madej, vice-president of Construction Sciences, Inc., to assist him in getting electrical materials in stock at the Westinghouse Electric Supply Company's warehouse in Lincoln, Nebraska. After telephone conversations between George Buchanan, credit manager of Westinghouse, and Madej, the exact substance of which is in dispute but which questioned Southeast's credit, Mr. Buchanan, on October 9, 1972, drafted and sent the following letter to Mr. Madej:

"Construction Sciences, Inc.
C. G. Smith Const. Co.
8425 Madison St.
Omaha, NB 68127

"ATTN: Mr. Theodore J. Madej - Vice President

"RE: Southeast Electric Co.
Wendell Cobleigh
Lincoln, Nebraska
Ruskin Place Apt. Project

"Dear Mr. Madej:

"As we discussed today on the phone, we will be selling electrical materials to Southeast Electric Co., of Lincoln for the Ruskin Place Apartments Project, your firm is constructing.

"We will expect your firm to guarantee payment of all our invoices for material furnished on this project and also it is understood that a joint payable checks for material will be made out to Westinghouse Electric Supply Co. and Southeast Electric Co.

"Would you kindly acknowledge the copy of this letter

and return it promptly to me for our files. Our terms of sale are '10th prox. - Net 30 Days.'
"Thank you for your consideration in this matter.
"Sincerely,
G. H. BUCHANAN /sgd./
G. H. Buchanan
District Credit Manager
"G.B./ds
Enclosure
"Theodore J. Madej V.P. 10/10/72 DATE"
ACKNOWLEDGED & ACCEPTED

It is to be noted that on October 10, 1972, Madej acknowledged and accepted exhibit 13. The question presented by this appeal is: Did exhibit 13 constitute a contract of guarantee by Construction Sciences, Inc., to Westinghouse Electric Supply Company for the payment of invoices furnished on the Ruskin Place Apartments? The trial court held it did not.

The trial court accepted the theory of appellees that the agreement was ambiguous. It thereupon permitted the introduction of parol evidence by Construction Sciences, Inc., that the language of the letter did not guarantee payment but merely was an assurance of payment by joint checks. Madej testified it was on this basis that he placed the words "ACKNOWLEDGED & ACCEPTED" on the bottom of the instrument.

We find the trial court was in error. Parol evidence was not admissible to add to, contradict, or vary the terms of the instrument. There is no theory on which we can find the instrument to be ambiguous. It definitely states that Westinghouse Elecric Supply Company was asking Construction Sciences, Inc., to guarantee payment of all their invoices for material furnished. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents. Gerdes v. Omaha Home for Boys (1958), 166 Neb. 574, 89 N. W. 2d 849.

The language used is clear and unequivocal. The letter further stated: "* * * and *also* it is understood that a joint payable checks for material will be made out to Westinghouse Electric Supply Co. and Southeast Electric Co." (Italics supplied.) It is clearly apparent that two separate points were made: (1) Construction Sciences, Inc., was to guarantee payment of all Westinghouse invoices; and (2) also they were to have joint payable checks issued for the material delivered.

For the reasons stated, the judgment of the District Court is reversed. The cause is remanded to the District Court with directions to determine the amount due to Westinghouse Electric Supply Company from the plaintiffs under the terms of the guarantee.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN M. BRIDGMON, APPELLANT.

246 N. W. 2d 57

Filed October 13, 1976. No. 40530.

1. **Sentences: Criminal Law.** A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. **Sentences: Criminal Law: Probation and Parole.** An order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion.
3. **Sentences: Criminal Law: Courts: Evidence.** In sentencing a defendant after conviction, the trial court has a broad discretion as to the source and type of evidence it may use to assist it in determining the kind and extent of punishment to be imposed within the limits fixed by statute.

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

Mark M. Sipple and Walker, Luckey, Whitehead & Sipple, for appellant.

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

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

BRODKEY, J.

In an information filed in the District Court for Platte County on May 23, 1975, the defendant, Steven M. Bridgmon, was charged in count I with a burglary of the Brown Derby Cocktail Lounge in Columbus, Nebraska, on or about May 11, 1975; and in count II with the burglary of Larry's Drive In Liquors in Columbus, Nebraska, on or about February 26, 1975. As a result of a plea bargaining agreement entered into between the county attorney of Platte County and court appointed counsel for the defendant, the defendant at the subsequent arraignment pled guilty to count I of the information, and the county attorney thereupon dismissed count II. The court set the date of July 18, 1975, for sentencing. However on that date, for reasons which do not appear in the record, defendant failed to appear, and a bench warrant was issued for him. Sentencing was finally held on September 19, 1975. At that time the court sentenced the defendant to imprisonment in the Nebraska Penal and Correctional Complex for a period of 3 years, with credit for 71 days time served in the Platte County jail awaiting disposition of the case; and also ordered him to pay the costs of prosecution. Defendant's motion for a new trial was subsequently overruled and he now appeals his conviction and sentence to this court, assigning as ground for reversal that the sentence imposed by the trial court was excessive and amounted to an abuse of discretion; and also that in determining the sentence to be imposed upon the defendant, the court erred in taking into consideration and in assuming defendant's guilt of the burglary for which he was charged in count II of the information, which had previously been dismissed pursuant

to the plea bargain agreement. We affirm.

Defendant contends that the evidence in this case does not warrant a sentence of 3 years in the Nebraska Penal and Correctional Complex, and urges upon the court the well-established rule as stated in State v. Sturm, 189 Neb. 299, 202 N. W. 2d 381 (1972): "This court may reduce the sentence rendered by the district court against the accused when in its opinion a sentence is excessive, and it is its duty to render such sentence as in its opinion may be warranted by the evidence. § 29-2308, R. R. S. 1943." In support of his contention that the sentence of 3 years was excessive, counsel for defendant argues that the defendant, who at the time of the offense was 24 years of age, was a first time felony offender and had pled guilty to a nonviolent crime which consisted of taking $12.40 in coins and 3 packages of cigarettes, and also that the burglary was committed on a spur of the moment whim and without premeditation. He also points out that the probation officer had suggested the possibility of further evaluation of the defendant, as opposed to imprisonment. In his brief counsel for defendant admits that defendant has had a rather lengthy misdemeanor history, but reiterates that this offense, to which defendant entered his plea of guilty, was his first felony conviction. The comments of the trial judge made at the time of defendant's sentencing, following the plea made on defendant's behalf by his counsel, are enlightening, and are, with one exception, fully supported by the presentence investigation and report before us as part of the record on appeal. At that time the court stated: "Under ordinary circumstances, I would be impressed by what you have said, Counsel. It is not to say that I am not impressed at this time, I am. Your argument or your talk in his behalf makes a lot of sense. But I get to looking at this boy's record, and number one, he has no steady record of employment. Secondly, he has got a long police record. True, a lot of the stuff is

petty, but he has still been involved with the police a great number of times, a few larcenies in there. It runs all the way back to 1965. You can just kind of see the handwriting on the wall: curfew, juvenile, petit larceny, violation of traffic, disturbing the peace, more violations, fighting, everything except working, drunk. He is just not a good risk for probation.

"So, we come to the point of what kind of a sentence am I giving him. This is one of two felonies that you were charged with and as a result of a plea bargain one of them has been dismissed. But I can't overlook the fact that he did commit another burglary. And it bothers me that he wasn't here when he was supposed to be here the last time for sentencing. We had to go get him."

The report of the presentence investigation reveals that the defendant has an arrest record containing 23 entries over a 10-year period from 1965 to 1975; and while he has not been previously convicted of a felony, the presentence report indicates a number of instances where he has served periods of confinement and a number of convictions for a variety of offenses. He also has had a history of mental trouble.

The statutory penalty provided for the offense of burglary, as set out in section 28-532, R. R. S. 1943, is confinement in the Nebraska Penal and Correctional Complex for not more than 10 years nor less than 1 year, or a fine not exceeding $500, or by imprisonment in the jail of the county not exceeding 6 months. Defendant's sentence of confinement for a period of 3 years is clearly within the limits of the statute. The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Keen, *ante* p. 291, 242 N. W. 2d 863 (1976); State v. Painter, 195 Neb. 183, 237 N. W. 2d 142 (1976); State v. Wade, 195 Neb. 761, 240 N. W. 2d 351 (1976). It is also the rule in this jurisdiction that an order or sen-

tence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion. State v. Keen, *supra*. In view of defendant's previous exposure to the criminal justice system, his repeated convictions of misdemeanors, and the seriousness of the offense to which he entered his plea of guilty, the sentence of 3 years imposed upon the defendant, while perhaps severe, was not excessive nor an abuse of discretion on the part of the court.

We now consider defendant's contention that the court committed reversible error in its comment at the time of the sentencing, as follows: "This is one of two felonies that you were charged with and as a result of a plea bargain one of them has been dismissed. But I can't overlook the fact that he did commit another burglary." Defendant contends that since there is no evidence in the record to indicate that he was in fact guilty of the burglary with which he was charged in count II, which was dismissed as the result of plea bargaining, he was deprived of due process of law when the court considered that fact in determining his sentence. While it is true the court made the statement complained of, and apparently did consider that fact, in connection with other facts, in making his overall determination of the sentence to be imposed, it is nowhere apparent from the record how much weight the court gave to the burglary charged in count II in making that determination. While the court mentioned the second burglary in its comments, it is clear that he gave principal weight to the fact that defendant had had a rather extensive prior record; and also to the fact that defendant had failed to appear for sentencing at the appointed time, and stated: "We had to go get him." These other items were in themselves more than sufficient to warrant the imposition of the sentence in question, even without consideration of or reference to the other burglary with which defendant had been charged in the information.

The law is well-established in this state that a trial judge in sentencing a defendant after conviction has a broad discretion as to the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by the statute. State v. Rose, 183 Neb. 809, 164 N. W. 2d 646 (1969); State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974); State v. Rapp, 184 Neb. 156, 165 N. W. 2d 715 (1969). It is clear from the foregoing authorities that a sentencing judge may properly consider for that purpose any type of relevant information, including his own observations of the defendant. In State v. Rose, *supra*, at the time of imposing sentence the trial court stated in response to the argument of defense counsel that defendant had reformed, that: "He certainly must have changed within the last few months, I will say that for him. I had him in court here where he came in and testified. If I ever heard perjury, it was certainly in that case. He came in and told a cock and bull story under oath in that case." The court stated in its opinion, with reference to the statement of the trial judge: "It is argued at length that the statement of the trial judge regarding the perjury of the defendant in the previous case is prejudicial to the rights of the defendant. The record of the presentence hearing is such that the sentence is clearly within the court's discretion even if the perjury statement had been locked within the court's breast." The same may be said in the instant case. In Rose, the court also stated: "It is true that many of the arrests did not lead to a conviction of crime, but they are no less proper to be considered in arriving at the sentence to be imposed."

Also in State v. Rapp, *supra*, the defendant had entered a plea of guilty to a charge of burglary and the court delayed sentencing until a presentence investigation could be made. Prior to the sentencing, the trial court disclosed information that had come to it to the effect that defendant attempted to escape from the

county jail after his plea of guilty and before the pronouncement of sentence. The defendant contended that he had a right to refute or to explain the incident. In its opinion this court stated: "The case is controlled by State v. Rose, 183 Neb. 809, 164 N. W. 2d 646. In that case we said: 'It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. * * * The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.'

"While we think it is immaterial here, it is noteworthy that defendant does not even contend in his briefs that the statement of the trial judge as to an attempted escape is false. It must be assumed, we think, that a trial judge knows the difference between information that is pertinent to the issue before him and that which is unfounded rumor." Likewise, in State v. Glouser, 193 Neb. 186, 226 N. W. 2d 134 (1975), the defendant appealed from a conviction of forgery upon a plea of guilty. The forgery involved the obtaining of funds from a savings association by use of an apparently stolen savings account book and a forged withdrawal slip. Defendant told the trial judge that she purchased the stolen passbook from a friend. The judge appeared to have disbelieved her story as to the source of the passbook and indicated by his remarks that it was stolen, although the reason for this belief was not shown in the record. The judge appeared to have considered in imposing sentence her refusal to reveal from whom the passbook was obtained. In support of the claim of excessiveness of sentence, the defendant asserted the use of "uncorroborated and unsubstantiated information, concerning the source of the subject pass

book" was indicative of an abuse of discretion; and also asserted that abuse of discretion was indicated by the claimed intemperate tone of the sentencing judge's remarks. The Supreme Court found the trial judge had not abused his discretion and in its opinion, quoting from Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, stated: " 'A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' "

The record in this case is free from prejudicial error, and we affirm the judgment and sentence of the District Court.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. DANIEL L. COLEMAN, APPELLANT.
246 N. W. 2d 61

Filed October 13, 1976. No. 40535.

1. **Criminal Law: Trial: Intoxication: Intent.** Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged.
2. **Criminal Law: Verdicts: Evidence.** The verdict of a jury must be sustained if, taking the view most favorable to the State, there is substantial evidence to support it.

3. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Walter J. Matejka, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

McCOWN, J.

The defendant was found guilty of burglary by a jury and sentenced to 3 to 5 years imprisonment.

On June 9, 1975, the defendant began drinking about noon. He testified that he remembers nothing from a point in the early evening until he woke up in the police station the next morning. At about 1:30 a. m., the defendant was seen by several witnesses in front of a bar and grill in downtown Omaha. He appeared to be in an intoxicated stupor. An acquaintance of the defendant could not rouse him from the stupor but turned off the lights and engine of defendant's pick-up, which was parked in front of the bar and grill. About 2 a. m., police officers saw someone inside the bar and grill, discovered the window in the front door had been broken, and entered the bar and grill. The food freezer was open. Food was strewn about and a gunny sack similar to a sack in the defendant's truck was found by the rear door. The officers found the defendant sitting on the floor with a towel over his head. The defendant had a flashlight from which the batteries were missing, and had a cut on his hand which matched a slit in a pair of gloves found at the scene. The defendant admitted the gloves were his. The flashlight batteries were found underneath shelves in the pantry where the defendant was found. The defendant responded to orders from the of-

ficers to get up and he sat at a table while the officers completed the investigation. At the police station at about 4 a. m. one of the same officers testified that the defendant was drunk and unconscious and could not be revived.

Defendant contends that he was so intoxicated that he was incapable of the necessary criminal intent, and that the evidence was therefore unsufficient to support the verdict as a matter of law.

The jury was properly instructed on the effect of excessive intoxication and there was no objection to any of the instructions. The jury determined the issues adversely to the defendant.

Whether excessive intoxication is such as to prevent a defendant from formulating criminal intent is to be determined from the evidence and surrounding circumstances and is therefore for the jury. Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged. State v. Barnes, 185 Neb. 384, 176 N. W. 2d 18.

The verdict of a jury must be sustained if, taking the view most favorable to the State, there is substantial evidence to support it. State v. Foster, *ante* p. 332, 242 N. W. 2d 876.

The defendant also contends that his sentence is excessive. The presentence investigation report reveals an extensive prior record, including a previous conviction for burglary. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wright, *ante* p. 377, 243 N. W. 2d 66. There was no abuse of discretion here.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT HOUSTON, JR., APPELLANT.
246 N. W. 2d 63

Filed October 13, 1976. No. 40549.

Criminal Law: Sentences: Constitutional Law. The fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal Constitutions.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

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

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

CLINTON, J.

The defendant pled guilty to the following charges: Count I, robbery and count II, use of a firearm in the commission of a felony; and pled nolo contendere to count III, a charge of shooting with intent to kill, wound, or maim. The pleas were found by the court to be intelligent and voluntary and were accepted. The defendant was adjudged guilty and sentenced to terms of imprisonment as follows: Count I, not less than 5 nor more than 15 years; count II, a consecutive sentence as required by the provisions of section 28-1011.21, R. R. S. 1943, of not less than 3 nor more than 10 years; and count III, a concurrent term of not less than 10 nor more than 25 years.

On appeal to this court the defendant asserts that the sentences are excessive and that he was deprived of due process of law because the trial judge, in determining sentences to be imposed, considered the effects that sec-

tion 83-1,107, R. S. Supp., 1976, the so-called good time law, might have upon the time of imprisonment which might actually be served. We affirm.

The record establishes that on June 13, 1975, the defendant and several companions, with the use of firearms, robbed the Sip-N-Chin tavern in Omaha, Nebraska, and that during the course of the robbery an employee of the bar was shot. The record also establishes that on the same day the defendant and his companions robbed another establishment and during the course of the robbery shot the attendant. Four days later they robbed a filling station and shot an employee during the course of that robbery. The record establishes that the shootings were in each case deliberate and that the "necessity" of shooting witnesses was discussed beforehand by the participants. Following the defendant's apprehension he and his companions, in an effort to escape, assaulted a guard and obtained a key from him by threatening to kill him. At the time of the offenses the defendant was 16 years of age. His companions were also youthful.

In the course of the sentencing procedure the judge listed a number of matters which he considered in imposing sentence. These included the nature and circumstances of the crimes; the part the defendant had played in them; the attitude of the defendant; his background and age; his previous record; and the attempted escape and the assault upon the guard. He then concluded: "So, I've taken into consideration all of these things. And I've also taken into consideration the present law which the last Legislature enacted in which there's all these mandatory release dates and good time dates. The Court has to take that into consideration now in assessing the penalty."

The defendant argues that the above statement by the sentencing judge establishes that the judge sought to defeat the legislative purposes of the "good time" statute and so considered irrelevant factors, all of which

constituted a constitutional violation of due process as well as an abuse of judicial discretion.

Three of the purposes of punishment, among others, are deterrence, retribution, and the expression by society of its moral disapproval of the offense. The nature of the crimes to which defendant either pled guilty or nolo contendere and the other crimes in which he participated, together with his demonstrated attitude of utter disregard for the life of innocent persons, shows a depravity and callousness which is chilling to contemplate. In the circumstances before us, light or minimum sentences could not have served the purposes mentioned and would have promoted disrespect and distrust of the law. Therefore, unless the fact that the judge stated that in determining sentence he considered the possible effects of section 83-1,107, R. S. Supp., 1976, constitutes a due process violation, the sentences, in our judgment, clearly do not constitute an abuse of discretion.

The defendant, in support of his position, cites and quotes from Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337. Both parties also cite State v. Rose, 183 Neb. 809, 164 N. W. 2d 646. These cases deal with the question of what factual matters, other than those presented during the course of trial, a court may consider in determining an appropriate sentence and the means by which the court may obtain information of such facts. In Williams the sentencing judge disregarded the recommendations of a jury for a life sentence and, after taking into consideration information as to the defendant's past record, his attitudes and propensities, imposed the death penalty. The United States Supreme Court on appeal held, among other things, that the fact that such additional information was not received in open court and in accordance with the rules of evidence did not violate due process requirements. The Rose case cited Williams and followed it.

The cases cited do not reach the issue here raised.

We know of none that do. The defendant's argument apparently is that the possible effect of the good time law is an irrelevant matter for consideration by the court in determining the sentence it will impose. Perhaps it is, but the mere fact the court stated that it took the effects of the statute into consideration does not, in our judgment, constitute a due process violation. First of all, whatever the court does in imposing sentence cannot affect the actual application of the statute, or other statutes which affect time served, for those statutes are administered by agents of the executive branch of government pursuant to statutes enacted by the legislative branch. Anything a sentencing court may say cannot prevent their application. See, Art. IV, § 13, Nebraska Constitution; §§ 83-1,107, 83-1,107.01, 83-1,101, 83-1,109, 83-1,110, 83-1,111, R. S. Supp., 1976. Let us cite a few examples. If a court imposes a term certain, it, under the provisions of section 83-1,105, R. S. Supp., 1976, becomes an indeterminate sentence, e.g., an imposed term of 7 years becomes, in fact, one of 1 to 7. Then under the provisions of sections 83-1,107 and 83-1,107.01, R. S. Supp., 1976, the executive officer of the penal facility allows credit for "good behavior" and "faithful performance of assigned duties." Then, under the provisions of sections 83-1,108 and 83-1,110, R. S. Supp., 1976, the Board of Parole may make further reduction for "good conduct." Thus a 7-year sentence possibly may result in actual confinement of less than 1 year. Thus, as a practical matter, sentences imposed by courts often have little relation to time actually served. The time served usually depends upon the defendant himself and those who are by law charged with carrying out the constitutional and legislative mandates. Determination by a sentencing court of an appropriate sentence is therefore to a substantial degree merely an expression of society's condemnation of the offense.

The trial courts of this state, for the most part, at

least, do their conscientious best, within the limits of the sometimes broad discretion granted them by statute, to make the sentence "fit the offender and not merely the crime." Williams v. New York, *supra*. In the light of the practicalities we have discussed, it would be anomalous were we to say that because a judge did his thinking aloud that due process was violated. The record before us does not support any conclusion that the sentence imposed was dictated by prejudice, ill will, vindictiveness, or other unworthy motive. It is our considered opinion that the sentences imposed in this case are appropriate not only for the crimes, but for the offender, and that the trial judge did not abuse his discretion. We hold that the fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal Constitutions.

We note in passing that we have previously affirmed, without opinion, under the provisions of Rule 1e(1) of the rules of this court, but after full consideration of the record, identical sentences imposed upon two of the defendant's accomplices.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TOMMY R. COOPER, APPELLANT.
246 N. W. 2d 65

Filed October 13, 1976. No. 40571.

1. **Criminal Law: Guilty Plea.** The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. ———: ———. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively

disclose that the defendant entered his plea understandingly and voluntarily.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Keith N. Bystrom and Leonard P. Vhynalek, for appellant.

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

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

NEWTON, J.

The defendant was charged with a third offense of driving while intoxicated and in counts II and III with refusing to submit to a blood, breath, or urine test, and operating a motor vehicle when his driver's license was suspended. The defendant was represented by private counsel and presented to the court a "Petition to Enter Plea of Guilty" which he had signed and which was witnessed by his counsel. That petition provides, in part, as follows: "I understand that I may, if I so choose, plead 'NOT GUILTY' to any offense charged against me, and that if I choose to plead 'NOT GUILTY' the Constitution guarantees me: (a) the right to a speedy and public trial by jury; (b) the right to see and hear all witnesses against me; (c) the right to use the power and process of the court to compel the production of any evidence, including the attendance of any witnesses, in my favor; (d) the right to have the assistance of counsel in my defense at all stages of the proceedings in this court; * * *." It also contains a statement of his counsel as follows: "I have read and fully explained to the defendant all the accusations against him, set forth in the information; I have discussed with him the possible penalties and alternatives open by way of plea. The plea hereinbefore tendered

by the defendant is consistent with my advice to him and I believe it is voluntarily and understandingly made." In conformity with a plea bargain, counts II and III were dismissed. The court held the petition to enter a plea of guilty, asked defendant if his signature appeared thereon, if he had read it or had it read to him, and if he knew what was in it. Affirmative replies were given. The court then read to the defendant section 39-669.07, R. R. S. 1943, ascertained that defendant understood it, explained the elements of the offense, and had the information read, all of which defendant stated he understood. Defendant informed the court that he had not been promised any leniency, or been threatened, or mistreated in order to induce a plea of guilty; and gave factual statements pertaining to the offense. Defendant received a sentence of 1 to 3 years.

On appeal defendant assigns as error the failure of the court to verbally inform him of his constitutional rights and contends his sentence is excessive.

As to his first assignment, defendant cites and relies upon Section 1.4 of the American Bar Association Standards for Criminal Justice Relating to Pleas of Guilty. That standard states: "The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and * * * (b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury, and * * *." Nebraska has adopted these standards. See State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. In the present instance it is apparent that the standard was not *strictly* complied with in that the court did not *orally* inform defendant that his plea waived a trial by jury. Must the standard be strictly complied with? We recommend that it be so adhered to in all cases, but in this instance we hold that failure to do so amounted only to harmless error, if any.

"The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and

intelligent choice among the alternative courses of action open to the defendant." State v. Gray, 187 Neb. 197, 188 N. W. 2d 705. See, also, North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162.

"A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." State v. Turner, *supra.* See, also, Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274.

Here, the court did directly address the defendant to the extent that it ascertained the defendant understood and had signed the petition to enter a plea of guilty which was witnessed by his counsel. That petition made it clear that defendant was waiving his right to a jury trial. There can be no doubt that he understood this and that his plea of guilty was voluntarily and intelligently entered. He does not even contend the contrary.

Defendant contends that the court committed an abuse of discretion in failing to grant him probation and imposing a 1 to 3 year sentence. The defendant's plea was entered in conformity with a plea bargain and it appears that he has had an alcoholic problem for years. His record shows, in addition to numerous misdemeanor offenses, convictions for feloniously entering a building with intent to wound or maim and a motor vehicle homicide. There was no abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS LEONARD, APPELLANT.

246 N. W. 2d 68

Filed October 13, 1976. No. 40578.

1. **Trial: Appeal and Error.** On an appeal to this court in a

criminal prosecution it is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence.

2. **Trial: Criminal Law: Prosecuting Attorneys.** It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence.

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

Douglas McArthur, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

CLINTON, J.

The defendant was found guilty by a jury on a charge of burglary of the inmate store in the Nebraska Penal and Correctional Complex. He was also charged as an habitual criminal and found guilty on that count as well. At the time of the burglary the defendant was an inmate of the correctional complex. He was sentenced to a term of 10 years in the complex with the sentence to be served concurrently with any term then being served.

On this appeal two assignments of error are made: (1) That the evidence was insufficient as a matter of law to support the finding of guilt on the burglary charge, and (2) that the court erred in not granting the motion of the defendant for a mistrial on the ground of alleged erroneous and prejudicial statements made by the prosecutor during the voir dire examination of the jury.

We have read the record carefully. No useful purpose would be served by detailing the evidence. Suffice it to say that the evidence clearly establishes that a

burglary did occur. The testimony directly supporting the defendant's part in the crime was that of an accomplice, another inmate, who admitted his part in the crime and testified for the State in exchange for a promise of a jail sentence only. The promise by the State was kept. The defendant admitted discussing plans for a burglary with the witness, but further testified that he changed his mind and did not participate because it was too risky. Testimony of other inmates supported the defendant's defense of alibi. It was for the jury to decide who was telling the truth. The evidence was legally sufficient to make a jury question. It is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. State v. Kelly, 193 Neb. 494, 227 N. W. 2d 848. The first assignment is not meritorious.

During the course of voir dire examination, defendant's counsel moved the court "for a mistrial on the following grounds; that during the voir dire examination, one of the County Attorneys who was conducting the voir dire examination, Rodney Rehm, asked the jury a question to the effect that whether or not they would be prejudiced if — whether or not they would be prejudiced because the defendant had stolen from the State . . . ." The prosecutor admitted he made some such statement. The motion for a mistrial was overruled. The exact language of the question put on voir dire does not appear in the record. After overruling the motion the court advised the jury of the presumption of innocence and the court stated in the record: "I feel that the jury was properly advised afterwards and particularly in view of the statement about the defendant's presumption of innocence and the fact that the jury indicated that they felt that he was presumed to be innocent."

It is, of course, improper for a prosecutor in oral argument to attempt to persuade the jury by giving an

expression of his personal opinion of the guilt of the accused other than as a deduction from the evidence. State v. Brooks, 189 Neb. 592, 204 N. W. 2d 86. It is certainly not clear from the record before us that the prosecutor was giving his personal opinion of the guilt of the accused. Rather the inference would appear to be that at the worst the prosecutor was making a somewhat ambiguous inquiry as to whether a jury bias might exist because the charge involved the taking of property of the State of Nebraska. The precise question, whatever it was, seems to have been put clearly on the premise that the defendant's guilt remained yet to be proved. The comment by the trial judge seems to make clear that the jurors understood that evidence had to be produced and that they must presume the defendant innocent. The usual instruction on this issue was later given. Under the circumstances it does not appear that the failure to grant a mistrial was erroneous. State v. Brooks, *supra*.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY E. MACHMULLER, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. BRIAN T. MACHMULLER, APPELLANT.

246 N. W. 2d 69

Filed October 13, 1976. Nos. 40615, 40616.

1. **Criminal Law: Sentences: Statutes.** Section 29-2260, R. R. S. 1943, which lists grounds to be considered by the trial court in sentencing a defendant, does not control the trial court's discretion in imposing a sentence.
2. **Assault and Battery: Weapons and Firearms.** Pointing an unloaded weapon at another person is an assault if the person aimed at does not know, or has no reason to believe, that it is not loaded.
3. **Criminal Law: Sentences.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless

there appears to be an abuse of discretion on the part of the sentencing judge.

Appeals from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Kirby, Duggan & McConnell, for appellants.

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

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

BRODKEY, J.

By stipulation of parties, the above two cases were consolidated for briefing and argument on appeal. Jeffrey E. Machmuller, age 24, and Brian T. Machmuller, age 19, are brothers, residing in Norfolk, Nebraska. They appeal to this court from the respective sentences imposed upon them by the District Court for Madison County, their sole assignment of error being that the sentences were excessive. We affirm.

Jeffrey was originally charged with: (1) Possession of a controlled substance with intent to deliver, (2) assaulting and resisting an officer, and (3) larceny from an automobile. Brian was originally charged with: (1) Possession of a controlled substance with intent to deliver, (2) delivering a controlled substance, and (3) assaulting and resisting an officer. As a result of plea bargaining, each defendant subsequently pled guilty to the felony charge of possession of more than 1 pound of marijuana under section 28-4,125(5), R. R. S. 1943, and to the misdemeanor charge of resisting and abusing an officer under section 28-729, R. R. S. 1943. Based upon their respective pleas of guilty, the court sentenced each defendant to 1 year in the Nebraska Penal and Correctional Complex on the felony count, and to 3 months in the county jail on the misdemeanor count, to be served concurrently.

It appears that in September 1975, Jeffrey and Brian, while driving down a country road, noticed some marijuana growing in a field, and picked a quantity of it, which they took to their home in Norfolk and hung in their basement to dry. The amount of the marijuana involved was approximately 6 pounds. The brothers dried the marijuana using a space heater, stripped it, pressed it using a box-type press, and packaged it in plastic bags.

The record also reflects on September 5, 1975, two Nebraska state troopers, named Fosmer and Brown, who were acting as undercover agents for the Nebraska Safety Patrol, picked up a hitchhiker by the name of Tracy Baker and solicited his assistance in purchasing some marijuana. After some apparently unsuccessful efforts, Baker ultimately took them to Jeffrey's and Brian's home in Norfolk. At about that time, Jeffrey, who had made preparations to take a trip out of the city, returned to the house to pick up his dog which he had inadvertently left behind. As he left the house he noticed Baker and the two undercover agents approaching from the car. Becoming suspicious, Jeffrey looked in the glove compartment of the car and discovered a police radio, a police gun, and a policeman's badge. He left those items in Fosmer's and Brown's car, proceeded to a bar, and called his brother on the telephone, informing him that the people he was dealing with were police officers; and informed Brian that he should attempt to get back the marijuana he had sold to the police officers. At the time of the phone call the two officers, and others, were sitting in the house smoking marijuana. Brian endeavored to recover the marijuana from the officers, but was unable to do so; and a few minutes later informed Jeffrey to that effect when Jeffrey called back on the telephone. Shortly thereafter, Fosmer and Brown attempted to leave the house with the marijuana they had purchased, but at that point Brian grabbed a shotgun out of the

gun rack, which he later claimed was empty and unloaded, and demanded that the marijuana be returned to him. The other individuals in the house immediately ran out the back door and met Jeffrey, who was returning, and informed him that there was gun play going on in the house. Jeffrey then ran to the officers' automobile, removed the gun and badge, and entered the house with the items in his hands. He noticed Brian holding a shotgun and ordered Brian to put the gun away, which Brian did. There is a dispute in the record as to whether the gun held by Jeffrey was loaded or not, Jeffrey claiming that it was not, but Officer Fosmer testifying that it was. There is also evidence in the record that at the time Brian pointed the shotgun at the officers, he operated the loading mechanism and the officers heard the customary clicking noises, indicating that the gun was being activated. Officer Brown then grabbed Brian, put his pistol in Brian's ear and threatened to shoot him if Jeffrey did not put down his gun. Jeffrey proceeded to comply, and the two brothers were then placed under arrest and taken to jail, following which criminal charges were filed against them as previously recited.

In support of his claim that the sentences imposed upon the brothers were excessive, their counsel argues that Jeffrey and Brian had not been involved in any criminal activity prior to this incident, and had no prior record of arrests or convictions other than minor traffic offenses. In his brief, counsel states: "Though the possibility of serious harm was possibly threatened, in fact no serious harm was caused. In reality nobody was threatened. Brian's shotgun was empty at all times. The police officer's gun that Jeff had was loaded *but if the Officers had followed their own procedure of locking the car the incident with the loaded gun could and would have never happened.*" (Emphasis supplied.) This effort to shift the blame for what occurred to the

police officers by introducing an argument based upon proximate cause does not impress us.

Counsel for Jeffrey and Brian also argue that under the provisions of section 29-2260, R. R. S. 1943, which contains specific provisions designed to aid the court in determining whether or not a sentence of imprisonment should be withheld and probation granted, there are a great many factors there enumerated which are present in the instant case and which would tend to indicate the desirability of withholding a sentence of imprisonment. In imposing sentence upon the defendants, the trial court considered and specifically referred to each of the items listed in the foregoing statute, and readily admitted that there were many elements favoring the argument advanced by the defendants. In the exercise of his discretion, the trial judge apparently concluded that there were more elements pointing the other way. Particularly, the court noted that while the crime involved did not cause serious harm under the foregoing statute, it did "threaten" serious harm. The court concluded that imprisonment was necessary in these cases for the protection of the public "because a lesser sentence will depreciate the seriousness of the offender's crime and promote disrespect for the law." In State v. Cottone, 188 Neb. 102, 195 N. W. 2d 196 (1972), we held that while section 29-2260, R. R. S. 1943, lists grounds to be considered by the sentencing court, it does not control its discretion. The statute specifically so provides.

The incident involved cannot be taken lightly. Both Jeffrey and Brian threatened the lives of Officers Fosmer and Brown. Brian pointed a shotgun at them, which he appeared to activate, stating: "I'm going to blow you son-of-bitches away." The fact that Brian claims he knew the shotgun was unloaded is not controlling. The officers did not know it. We have held that the pointing of an unloaded weapon at another is an assault if the person aimed at does not know but that

it is loaded and has no reason to believe that it is not. State v. Brauner, 192 Neb. 602, 223 N. W. 2d 152 (1974); State v. McGhee, 184 Neb. 352, 167 N. W. 2d 765 (1969). Jeffrey also threatened the lives of the two officers when he pointed the .38 revolver, which he had taken from the officers' car, in their direction. Officer Fosmer testified that the revolver was loaded, cocked, and ready to be fired. The record is clear that the marijuana was in fact sold to Officers Brown and Fosmer, although that charge was reduced to possession of more than 1 pound of marijuana, which was clearly warranted, as the evidence reveals that Jeffrey and Brian had possession of approximately 6 pounds of marijuana.

The sentences imposed upon the brothers were within the statutory limits for the offenses involved. We deem it unnecessary to cite authority for the well-established rule that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. Clearly there was no abuse of discretion in these cases, and we affirm the action of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. MORROW, APPELLANT.

246 N. W. 2d 72

Filed October 13, 1976. No. 40736.

Criminal Law: Sentences: Probation and Parole. The granting of probation is discretionary with the trial court. In the absence of an abuse of discretion, a denial of probation is not error.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with theft of a motorcycle, a felony under section 28-522, R. R. S. 1943. To this charge the defendant pleaded not guilty. Later, an amended information was filed charging the defendant with wrongful use of the motorcycle, a misdemeanor under section 28-521, R. R. S. 1943. To this charge the defendant pleaded nolo contendere, was found guilty, and sentenced to 4 months in the county jail and fined $250. Upon appeal the sole issue is whether the sentence was excessive. The defendant contends that he should have been placed on probation.

The defendant was 18 years of age at the time of the offense. He was stopped for a traffic offense by a state patrolman while riding the stolen motorcycle. He exhibited a bill of sale to another motorcycle to support his claim that he owned the stolen motorcycle. After the motorcycle had been reported stolen the defendant was arrested and brought to police headquarters. At that time he stated he had borrowed the motorcycle from a third party and had returned it to him. Later the same day, the defendant took the police to the place where he had concealed the motorcycle.

When the motorcycle was recovered a license plate issued to the defendant was attached to it and several parts were missing. The missing parts had been removed by the defendant and concealed in the garage at his parents' home. Certain other parts owned by the defendant had been installed on the stolen motorcycle.

At the sentencing hearing the defendant admitted he had not disclosed all the details of the offense to the probation officer. Under questioning by the trial court

the facts concerning the stripping and concealment of the motorcycle were developed.

The defendant has a poor employment record and has since been involved in a burglary. The record indicates that it is probable the defendant would not have successfully completed probation.

The granting of probation is discretionary with the trial court. In the absence of an abuse of discretion, a denial of probation is not error.

The denial of probation in this case was not an abuse of discretion and the sentence imposed was not excessive under the circumstances.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL JOHN ROTELLA, APPELLANT.
246 N. W. 2d 74

Filed October 13, 1976. No. 40739.

1. **Trial: Evidence: Witnesses.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
2. **Homicide: Motor Vehicles: Negligence.** In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

SPENCER, J.

Michael John Rotella, defendant, was convicted of motor vehicle homicide in connection with a two-car collision resulting in the death of the driver of the other vehicle. He was sentenced to a term of 5 months in the Douglas County correctional department. He prosecutes this appeal, alleging two assignments of error. (1) The court erred in excluding the testimony of an expert witness as to the presence of a drug in the blood of the deceased. (2) The court erred in admitting in evidence over objection a diagram depicting the point of impact of the accident scene. We affirm.

We first consider defendant's second assignment. The accident occurred on October 3, 1975. Both cars involved were proceeding along 108th Street in Omaha. Defendant was traveling in the southbound lane and decedent in the northbound lane. The State sought to prove that defendant was driving on the wrong side of the road at the time of impact between the two vehicles. The trial court sustained a motion in limine which prevented the investigating officers from giving an opinion as to the point of impact.

The State was permitted to introduce over objection a diagram, exhibit 3, which showed the position of the automobiles, skid marks, and the gouge marks in the pavement. The gouge marks in the northbound lane are marked with an "X" and identified on the chart as point "B." Point "B" was further identified on the chart as "possible point of impact." The trial court required the deletion of the words "possible point of impact" before the admission of the exhibit.

It is defendant's contention that the jurors, in examining the exhibit, would naturally assume the "X"

marked the point of impact. Defendant's motion in limine was based upon Stillwell v. Schmoker (1963), 175 Neb. 595, 122 N. W. 2d 538. In the past, an investigating officer has not been permitted to testify over objection as to the location of the point of impact. We have held the point of impact to be an ultimate fact to be determined by the jurors from the physical facts presented to them. This record contains no hint of an opinion by the State's witness as to the location of the point of impact. The chart is one of the scene. Point "B" marks gouge marks. While the officer thought it to be the possible point of impact, that fact was excluded from the exhibit before it was presented to the jury.

Stillwell v. Schmoker, *supra*, relied heavily on the fact that the opinion offered invaded the province of the jury. The basis for the objection was the general rule of evidence that the testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinion and conclusions deducible from evidentiary facts. In 1975, we revised our rules of evidence. Section 27-704, R. R. S. 1943, provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This in the proper case vitiates the Stillwell v. Schmoker rule.

Rotella's other assignment is directed to the fact that the court refused to permit him to withdraw his rest to present evidence that an examination of the decedent's blood showed the presence of amphetamines in a quantity such as to impair his decision-making ability. The court based its ruling on the finding that such evidence would be irrelevant.

Essentially what defendant is seeking to prove is contributory negligence on the part of the deceased. However, contributory negligence is not a defense to a charge of motor vehicle homicide. The issue is whether defendant's violation of law was a contributing factor to the death. See Vaca v. State (1948), 150 Neb. 516, 34 N. W.

2d 873, in which we held: "When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility." See, also, Hoffman v. State (1956), 162 Neb. 806, 77 N. W. 2d 592. We there held: "In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another."

The only question of fact involved was whether the defendant was negligent in operating his vehicle by crossing over the centerline. The jury found that he was. The evidence is more than ample to sustain its verdict.

For the reasons given, the defendant's assignments of error are without merit. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD D. HAYES, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. RONALD D. HAYES, APPELLANT.

246 N. W. 2d 76

Filed October 13, 1976. Nos. 40769, 40770.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

NEWTON, J.

On a plea of guilty defendant was convicted of burglary in case No. 40769 and was sentenced to a term of 2 to 4 years. In case No. 40770, two charges of forgery were reduced in conformity with a plea bargain to one of obtaining money by false pretenses. On his pleading guilty, he received a sentence of 1 to 2 years. The sentences are to run consecutively.

The sole issue on appeal is that the sentences are excessive. Defendant was 19 years of age. He has an extensive juvenile record commencing at age 9. Following a series of burglaries he was sent to the Kearney Youth Development Center, was paroled, violated parole and was returned. While awaiting sentence he was found in possession of marijuana and broke into a motor vehicle. He has admitted involvement in numerous other burglaries for which he has not been prosecuted.

The sentences are within statutory limits and it is apparent that no abuse of discretion occurred.

The judgments are affirmed.

AFFIRMED.

ROBERT L. EGGERLING ET AL., APPELLANTS, V. OTTO CUHEL ET AL., APPELLEES.
246 N. W. 2d 199

Filed October 20, 1976. No. 40490.

1. **Brokers: Agents: Statutes.** Section 81-875.01, R. R. S. 1943, was regulatory and in the nature of a penal statute. It did

not grant a new civil remedy against real estate brokers in addition to the penalties imposed by statute.

2. **Brokers: Contracts: Principal and Agent.** Where a real estate broker has paid over a buyer's deposit or downpayment on a real estate contract to the broker's disclosed principal, or in good faith changed his position before he learns of the buyer's claim or demand for refund, the broker cannot be held liable for the return of the funds in the absence of an intention to impose personal liability on the broker as shown by the circumstances and the agreement of the parties.

Appeal from the District Court for Madison County: GEORGE H. DITTRICK, Judge. Affirmed.

William E. Naviaux of Corrigan, Naviaux, Kinney & Titus, and George H. Moyer, Jr., of Moyer, Moyer, & Egley, for appellants.

Kirby, Duggan & McConnell, for appellees Cuhel et al.

John M. Thor of Grady, Caskey & Thor, and Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellees Thor and Jenkinson.

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

MCCOWN, J.

This is an action to recover a payment made to a real estate broker by a buyer in connection with a real estate purchase and sale contract. The plaintiff buyer sought to recover against three defendants, the sellers, the real estate broker, and the real estate salesman. The broker and the salesman filed motions for summary judgment. The District Court granted the motions for summary judgment and dismissed the action against the broker and the salesman. The plaintiff buyer has appealed. The action against the sellers remains pending in District Court.

On March 21, 1969, Otto and Martha Cuhel listed their 400-acre farm for sale with John Thor, doing busi-

ness as Thor Agency, in Norfolk, Nebraska. Sometime thereafter, through the efforts of Robert Jenkinson, a salesman for the Thor Agency, Robert L. and Judith A. Eggerling became interested in the property. Sometime before May 8, 1969, the Eggerlings made an offer to purchase the property on a purchase offer form, but the offer was rejected by the Cuhels. On May 8, 1969, the Eggerlings signed a contract to purchase the property and delivered to the agency a check for $4,000. The check was payable to the Thor Agency trust account, and marked "Down pymt. Knox Co. Farm." The check was deposited in the Thor Agency trust account. On May 19, 1969, the real estate broker and the salesman took the contract to the Cuhels' home in O'Neill, Nebraska, and the Cuhels signed and acknowledged the contract. At that time the broker gave the Cuhels a check for $2,300 drawn on the Thor Agency trust account, which was the $4,000 deposit minus the 5 percent commission of $1,700. The $1,700 commission was later split evenly between the broker and the real estate salesman Jenkinson.

The contract between the Cuhels and the Eggerlings provided for a purchase price of $34,000, "payable as follows:

"(a) The sum of $4,000.00 deposited herewith and the sum of $2,000.00 to be paid by buyers to sellers on or before January 1, 1970."

The balance of $28,000 was payable by buyers assuming an FHA loan of $12,000, with the $16,000 balance to be payable over a period of 20 years, beginning January 1, 1971. The sellers agreed to furnish an abstract of title showing good and merchantable title to the sellers, except for the FHA loan, within 1 year of the date of the contract, and a warranty deed was to be delivered into escrow for delivery to the buyers at such time as the terms and conditions of the contract had been fulfilled. Possession was to be delivered on January 1, 1970.

After the contract was executed between the par-

ties, the Eggerlings determined that the Cuhels did not hold the mineral rights to the land and the FHA mortgage could not be assigned by the sellers nor assumed by the buyers under FHA regulations. The Eggerlings made no payment on January 1, 1970, and possession was not transferred. Negotiations to work out the problems continued until 1972. In May of 1972, the Cuhels sold 57 acres of the property to another buyer and the Eggerlings then brought this action against the Cuhels, the broker, and the real estate salesman for the recovery of the $4,000 downpayment deposit.

Plaintiffs contend that the District Court erred in sustaining the motions for summary judgment by the broker and the salesman, and rely on section 81-875.01, R. R. S. 1943. That statute in pertinent part provided: "(1) Each broker shall maintain a separate bank account which shall be designated a trust account wherein all downpayments, earnest money deposits or other trust funds received by the broker or his salesman on behalf of his principal or any other person shall be deposited * * * * * *

"(6) A broker shall not be entitled to any part of the earnest money or other money paid to him in connection with any real estate transaction as part or all of his commission or fee until the transaction has been consummated or terminated."

The statute by its terms applied only to brokers and to brokers' trust accounts. In the case before us, the salesman, Robert Jenkinson, received the $4,000 check and promptly delivered it to the broker. The statute imposed no responsibility on the salesman and the evidence is undisputed that the salesman was acting only as an agent for a disclosed principal. Under such circumstances, Jenkinson had no independent individual liability to the buyers under the statute or otherwise. The action of the District Court in granting motion for summary judgment in favor of Jenkinson was clearly proper.

Section 81-875.01, R. R. S. 1943, was regulatory and in the nature of a penal statute. Penalties for its violation involved suspension or revocation of licenses under section 81-881, R. R. S. 1943. There is no indication that the Legislature intended to create a new civil remedy against real estate brokers in addition to the penalties imposed by statute, and under such circumstances the statute should be construed narrowly and not expansively. See Trott v. Hild, 190 Pa. Super. 85, 151 A. 2d 832.

Even if the statute was deemed to have created a new civil cause of action, the statute under its terms did not apply after the transaction had been consummated or terminated. In that connection it should be noted that it is tacitly conceded in this case that the broker was entitled to his commission on May 19, 1969, when the downpayment had been paid and the contract signed by both parties. Insofar as the broker was concerned, the transaction had been consummated at that time.

In the absence of statute, courts have taken different views with respect to a broker's liability to a prospective purchaser for a refund of a deposit or earnest money when the contract of purchase later fails because of a defect in the seller's title or for other causes which would entitle the purchaser to rescind.

In Huffman v. Newman, 55 Neb. 713, 76 N. W. 409 (1898), an agent for disclosed sellers signed a sales agreement for them and accepted a downpayment of $100 from the purchaser. The agent then reported the sale to the sellers, sent them a deed to sign, and advised them that he had received the downpayment and applied it on his commission. The sellers had already approved a different sale by another agent and the premises were never conveyed to the buyer. The buyer brought an action against the agent to recover the $100 downpayment. This court held that the agent was not liable to the buyer, either in an action for conversion or for money had and received. The basis of the holding was

that where the name of the principal was disclosed, the contract was that of the principal and not of the agent. While that case is not determinative of the modern state of the law, it does touch upon the critical issue of whether the deposit or earnest money had been paid to or became the property of the sellers before or after notice of the buyer's claim or demand for refund. We think the better view to be that where a real estate broker has paid over a buyer's deposit or downpayment on a real estate contract to the broker's disclosed principal, or in good faith changed his position before he learns of the buyer's claim or demand for refund, the broker cannot be held liable for the return of the funds, in the absence of an intention to impose personal liability on the broker as shown by the circumstances and the agreement of the parties. See, Restatement, Agency 2d, § 339, p. 97; 3 Am. Jur. 2d, Agency, § 335, p. 693; 12 C. J. S., Brokers, § 144, p. 353; Annotation, 38 A. L. R. 2d 1382, and cases there cited. Neither the contract nor the circumstances here indicate an intent to impose personal liability on the broker for his principals' default, nor to make him a stakeholder trustee until merchantable title can be established.

On the record here the sellers became entitled to the $4,000 downpayment or deposit when they signed and acknowledged the contract on May 19, 1969. The broker, with the knowledge and consent of the sellers, retained $1,700 of the $4,000 as his earned commission, and paid $2,300 to the sellers. He then paid his salesman one-half of the commission. The practical effect of the transaction was no different than if the broker had paid the entire $4,000 to the sellers and taken their check for his $1,700 commission. Either way, the sellers received cash or credit from the broker for the entire $4,000. There is no allegation nor evidence of fraud or bad faith on the part of the broker or the salesman. Any liability to the buyers for the return of the $4,000

downpayment deposit now rests with the sellers, and that case remains in the District Court.

The action of the District Court in sustaining the motions for summary judgment on behalf of the broker and salesman was correct and the judgment is affirmed.

AFFIRMED.

NORVAL BRANDT, APPELLANT, V. LYLE MAYER ET AL., APPELLEES.

246 N. W. 2d 203

Filed October 20, 1976. No. 40509.

1. **Motions, Rules, and Orders: New Trial.** The purpose of a new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceedings.
2. **Motions, Rules, and Orders: New Trial: Judgments.** Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the modified judgment is not required.
3. **Appeal and Error: Courts: Judgments: Evidence.** It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict.
4. **Trial: Judgments.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

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

Crosby, Guenzel, Davis, Kessner & Kuester and Jeffrey A. Knoll, for appellant.

Pierson, Pierson & Fitchett, for appellees.

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

SPENCER, J.

This is an action by Norval Brandt, a contractor, to recover a balance due on an oral contract to construct a residence for defendants, Lyle and Manette Mayer. The issue tried was whether the oral agreement was made on a cost-plus basis. The trial court determined plaintiff failed to prove a cost-plus agreement. The trial court further found plaintiff also failed to prove the reasonable value of overhead and profit. Judgment was rendered for plaintiff in the amount of $4,432.92. Plaintiff appeals. We affirm.

After trial, the court determined plaintiff and defendants entered into an agreement to build a residence on a cost-plus contract. On that basis, he rendered a judgment for $8,176.90. After arguments on a motion for a new trial and a review of the record, the trial court amended its original judgment to reflect the judgment on appeal herein.

Plaintiff is a building contractor. In early 1970, he contracted with the defendants to build a new home for them. The Mayers had a set of plans for the construction of this home. In reviewing those plans, the parties decided a new set of plans should be prepared. Brandt had a set of plans prepared in accordance with the discussion of the parties. During these discussions Brandt told the Mayers that based on the early plans the home should cost somewhere in the neighborhood of $30,000 to $32,000. At no time, however, was there ever any agreement with reference to a fixed price for the home.

Brandt argues the final agreement was a cost-plus 10 percent profit contract. Defendants deny the words "cost-plus" were ever used in their discussions. Brandt requested the Mayers make monthly payments to him after construction commenced in order that he might be able to pass the material discounts he would receive for making early payments to his suppliers along to them. As the construction proceeded many extras not

reflected in the original plans were added to the home. Some of these items include special kitchen cabinets, a movable wardrobe; a finished basement, including a fireplace; an inside access garage door; and other items.

Brandt testified that throughout the entire project he supervised and managed the construction. He made sure his subcontractors knew what was to be done and how it was to be done. In determining his fixed labor costs, such as Social Security, insurance, etc., a flat fee was included in the labor charges which were paid as they were incurred on the monthly basis. Monthly payments by the Mayers were determined on the amount of material and labor supplied the previous month. Brandt would figure these amounts at the end of the month and bill the Mayers shortly thereafter.

After the Mayers moved into the home there were minor problems which were all corrected. Approximately 8 months after they moved into the home, Brandt sent them a final bill. It was at this point the dispute arose. At the request of the Mayers, Brandt submitted a list of the extras, together with the estimated additional cost of such extras. By this method the original estimate of $30,000 or $32,000 was increased to $43,800 or $45,800. The amount paid by the Mayers to Brandt totalled $30,900. Additionally, the amount paid by defendants directly to suppliers totalled approximately $9,800. The total amount paid by the Mayers for construction as of the time of the trial was approximately $40,700. Plaintiff's action was to recover $8,484.70.

The action was tried to the court without a jury. Judgment was originally entered for the plaintiff Brandt in the sum of $8,176.90. Upon defendants' motion for a new trial, the court reconsidered the evidence, made revised findings of fact, and entered an amended judgment for the plaintiff of $4,432.92. He sustained defendants' motion for a new trial to the extent set forth in the amended judgment.

Defendants contend it was necessary for the plaintiff to file a motion for a new trial before processing this appeal. We determine it was not. The purpose of a new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceeding. Engel v. Mead (1974), 191 Neb. 541, 216 N. W. 2d 718.

The court did correct alleged errors on defendants' motion for a new trial. Another motion for a new trial would merely address the same points already passed on in the defendants' motion for new trial. To again require the trial court to review the record would be a useless gesture. We hold the appeal is properly before us. Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the modified judgment is not required.

Plaintiff states in his brief: "The evidence adduced at trial clearly indicates that the Mayers' home was built by Mr. Brandt under an oral contract on a 'cost-plus' basis." However, at no place in his brief does he call our attention to the evidence which so clearly indicates. In our review of the record, we are in agreement with the trial court. The evidence does not support the finding of a cost-plus arrangement.

Plaintiff relies on Jensen v. Manthe (1959), 168 Neb. 361, 95 N. W. 2d 699, to support his argument there was a cost-plus agreement. There, we affirmed the judgment of the trial court which found the parties had orally agreed to the construction of a house on a time and materials cost basis. The court there rejected the argument that the contract was for a fixed price, pointing to the fact that construction was begun without complete plans and specifications. The defendants there not only selected the materials to be used but also selected and paid the subcontractors. While some of the facts may be analogous, that case is distinguishable and not controlling herein. The issue was whether

the agreement was for the construction of the house for a fixed price or for construction of the house on a time and material cost basis. The trial court from the evidence found the latter. This court following well-established rules affirmed. It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict.

Here, the record does not disclose any discussion about building on a cost-plus basis. Plaintiff testified the agreement was the house would be built the same way as a neighbor's house had been, but nothing was said about cost. The neighbor's house was built for cost-plus 10 percent. Mr. Mayer testified he did not know what arrangement the neighbor had for the payment of his house, and plaintiff never made any reference to its cost. He further testified cost-plus was never mentioned in the discussions. Plaintiff testified there was no discussion between the parties about arrangements for payment during the course of construction. The monthly statements contain no indication that billing was to be on a cost-plus basis.

Plaintiff relies on the case of Timmons v. Nelsen (1954), 159 Neb. 193, 66 N. W. 2d 406, where this court found a cost-plus contract. There, however, the facts showed an unexecuted written contract was prepared on a cost-plus 10 percent basis. Further, the monthly statements contained a 10 percent charge which was designated as "profit." None of these factors are present in the instant case.

Plaintiff further argues that even if he failed to prove the home was constructed on a cost-plus basis, he should be permitted to recover for the reasonable value of his overhead and profit. The difficulty with this contention, as the trial court found, is there is no evidence in

the record to establish the reasonable value of his overhead and profit.

There is nothing in the record to even suggest a 10 percent charge for overhead and profit except the final statement rendered by the plaintiff which brought on the dispute. Plaintiff argues the value of his services can be inferred from this statement. He argues it was defendants' burden to show the charge to be unreasonable. In the statement, the plaintiff itemizes items of labor and material for a total of $35,557.92. He then adds "Overhead and Profit," $3,556.78, which is approximately 10 percent. He then adds "5% on Plb. & Heat & Elec" $270. He then shows a total of $39,384.70. These two additions are the items which were disputed. It was the plaintiff's burden to show the reasonable value of these charges.

We do not believe the reasonableness of the charges can be inferred from its mere presence on a statement which is disputed as soon as it is rendered. No attempt was made to show what these charges actually covered. No testimony was adduced on plaintiff's overhead. Even in the statement there is a difference in the charge — 10 percent in one instance, 5 percent in another. Plaintiff explains this by saying although he supervised the installation of the plumbing and heating, he only charged 5 percent because the defendants made direct payments to the subcontractor.

In Sorensen Constr. Co. v. Broyhill (1957), 165 Neb. 397, 85 N. W. 2d 898, where quantum meruit recovery for labor and materials was permitted, the court said: "As to supervision there is no evidence as to the amount required or reasonable value. * * * Attention has not been called to any rule that would allow a recovery of profit in a case such as the one presented by this record. This is not to say that profit may not be an element of recovery in an action based upon a cost-plus agreement." In Broyhill recovery on quantum meruit was allowed for labor and material, but a 10 percent

charge for supervision was not allowed because of failure of proof.

The case below was tried to the court. Our rule is well-established. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority (1974), 192 Neb. 643, 223 N. W. 2d 816.

For the reasons given, we affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUFUS VON SUGGS, APPELLANT.
246 N. W. 2d 206

Filed October 20, 1976. No. 40521.

1. **Criminal Law: Trial: Evidence.** Circumstantial evidence which is substantial is sufficient to support a finding of guilty.
2. **Criminal Law: Searches and Seizures: Stop and Check.** Informal detention for the purpose of investigation may be lawful even though probable cause sufficient to authorize a formal arrest may not exist.
3. ———: ———: ———. 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.

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

John J. Battershell, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of burglary and sentenced to imprisonment for 3 to 10 years. He has appealed and contends the evidence is not sufficient to sustain the conviction; that the trial court erred in failing to sustain his motion to suppress and his motion for a continuance; and in failing to give a requested instruction.

The State produced evidence from which the jury could find that the Indianola Cafe in Indianola, Nebraska, was burglarized during the early morning hours of April 4, 1975. A cigar box containing more than $100 in coins, several receipts, and several bad checks that had been returned to the cafe was taken. More than $100 was taken from the cash register. On the evening of April 3, the defendant had been seen behind the cafe looking at the rear door of the cafe. Later that same evening he drank two bottles of beer in the cafe. He was apprehended at Bartley, Nebraska, the next day with the cigar box and part of its contents in his possession. He also had $49 in his billfold and $81 in currency wrapped in a paper towel concealed in his trousers.

Although much of the evidence was circumstantial, the evidence of the State was substantial and, if believed, was sufficient to sustain a finding of guilty beyond a reasonable doubt. In a criminal case it is not the province of this court to determine the credibility of witnesses or weigh the evidence.

The motion to suppress was directed at the items of evidence found in the possession of the defendant at the time of his arrest on April 4, 1975.

The record shows that after the burglary was discovered the sheriff was notified and a criminal investigator for the state patrol came to Indianola to assist with the investigation. While the patrolman was conducting his investigation, Shirley Miner, the daughter of the cafe owner and the employee who had discovered

the burglary, reported to the patrolman that Kenneth Burke, a resident of Bartley, Nebraska, and a student at the McCook Community College, had seen an older man, kind of thin, grey haired, and not too tall in the Bartley Cafe in Bartley, Nebraska, with a cigar box that appeared to have change in it. The patrolman immediately drove to Bartley, Nebraska, where he found the defendant hitchhiking on the east side of Bartley. The patrolman, who was not in uniform, stopped his automobile, which was unmarked, and the defendant entered the automobile. The defendant was carrying a brown paper sack which appeared to contain a cigar box.

The patrolman inquired as to where the defendant had been and where he was going. The defendant replied that he had been in Denver and was going to Holdrege, Nebraska. In response to an inquiry as to what was in the sack the defendant said "personal belongings." The patrolman then stopped the automobile, identified himself, and asked for identification. The defendant produced a slip of paper with his name written on it.

The patrolman advised the defendant of his "Miranda rights" and then said that the defendant would have to return to McCook, Nebraska, so that the patrolman could find out who he was and what was in the sack. The patrolman made a quick search for weapons and found a 4-inch knife in the defendant's pocket. When ordered to produce the knife the defendant removed it from his pocket and opened the blade. The defendant refused to surrender the knife and warned the patrolman not to reach for his gun. After a brief struggle the patrolman disarmed the defendant, handcuffed him, and then took him to the patrol office in McCook.

At McCook the sack was opened and found to contain the cigar box stolen from the Indianola Cafe. Inside the cigar box were loose coins, coins in wrappers,

the bad checks belonging to the cafe, and the receipts.

The defendant contends that both the arrest and search of the defendant were illegal. The officer had no warrant so the justification for the search in this case rests upon the validity of the arrest. The officer knew that a felony had been committed. The question is whether the officer had probable cause to believe the defendant had committed the burglary.

The item which connects the defendant to the burglary is the cigar box. Upon receiving the report that a man had been seen in Bartley that morning carrying a cigar box with change in it, it was reasonable for the patrolman to conclude the man might have some connection with the crime and he should be located and questioned. When the patrolman found the defendant on the highway on the east side of Bartley, and he fitted the description and appeared to be carrying a cigar box in a paper sack, it was reasonable for the patrolman to detain the defendant and question him concerning his identity and the contents of the paper sack.

Informal detention for the purpose of investigation may be lawful even though probable cause sufficient to authorize a formal arrest may not exist. § 29-829, R. R. S. 1943; State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321; Stage v. Goings, 184 Neb. 81, 165 N. W. 2d 366. Whether such a detention is reasonable depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607.

In Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612, the United States Supreme Court said: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response.

See id., at 23, 88 S. Ct., at 1881. *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.* Id., at 21-22, 88 S. Ct., at 1879-1880; see Gaines v. Craven, 448 F. 2d 1236 (CA9 1971); United States v. Unverzagt, 424 F. 2d 396 (CA8 1970)." (Emphasis supplied.)

In this case the defendant was a transient. If the patrolman had not proceeded immediately to Bartley, Nebraska, and apprehended the defendant, it is probable that the defendant would have escaped detection, the evidence of the crime which he had in his possession would have been lost or destroyed, and the victims would not have recovered any of the money that was stolen. The circumstances fully justified an informal detention of the defendant.

After the defendant had entered the patrol car and was unable to produce satisfactory evidence of his identity and refused to disclose the contents of the paper sack, a further detention was reasonable. When the limited search of the defendant's person disclosed the knife which the defendant refused to surrender and used to threaten the officer, probable cause for the arrest of the defendant existed. It was at that time that the patrolman disarmed the defendant, handcuffed him, and took him to patrol headquarters at McCook. The search of the paper sack which was made at that time was incident to a lawful arrest and was authorized. The motion to suppress was properly overruled.

The motion for a continuance was based upon an alleged failure of the county attorney to comply with a discovery order. The discovery motion requested an order allowing the defendant to inspect, copy, or photograph certain documents. The discovery motion was sustained on August 19, 1975, and the record indicates the documents were available to defendant's counsel at the office of the county attorney within the time speci-

fied by the trial court but defendant's counsel failed to call at the county attorney's office to inspect the documents. There was nothing in the order which required the county attorney to deliver the documents to defendant's counsel and there is no showing of any failure by the county attorney to comply with the discovery order. The record also fails to show any prejudice to the defendant. We find no error in failing to grant the continuance.

The requested instruction which was refused related to the force necessary to constitute a breaking and entering. Apparently, the defendant thought the jury might be confused and find him guilty because he had entered the cafe and purchased two bottles of beer during regular business hours on the evening of April 3, 1975. The requested instruction stated in substance that entrance into a business establishment during regular business hours to conduct business is not an act of physical force by which entrance is gained.

The trial court instructed the jury fully and completely concerning the elements of burglary. It was unnecessary to instruct the jury as to what was not burglary. The refusal to give the requested instruction was not error.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIS PARKER, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. ARMSTEAD H. PIERCE, APPELLANT.

246 N. W. 2d 210

Filed October 20, 1976. Nos. 40533, 40534.

1. **Kidnapping: Statutes: Criminal Law.** Kidnapping includes unlawful imprisonment or a holding against the will of the person held for the purpose of compelling the performance of any

act by such person. § 28-417, R. R. S. 1943.

2. **Rape: Trial: Evidence: Criminal Law.** In a prosecution for rape, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent.

3. **Attorney and Client: Criminal Law.** In the absence of conflicting interests, two or more defendants may be represented by the same counsel in a criminal prosecution.

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

Bruce G. Mason of Ross & O'Connor, for appellants.

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

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

BOSLAUGH, J.

The defendants, Willis Parker and Armstead H. Pierce, were separately charged with kidnapping and rape. The cases were consolidated for trial in the District Court and were consolidated for briefing and argument in this court. The jury returned verdicts of guilty on all counts and the defendants have appealed.

The offenses were committed on June 1, 1975, before the repeal of section 28-408, R. S. Supp., 1974, became effective.

The prosecuting witness was 18 years of age. She testified that she and her nephew, who was 2 years old, had gone to a grocery store in Omaha, Nebraska. When they arrived at the grocery store it was closed. As they were leaving the parking lot an automobile driven by the defendant Pierce drove into the parking lot and pulled up next to her. While Pierce tried to engage her in conversation, the defendant Parker got out of the car, picked up her nephew, and placed him in the back seat of the automobile. Parker then told her she had to go with them because they had her nephew in the car.

The prosecuting witness entered the front seat of the car and Parker got in the back seat with the nephew. After driving around for a while, Pierce stopped at a liquor store and obtained some wine. He then drove to a house near 28th and Miami Streets, rented by a brother of Pierce, and all four of them went into the house.

The defendants drank some of the wine and smoked some marijuana cigarettes. Pierce asked the prosecuting witness to dance with him so she danced with him for a while. When she tried to leave the house one of the defendants grabbed her and threw her in a chair and threw the nephew on a couch. She fought with the defendants and scratched them, and bit Parker when he tried to kiss her. Finally Pierce took her into the bedroom, pushed her onto the bed, and told her to take her clothes off. When she refused, Parker came into the bedroom and said he would throw her nephew down the stairs if she didn't do what they wanted. Pierce had sexual intercourse with her first and then Parker had sexual intercourse with her. When they had finished the defendants took her to 40th and Pratt Streets.

The prosecuting witness called one of her teachers from a friend's house near 40th and Pratt Streets and asked her to come and get her. When the teacher and her husband arrived the prosecuting witness told them she had been raped, related the details of the offense, and pointed out the house where it had occurred. When she arrived home she told her mother she had been raped and related the details of the offense. The police were called and came to her home where they interviewed her. She was examined at the University of Nebraska Medical Center and sperm was found in her vagina.

The evidence which has been summarized was clearly sufficient, if believed, to sustain the finding of guilty of kidnapping and rape as to each defendant. Under section 28-417, R. R. S. 1943, kidnapping includes unlaw-

ful imprisonment or a holding against the will of the person held for the purpose of compelling the performance of any act by such person. The testimony of the prosecuting witness as to the rape was fully corroborated.

Both defendants testified and admitted they had sexual intercourse with the complaining witness but claimed they used no force and that it was with her consent. Their testimony and the testimony of other witnesses called in their behalf was in conflict with the evidence of the State in many details. The evidence presented questions of fact for the jury which resolved these questions against the defendants. It is not the province of this court to resolve conflicts in the evidence or to weigh the evidence.

The defendants contend the evidence was not sufficient to support the conviction for rape because it failed to show sufficient resistance on the part of the prosecuting witness. The defendants cite Oleson v. State, 11 Neb. 276, 9 N. W. 38.

In the Oleson case this court said that a prosecutrix in possession of her natural mental and physical powers must resist to the extent of her ability unless terrified by threats or in such a position that resistance would be useless. In State v. Campbell, 190 Neb. 22, 206 N. W. 2d 53, we said: "Where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the female's opposition and lack of consent. It is only required that the female make reasonable resistance in good faith under all the circumstances, and that the resistance be such as to make nonconsent and actual opposition genuine and real."

Parker and Pierce were 22 or 23 years of age. Although the prosecuting witness had no real possibility of overpowering the defendants, she did struggle with them, biting and scratching when they refused to allow her

to leave the house on Miami Street. Perhaps more importantly, the defendants held the 2-year-old nephew as a hostage and threatened to harm him if the prosecuting witness did not satisfy their demands. The evidence was sufficient to permit the jury to find that the prosecuting witness had made reasonable resistance in good faith under the circumstances of the case.

The other assignment of error relates to the fact that the defendants were represented by the same attorney at the trial. The defendants contend they were denied effective assistance of counsel because their defense involved conflicting interests.

There was no objection made in the trial court to the consolidation of the cases for trial or to the representation of both defendants by one lawyer.

The claim of a conflict in interest is based, primarily, upon a pretrial statement by Pierce to the police in which Pierce stated that no one was with him when he was with the prosecuting witness. Pierce admitted on direct examination that the statement was untrue and said that he had made the statement in an effort to protect Parker, his cousin, who was married.

The statement was not prejudicial to Parker because he admitted that he had sexual intercourse with the prosecuting witness. The issue was consent, not whether Parker had participated in the offense. There was no conflict of interest which prevented Parker from having a fair trial.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEITH S. MARION, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. KEITH MARION, APPELLANT.

246 N. W. 2d 212

Filed October 20, 1976. Nos. 40555, 40816.

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

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

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BOSLAUGH, J.

Although separate appeals, these cases were briefed and argued together in this court. The defendant was charged with robbery in case No. 40555 and with assault with intent to inflict great bodily injury in case No. 40816. Upon pleas of guilty he was sentenced to imprisonment for 3 to 9 years on the robbery charge and to 5 years imprisonment on the assault charge, the sentences to run consecutively. Upon appeal the defendant contends the sentences are excessive.

The defendant was 17 years of age at the time the robbery took place. He had enlisted in the military service on February 12, 1975, and had received an undesirable discharge on May 1, 1975.

On October 22, 1975, the defendant was driving an automobile that had been stolen from a dealer's lot 3 days earlier. When the automobile broke down the defendant asked the attendant at the L & M Tow Lot to repair the automobile. When the attendant said that the automobile could not be repaired until the following day, the defendant and his three companions assaulted the attendant and robbed him.

The assault with intent to inflict great bodily injury took place at the Douglas County sheriff's youth center on November 14, 1975. The defendant and several other prisoners assaulted two guards in an attempt to escape. The assault involved striking a guard with a television set and a steel table top and choking him with an electrical cord until he was unconscious. The guard stated that the prisoners intended to kill him.

The defendant has demonstrated that he is a violent person with no regard for the rights of others. There is no basis in the record upon which the sentences imposed could be said to be excessive.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDDIE ADDISON, APPELLANT.
246 N. W. 2d 213

Filed October 20, 1976. No. 40596.

1. **Criminal Law: Forgery.** The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud.
2. **Criminal Law: Trial: Evidence.** An essential element of a crime may be proved solely by circumstantial evidence.

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

Charles Plantz, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

CLINTON, J.

The defendant was found guilty by a jury on a charge of having, on December 27, 1974, uttered a forged instrument. He was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex with credit being given for 102 days jail time served while awaiting trial. On this appeal he asserts the insufficiency of the evidence to support the jury verdict. This contention rests on two grounds: (1) The evidence does not establish the defendant's identity as the utterer; and (2) the evidence does not show the defendant knew the instrument was forged.

The State's evidence shows the check in question was drawn on the Stockmen's National Bank, Rushville, Nebraska, in the amount of $40, and bore the name of Eddie Addison as payee and the name of Jack Smith as maker. The State's first witness, a bartender, testified that on December 27, 1974, the defendant, a man whom he knew and had known for a period of 2 or 3 years as Eddie Addison and whom he had seen 1 week before December 27 in the bar where the witness worked, presented the check to him in payment of a purchase. At that time the defendant stated the check had been given to him by Jack Smith as lease money. The check itself bore the notation for labor. The witness was acquainted with one Jack Smith. The witness further testified that in the witness' presence the defendant endorsed the check with the name of Eddie Addison. The witness then gave the defendant the merchandise which he had purchased and cash for the difference between the purchase price and the amount of the check.

The above testimony was clearly sufficient to make a jury question on the identity of the defendant as the utterer.

The State's evidence further showed the check was, on the day following December 27, 1974, included in the deposit of the bar made to the Stockmen's National Bank, Rushville. The assistant cashier of the bank, who

knew Jack Smith, testified the bank returned the check to the bar unpaid because the account of Jack Smith at the bank had earlier been closed and the signature was not that of Jack Smith. She testified she knew the signature of Jack Smith and had also compared the purported signature on the check with that of Jack Smith on an old signature card at the bank.

Jack Smith was called as a witness. He was a longtime resident of the area. He testified he had not made the check in question, had not authorized anyone to affix his signature thereto, and that the signature thereon was not his. He was personally acquainted with the defendant Eddie Addison as they had participated in bronc riding together and he had known him for a long time. He had not given Addison the check. This witness further stated he was the only Jack Smith who lived in that area. The assistant bank cashier testified that this witness was the only Jack Smith in the area and that the bank had no account for him or any other Jack Smith. The defense did not present the testimony of any person purported to be the maker of the check, nor any evidence that there was any other Jack Smith residing in the area. The above evidence is clearly sufficient to establish circumstantially that the defendant knew the check was a forgery.

The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. An essential element of a crime may be proved solely by circumstantial evidence. State v. Fox, 192 Neb 424, 222 N. W. 2d 121.

The State's evidence in this case does not suffer from the deficiencies of proof which existed in State v. Addison, 191 Neb. 792, 217 N. W. 2d 468.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED A. RONFELDT, APPELLANT.
246 N. W. 2d 215

Filed October 20, 1976. No. 40607.

1. **Criminal Law: Sentences: Probation and Parole.** An order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion.
2. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

D. L. Pelton, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

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

BRODKEY, J.

Defendant Ronfeldt appeals a sentence of 2 to 5 years in the Nebraska Penal and Correctional Complex imposed upon him by the District Court for Sarpy County following his plea of guilty to an amended charge of burglary of 15 color television sets and one microwave oven, claiming that the sentence was excessive and constituted an abuse of discretion on the part of the sentencing court. He was originally charged with felonious entry in violation of section 28-533, R. R. S. 1943, which provides for imprisonment for not less than 3 nor more than 20 years; but as a result of plea bargaining with the deputy county attorney, he was arraigned and plead guilty to an amended charge of burglary under section 28-532, R. R. S. 1943, which carries a possible penalty of not more than 10 years nor less than 1 year, or by a fine not exceeding $500, or imprisonment in the jail of the county not exceeding 6 months. We affirm.

Defendant is 24 years of age, divorced, and the father of a child. He claimed the whereabouts of his wife and child were unknown to him, but alleges in his brief that his wife was supportive of him during this criminal proceeding. Prior to the offense involved herein, he was more or less regularly employed in a woodworking firm in Council Bluffs, Iowa. Although his record reveals no prior felony convictions, it reflects previous criminal behavior, including assault and battery, intoxication, drunk driving, and contempt of court, all being misdemeanors. Defendant claims that these prior offenses arose out of altercations with his former wife, and were due to problems related to the use of intoxicating liquors during 1973 and 1974, at which time his marriage was breaking up. In April 1975, he was ordered by the divorce court to pay child support but has completely failed to do so. Although he attempts to explain his failure as caused by interruptions in his employment, it does not appear that he ever made any such payments, even while employed. After repeated failures to appear for conferences with his probation officer, the court found it necessary to issue a bench warrant in order to obtain the necessary information for the presentence report. His explanation for these failures to appear was that he had no transportation, but the record contains no explanation for his failure to attempt to contact his probation officer in some other manner, such as by telephone.

The defendant contends, notwithstanding, that he should have been placed on probation, or at least received a lesser sentence. At its sentencing of the defendant, the trial court specifically found that the defendant would engage in additional criminal conduct if placed on probation, or that a lesser sentence than imprisonment would depreciate the seriousness of the offense and promote disrespect for the law.

The applicable rules of law are well settled. The action of a trial court in denying probation and im-

posing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974); State v. Keen, *ante* p. 291, 242 N. W. 2d 863 (1976). A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears on the record. State v. Atwater, 193 Neb. 669, 228 N. W. 2d 876 (1975); State v. Painter, 195 Neb. 183, 237 N. W. 2d 142 (1976).

There was no abuse of discretion on the part of the trial court, and its sentence should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAY M. APPLEGARTH, APPELLANT.
246 N. W. 2d 216

Filed October 20, 1976. No. 40617.

1. **Criminal Law: New Trial: Time.** The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day.
2. **Administrative Law: Motor Vehicles.** The certification of a copy of an order suspending a motor vehicle operator's license is a ministerial act.
3. ———: ———. Administrative authority vested in the Director of Motor Vehicles by the statute may be exercised in the name of the director by properly designated subordinates.
4. **Criminal Law: Records: Motor Vehicles: Trial: Evidence.** An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence.

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

Donald R. Hays, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

SPENCER, J.

Defendant, Jay M. Applegarth, was found guilty in municipal court of operating a motor vehicle while his operator's license was suspended. The District Court affirmed. Defendant prosecutes an appeal to this court, presenting two questions. (1) Whether section 60-418.01, R. R. S. 1943, requires personal certification by the Director of Motor Vehicles before a copy of the order of suspension of an operator's license can be admitted into evidence. (2) Whether the identity between the defendant and the person named in the order of suspension was sufficiently proved. We affirm.

We note defendant's motion for new trial was filed within 10 days from the date of the sentencing but not within 10 days from the date of the verdict. In State v. Lacy (1976), 195 Neb. 299, 237 N. W. 2d 650, we said: "The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day."

There has been confusion about this point. The appellee has not made it an issue herein. We again call attention to it, but decide the case on the issues presented.

Exhibit 1, a certified copy of the order of suspension and copies of abstracts of prior convictions, was introduced into evidence for the purpose of proving the defendant's license had been suspended. These copies carried the seal of the Department of Motor Vehicles. They were certified in the name of the director by Sidney L. McCartney, who was described as "Supervisor Driver

Records Office and the officer having custody of the records."

Defendant argues that a certified copy of an order suspending a motor vehicle operator's license to be admissible in evidence must be personally certified by the Director of Motor Vehicles. There is no merit to this assignment. See Lutjemeyer v. Dennis (1970), 186 Neb. 46, 180 N. W. 2d 679. We there held the revocation of a license to operate a motor vehicle under the point system is a ministerial act. We also held administrative authority vested in the Director of Motor Vehicles by the statute may be exercised in the name of the director by properly designated subordinates. It should be apparent, and we so hold, if the revocation of the license in the first instance is a ministerial act, certainly the certification of a copy of the suspension order must be also.

Defendant for his second assignment argues the identity between him and the person named in the record was not sufficiently proved, because no evidence was submitted at the trial tending to show he was the same person as the person named in the record. Section 60-418.01, R. R. S. 1943, provides that a copy of the order revoking any motor vehicle operator's license for the privilege of operating a motor vehicle, duly certified and bearing the seal of the Department of Motor Vehicles, shall be admissible in evidence without further proof, and shall be prima facie evidence of the facts therein stated in any proceedings, civil or criminal, in which such suspension or revocation is an issuable fact.

Section 60-418.01, R. R. S. 1943, is analogous to section 29-2222, R. R. S. 1943, permitting proof of a prior conviction in an habitual criminal proceeding by the introduction of a copy of the former judgment. What we said in State v. Micek (1975), 193 Neb. 379, 227 N. W. 2d 409, on that point is controlling herein: "An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient

to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto."

We hold that an authenticated record, certifying the suspension of an operator's driving privilege is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. The defendant did not deny that he was the person named in the suspension order. Nor did he offer any contradictory evidence to that effect. There is no merit to his assignment.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARLOS DELEON, APPELLANT.

246 N. W. 2d 218

Filed October 20, 1976. No. 40637.

Criminal Law: Sentences. A sentence within the statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

SPENCER, J.

Defendant pled guilty to a charge of violation of pro-

bation. He was given an indeterminate sentence of 18 months to 3 years imprisonment in the Nebraska Penal and Correctional Complex. He prosecutes this appeal, alleging the sentence imposed was excessive. We affirm.

On August 14, 1975, the defendant was placed on 2 years probation for the offense of burglary. On December 2, 1975, the defendant pled guilty to violation of the terms of his probation. The violation charged was that defendant resisted and abused a Lincoln police officer when he was arrested for burglary and tried to escape. He was tried and convicted in county court for resisting an officer and for petit larceny.

Defendant was 18 years of age at the time he was sentenced. Presentence investigation reveals that he had trouble as a juvenile, at least since 1972. His juvenile record shows a charge of malicious mischief in 1972, and a charge of possession of stolen property and incorrigibility in 1973. In 1974, he was charged with breaking and entering, and theft.

Besides the burglary, which is the basis of his present appeal, he pled guilty in Lancaster County court on March 11, 1975, to concealing stolen property, and was placed on probation for 6 months. On April 16, 1975, he was arrested for the burglary of a residence. He was arrested again on October 26, 1975, for a burglary. A search of his room on October 27, 1975, turned up two checks belonging to the Y.M.C.A. where he worked, and narcotics paraphernalia.

The presentence report indicates that many attempts have been made to help the defendant without avail. It is apparent the District Judge, who previously had been very lenient with defendant, felt the time had come where imprisonment was the only answer. In view of defendant's record, the sentence imposed is on the lenient side. Our law is well settled. A sentence within the statutory limits will not be disturbed on appeal

unless there is an abuse of discretion. State v. Wright (1976), *ante* p. 377, 243 N. W. 2d 66.

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

AFFIRMED.

WHITE, C. J., not participating.
CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. ROYAL D. LEWIS, APPELLANT.
246 N. W. 2d 220

Filed October 20, 1976. No. 40709.

Appeal and Error: Criminal Law. Assignments of error on grounds available to the defendant in the District Court must first have been presented to the District Court.

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

Renne Edmunds of Knowles & Edmunds, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

WHITE, C. J.

This is a post conviction proceeding. The defendant plead guilty in the District Court to charges of robbery; shooting with intent to kill, wound, or maim; and use of a firearm in the commission of a felony. The defendant's plea was accepted by the District Court and he was sentenced. Thereafter, the defendant filed with the District Court a motion seeking to vacate and set aside his conviction and sentence, which was treated by the District Court as a motion for post conviction relief. Following a hearing, the defendant's motion was

denied. The defendant appeals. We affirm the judgment of the District Court.

In his brief, the defendant assigns as error and argues only that he was denied effective assistance of counsel. A review of the record reveals that the issue of effective assistance of counsel was not presented to the District Court. In his motion, the defendant raised several specific issues: An invalid guilty plea, guilty plea not voluntarily and understandingly made, illegal arrest and seizure, violation of his self-incrimination privilege, that statements given by him to the police were done so under duress and under the auspices of a plea bargain, that the District Court was biased against the defendant, and violations of his Miranda rights. Nowhere in his motion did the defendant raise or discuss the issue of effective assistance of counsel, nor was this raised at the hearing on the defendant's motion.

On appeal, the defendant is limited to a review of only those issues raised in the District Court. Effective assistance of counsel was not raised by the defendant below and is not reviewable by this court. See, State v. Taylor, 193 Neb. 388, 227 N. W. 2d 26 (1975); State v. Knowles, 192 Neb. 281, 220 N. W. 2d 30 (1974).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY LEO CRAPSON, APPELLANT.
246 N. W. 2d 221

Filed October 20, 1976. No. 40719.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

NEWTON, J.

Defendant plead guilty to a charge of rape involving his 14-year-old daughter. He was sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex. The sole issue on appeal is defendant's contention that the sentence is excessive.

Examination of the record reveals that no error of law appears and that the appeal is frivolous.

The judgment is affirmed. See Rule 20 and State v. Cohen, *ante* p. 523, 243 N. W. 2d 782.

AFFIRMED.

RUTH D. COZETTE, APPELLEE, V. GERARD J. COZETTE, APPELLANT.
246 N. W. 2d 473

Filed October 27, 1976. No. 40453.

1. **Divorce: Property.** Upon dissolution of a marriage where the parties cannot agree upon a division of property, it is incumbent on the court to make an order for such division of the property as is conscionable and fair under the circumstances of the marriage. § 42-366(2), (3), R. R. S. 1943.
2. ———: ———. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation irrespective of how legal title is held.

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

Fred J. Swihart, for appellant.

Albert L. Feldman of Stern, Harris, Feldman, Becker & Thompson, for appellee.

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

CLINTON, J.

This is an action for dissolution of marriage under the provisions of section 42-347 et seq., R. R. S. 1943. The court found that the marriage was irretrievably broken and entered an order dissolving the marriage and dividing the property of the parties. The respondent husband appeals and here contends that he should have been awarded a portion of the 7,828.8 shares of stock of the Guaranty National Bank of Huntington, West Virginia, which was held in the names of the parties as cotenants (whether as tenants in common or as joint tenants is not clear from the record), and which, by the decree, became entirely the property of the petitioner wife. This is the only issue presented for our consideration. We affirm the judgment of the trial court.

The parties were married in 1942 and at the time of the trial had been married for 33 years. Two sons of the marriage were then adults and self-supporting.

Under the terms of the decree the petitioner wife received (1) all the household goods and furnishings, (2) checking and savings accounts standing in her own name, (3) 400 shares of stock of the Huntington Steel and Supply Company, (4) 54 shares of stock of the Northern Natural Gas Company, (5) 144 shares of stock of Conagra, (6) promissory notes of the Christian Missionary Alliance in the amount of $20,000, the principal amount of which upon the death of the petitioner becomes the property of the Alliance, (7) 559.955 shares of stock of the Guaranty National Bank held in her name alone, (8) a 1972 Plymouth automobile, (9) any other personal property in her possession, and (10) the jointly held Guaranty National Bank stock previously mentioned.

The respondent husband was awarded personal prop-

erty in his possession as follows: (1) 2,234 shares of stock of various corporations, the shares of which are publicly traded, (2) an AT&T debenture, (3) various savings and checking accounts, (4) cash in his own safe deposit box, (5) a Beechcraft airplane, (6) Bell System savings account, (7) two life insurance policies on his own life, (8) a 1973 Tempest station wagon, (9) the home of the parties which had been jointly held, (10) 150 shares of AT&T stock, standing in the name of the parties as cotenants, and (11) $25,000 in cash to be paid by the petitioner to the respondent.

No alimony was awarded to either party. The value of the property awarded the respondent by the decree is about $165,000. The net value of the property awarded to the petitioner is about $420,000, of which value about $390,000 consists of the 7,828.8 shares of jointly held bank stock. The respondent is an engineer for Western Electric Company and at the time of trial had been employed by that company for 33 years. His annual salary at the time of trial was almost $25,000. Upon retirement he will receive a substantial pension as well as social security. The petitioner had not been employed to any substantial degree during the course of the marriage, but after the separation of the parties was employed by a religious organization on a part-time basis and was earning about $2,000 a year.

The 7,828.8 shares of bank stock is traceable to the following sources: (1) 66.66 shares, a gift from petitioner's grandmother; (2) 100 shares, a gift from petitioner's father; and (3) 100 shares acquired in 1960 from petitioner's grandmother in exchange for a promise by petitioner to pay an annuity. The sum of $6,034 was paid on this annuity before the death of the grandmother. Dividends from the bank stock were more than sufficient to pay this obligation. By virtue of stock splits and stock dividends the above-mentioned shares multiplied to the total previously set forth. From 1954 to 1974, dividends from the Huntington

Steel Company stock and the bank stock, plus dividends from a trust of the same bank stock of which petitioner was a beneficiary, amounted to about $235,000. From 1954 through 1973, respondent had income from his employment in the amount of $295,555. The family had additional income from the other stocks and bank accounts which have been previously mentioned which had been obtained through the investment of income.

Respondent contends that he should have been awarded 1,848 of the 7,828.8 shares because 60 of the original shares were at one time in his name alone and later transferred to cotenancy and that these shares, increased by the splits and dividends, amount to 1,008 shares. He further contends that he is entitled to an additional 840 shares as his half of the accumulated shares attributable to the original 100 shares acquired in consideration of the promise to pay the annuity.

The parties were unable to agree upon a division of the property. Therefore, it became incumbent upon the court to make such a division as it deemed conscionable and fair under all the facts and circumstances. § 42-366(2), (3), R. R. S. 1943. The trial court was entitled to consider the fact that the respondent's efforts contributed nothing to the acquisition of the bank stock. Even if the 60 shares of the stock were originally placed in respondent's name alone (and the record in our judgment does not justify that conclusion), the court was nonetheless entitled to consider that the source was a gift from the petitioner's family and not acquired through any effort of the parties. Furthermore, the evidence is such that the court could and probably did conclude that it was only because of the income from the stock and the trust that respondent was able to invest and accumulate the substantial amount of personal property standing in his own name and which was awarded to him by the decree. The record further justifies the conclusion (admitted by respondent) that the education of the two

sons was paid for either by gifts from petitioner's family, or income from the bank stock.

The evidence indicates that from 1971 to 1973 respondent contributed only $100 per month to petitioner's support and after that until their separation nothing at all; that his earlier contributions from his own income did not fully support the family and the difference was supplied from the bank dividends income. The record shows that respondent really has no need for the additional income which the shares he claims would give him. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation irrespective of how legal title is held. Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698.

The petitioner is awarded the sum of $1,500 for the services of her attorney in this court.

AFFIRMED.

PAMELA A. CHILESE, APPELLANT, V. LAWRENCE A. CHILESE, APPELLEE.
246 N. W. 2d 475

Filed October 27, 1976. No. 40475.

1. **Divorce: Parent and Child: Adultery: Infants.** While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the court in determining what is in the best interests of the child.
2. **Divorce: Parent and Child: Appeal and Error: Infants.** The discretion of the trial court with respect to awarding or changing the custody and support 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 Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Barlow, Johnson, DeMars & Flodman and Stephen L. Ahl, for appellant.

Friedman & Berry, for appellee.

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

WHITE, C. J.

This is an appeal from a divorce decree. The sole question presented here is the propriety of the custody award. We affirm the judgment of the District Court.

The parties were married on October 4, 1970. They are the parents of one child, Maya Terra Chilese, born October 15, 1971. The District Court found that the appellee was a fit and proper person for the permanent care, custody, and control of Maya, and that the appellant was not. The District Court further found and directed that it is in the best interests of Maya that permanent legal custody be placed with the juvenile probation office of Lancaster County and that physical custody be with the appellee, subject to the supervision of the juvenile probation office. Appellant was to be given reasonable visitation rights.

The record shows that both parents love their child, and that she loves both her parents. The record also shows, as is often the case, that neither parent is totally without faults, or totally without positive attributes.

At the time of trial, the appellee was steadily employed as an architect, earning adequate wages, and living in and maintaining the family home. This home is located a block and one-half from an elementary school, with many children of Maya's age in the neighborhood. The appellee comes from a large family. He has one sister who, along with her family, lives in Lincoln. The remainder of his family lives in Omaha, Nebraska, as does the appellant's mother. Maya enjoys her relatives and enjoys being with them and visiting them.

At the time of trial the appellant intended to move with Maya to Burlington, Vermont, where she would work towards a graduate degree in psychology. Maya has no relatives in Vermont, however, the appellant testified that she anticipated making friends there.

The record shows that the appellant had sexual relations with an individual other than her husband between the time they were married and before the filing of the petition for dissolution of marriage. Following the separation of the parties, the appellant had sexual relations with several persons including Bill Zetterman. She testified that she had slept with Mr. Zetterman several times in her apartment, while Maya was present, asleep, and that during these times Maya could have gotten up for some reason and observed them together. The appellant testified that Mr. Zetterman planned to follow her to Vermont. Concerning their planned relationship in Vermont, the appellant testified that, while Mr. Zetterman would not live under the same roof, there probably would be times when he would spend the night with the appellant at her place while Maya was present.

The following rules are applicable to our review of the District Court's decision.

While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the court in determining what is in the best interests of the child. Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667 (1970); Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581 (1975).

"The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining

the best interests of children in custody proceedings." Fisher v. Fisher, *supra*. See, also, Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971). "The discretion of the lower court with respect to awarding or changing the custody and support 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." Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544 (1968). See, also, Conger v. Conger, 194 Neb. 771, 235 N. W. 2d 634 (1975).

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

AFFIRMED.

IN RE ESTATE OF NELLIE DILLON ANDERSON, DECEASED. JERRY E. ANDERSON, APPELLEE, V. SYLVIA M. CLAUSSEN APPELLANT.

246 N. W. 2d 586

Filed November 3, 1976. No. 40499.

1. **Verdicts: Trial.** It is a general rule that special findings of a jury take precedence over a general verdict, and a general verdict cannot rectify improper or erroneous special findings.
2. **Verdicts: Wills: Undue Influence: Incompetent Persons.** Special findings by a jury that a testatrix was incompetent to make a will and also that the will was procured by undue influence are not conflicting, and do not invalidate a general verdict denying the validity of the will.

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

John J. Respeliers of Respeliers & DiMari, for appellant.

Thomas P. Leary and Robert G. Grove, for appellee.

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

BRODKEY, J.

Sylvia M. Claussen appeals to this court from a verdict of the jury and subsequent judgment thereon entered by the District Court for Douglas County denying the validity of a purported will executed by the deceased, Nellie Dillon Anderson, on October 9, 1969, and holding, in effect, that a prior will of the testatrix, dated August 5, 1943, was her valid last will and testament. Appellant's sole assignment of error, and the sole issue on appeal, is that the special findings of the jury that the testatrix was not competent to execute the 1969 will and that the will was procured by undue influence are inconsistent with each other so that the general finding of the jury that the 1969 will was not the last will and testament of the testatrix cannot stand. We affirm.

Following the death of the testatrix on September 20, 1973, Jerry E. Anderson, grandson of the testatrix and son of Sidney Dillon Anderson, filed a petition for the probate of the 1943 will in the county court of Douglas County. Under the terms of that will, the testatrix left the bulk of her property to her son, Sidney Dillon Anderson, who subsequently died, and to her daughter, Sylvia M. Claussen, in equal shares. Appellant, Sylvia M. Claussen, thereupon filed objections to the probate of the 1943 will, and, in turn, petitioned for the probate of the 1969 will which left the bulk of the testatrix' property to her.

The county court determined that the 1969 will was valid and admitted it to probate, denying probate of the 1943 will. On appeal to the District Court the parties stipulated that the 1943 will was valid when executed, reserving the issue of whether the testatrix had effectively revoked it by making the 1969 will. The plaintiff contended that the 1969 will was invalid on the grounds of (1) improper execution; (2) lack of testamentary capacity; and (3) undue influence. The case was tried to a jury, which was directed by the trial court to re-

turn a general verdict and to make three special findings on the aforementioned issues. The jury returned a general verdict for the plaintiff, and specially found (1) that the 1969 will was properly executed; (2) that the testatrix was mentally incompetent to make the 1969 will; and (3) that the 1969 will was procured by undue influence. The District Court entered a judgment on the verdict and ordered that the 1943 will be admitted to probate.

The defendant has appealed, contending that the special findings of the jury on the issues of the testatrix' competency and undue influence are inconsistent and irreconcilable, and therefore not a proper basis to support the general verdict. Essentially the defendant argues that a finding of undue influence in a will contest concedes the existence of testamentary capacity, and that there can be no undue influence of a person devoid of mental competency. Thus it is contended that a finding of mental incompetency conflicts with a finding of undue influence so that a general verdict denying the validity of a will cannot be supported.

Defendant is, of course, correct in her contention that special findings of a jury take precedence over a general verdict, and a general verdict cannot rectify improper or erroneous special findings. Wagner v. State, 176 Neb. 589, 126 N. W. 2d 853 (1964). Section 25-1120, R. R. S. 1943, provides that when "the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." At this point, however, we part company with the defendant's theories.

Although the issues of undue influence and capacity to execute a will are distinct and involve different elements, they are closely related. One of the elements of undue influence is that the testatrix was the kind of person who was subject to influence. Benge v. Sutton, 169 Neb. 769, 100 N. W. 2d 857 (1960). The elements of testamentary capacity are that the testatrix knew and

understood the nature of her act, the extent and character of her property, the proposed disposition of her property, and the objects of her bounty. Holman v. Morrison, 186 Neb. 159, 181 N. W. 2d 441 (1970.) It can be seen that the questions of competency and undue influence are closely connected because one of the elements of undue influence is that the testatrix was subject to influence which overcomes her free will. It is obvious that mental capacity and soundness of mind are relevant considerations in determining whether a testatrix is subject to undue influence, and cases have so stated. Spinar v. Wall, 191 Neb. 395, 215 N. W. 2d 98 (1974); In re Estate of Paisley, 91 Neb. 139, 135 N. W. 435 (1912); 79 Am. Jur. 2d, Wills, § 396, p. 554. Thus in will contests where the testatrix has diminished mental capacity, the issues of both competency and undue influence often arise, and it is proper to submit both issues to the jury for a finding of fact. In re Estate of Strelow, 120 Neb. 235, 231 N. W. 837 (1930).

Defendant relies on In re Metz' Estate, 78 S. D. 212, 100 N. W. 2d 393 (1960), and In re Estate of Melcher, 232 N. W. 2d 442 (S. D., 1975), in support of her contention that findings of both undue influence and incompetency are conflicting. There is general language in those cases to the effect that there can be no undue influence on a person devoid of mental capacity. However, those cases draw a distinction between mental incompetency which voids a will, and diminished mental capacity which is insufficient to void the will, but which shows a susceptibility on the part of the testator to undue influence. Both cases stand for the proposition that where a testator is mentally incompetent to make a will, the question of undue influence is superfluous and need not arise since the will is already invalid on the ground of incompetency. Neither opinion, however, involved the question or is authority for the proposition that findings of both mental incapacity and un-

due influence are conflicting so that a general verdict denying the validity of a will must fall.

Although no prior decisions in this jurisdiction have settled the precise question raised, findings of both undue influence and incompetency have previously been upheld. In the case of In re Estate of Kubat, 109 Neb. 671, 192 N. W. 202 (1923), the jury returned special findings of both incompetency on the part of the testator and undue influence. Although the case was appealed on the ground of insufficiency of the evidence and not on the ground of conflict between the special findings, this court reviewed the evidence on both issues and upheld the jury's findings on both. Similarly, in Holman v. Morrison, *supra,* this court upheld the sufficiency of evidence on both a determination of undue influence and lack of mental capacity.

Moreover, cases in other jurisdictions clearly hold that special findings, such as the ones presented in this case, are not conflicting and do not invalidate a general verdict denying the validity of a will. In Board of Regents of the University of Texas v. Yarbrough, 470 S. W. 2d 86 (Tex. Civ. App., 1971), the court held that "there is no conflict between a finding of undue influence and a finding of mental incapacity." The same result was reached in In re Estate of Brannan, 213 So. 2d 725 (Fla. App., 1968); In re Anderson's Estate, 29 Cal. App. 2d 637, 85 P. 2d 212 (1938); and In re Murphy's Estate, 43 Mont. 353, 116 P. 1004 (1911).

We find, therefore, that the contentions of the defendant are without merit. Although the issue of undue influence is superfluous and need not arise when there has been a determination that the testatrix was incompetent to make a will, findings of both incompetency and undue influence are not inconsistent in the sense that each requires the rendition of a different judgment and therefore contradicts the other. If either finding is supported by the evidence, the general verdict denying the validity of the will should be sus-

tained. In this case the defendant does not contest the sufficiency of the evidence on either issue presented to the jury, and therefore the judgment below must be affirmed.

AFFIRMED.

JOHN VAN BLOOM, APPELLEE AND CROSS-APPELLANT, V. MARILYNN VAN BLOOM, APPELLANT AND CROSS-APPELLEE.
246 N. W. 2d 588

Filed November 3, 1976. No. 40522.

1. **Divorce: Property.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
2. **Divorce: Property: Alimony.** The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case.
3. **Divorce: Judgments.** While an action for a dissolution of marriage is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
4. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellant.

Paul E. Galter of Bauer, Galter & Geier, for appellee.

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

SPENCER, J.

This is an action for dissolution of marriage instituted by the husband against his wife. The respondent wife essentially assigns two errors. (1) The trial court erred in failing to properly divide the marital estate between the parties. (2) The trial court erred in ordering that the alimony awarded to respondent should terminate upon the death of either party or remarriage of the wife. We affirm.

The parties were married in 1965. It was John's second marriage and Marilynn's fourth. No children were born of this marriage. John, however, adopted Marilynn's youngest daughter, Diana, born February 18, 1958. John's children and Marilynn's other children by previous marriages have reached the age of majority. At the time of the trial John was 62 years old and operated an insurance agency. Marilynn was 55 years old, a housewife with no outside employment.

The trial court essentially gave the parties the residue of the property brought by them into the marriage. The equity in the residence was assigned to the husband and the household goods and personal effects were divided as per agreement between the parties. Additionally, John was ordered to pay $225 per month to the respondent for the support of the minor child of the parties, and alimony at the rate of $750 per month for a period of 36 months and $100 per month thereafter for a period of 83 months, with the proviso that if John's income remained the same additional alimony may be allowed during the last 83 months. Further, the husband was directed to pay the wife $8,500, which was approximately the amount of a debt she owed to her bank on a personal indebtedness.

At the time of the marriage the husband had net assets totaling $177,000, plus furniture for his home. By the distribution, the court has decreed petitioner receives net assets of approximately $190,000, after paying the items the court directed him to pay in the de-

cree. The net value of the wife's assets, including the $8,500, is approximately $150,000. In his decree of dissolution the trial judge specifically itemized the considerations which induced him to make the distribution he did. No purpose will be served by their recital. A review of the record convinces us that he did not abuse his discretion in what he did.

We said in Tavlin v. Tavlin (1975), 194 Neb. 98, 230 N. W. 2d 108: "This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record." On the record herein, we cannot say that the distribution made reaches that standard.

Marilynn does not complain about the adequacy of the alimony. Her complaint is directed to the fact that the court made the order terminable upon the death of either party or the remarriage of the wife. By virtue of section 42-365, R. S. Supp., 1976, this would be the effect in the absence of an agreement of the parties or an order of the court.

As we said in Tavlin v. Tavlin, *supra:* "The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case."

While an action for a dissolution of marriage is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Seybold v. Seybold (1974), 191 Neb. 480, 216 N. W. 2d 179. We have re-

peatedly held that the fixing of alimony rests in each case within the sound discretion of the trial court. Fanning v. Fanning (1975), 194 Neb. 821, 235 N. W. 2d 878. On the record herein the action of the trial court does not shock the conscience of this court. There is no abuse of discretion.

The judgment of the trial court is affirmed. Costs are taxed to the party incurring them. No attorney's fee is allowed appellant in this court.

AFFIRMED.

IN RE INTERESTS OF AUBREY JOHNSON ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ANNETTE M. JOHNSON, APPELLANT, IMPLEADED WITH WILLIE CALVIN WRIGHT, ALSO KNOWN AS WILLIAM WASH, APPELLEE.
246 N. W. 2d 591

Filed November 3, 1976. No. 40531.

1. **Parent and Child: Infants: Statutes.** Under section 43-209(2), R. S. Supp., 1974, the court may terminate parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection.
2. **Parent and Child: Infants: Courts.** In cases involving child custody, determinations of Juvenile Court findings, both as to the evaluation of the evidence and to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of evidence.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

David J. Cullan of Cullan & Cullan, for appellant.

John J. Reefe, Jr., for appellee State.

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

WHITE, C. J.

This is an appeal arising out of proceedings in the Separate Juvenile Court of Douglas County, Nebraska. This action was commenced by the filing of a supplemental petition on May 20, 1974, seeking to have the appellant's three minor children, Aubrey Johnson, Bridgette D. Wright, and Carmencita A. Johnson, adjudicated neglected and dependent children, and to have the parental rights to these children of the appellant, the natural mother, terminated.

Pursuant to section 43-206.03, R. S. Supp., 1974, an adjudication hearing was held on October 9, 1974. The court, by order dated March 4, 1975, found that Carmencita was a child within section 43-202 (2), R. S. Supp., 1974, and directed that Carmencita continue in the custody of the Douglas County social services (where she had been placed by a previous order dated May 28, 1974), pending a disposition hearing. The supplemental petition concerning Aubrey and Bridgette was dismissed.

A disposition hearing was held on June 10, 1975. The court, by order dated August 29, 1975, found that Carmencita was a neglected child within the meaning of section 43-209 (2), R. S. Supp., 1974, and that it was in the best interests of Carmencita that the appellant's parental rights be terminated. It ordered that Carmencita remain temporarily in the custody of the Douglas County social services and directed that a plan for her permanent placement and adoption be submitted. We affirm the judgment and order of the Juvenile Court.

It is contended on appeal that there was insufficient evidence to support the Juvenile Court's findings that Carmencita was a neglected child within the meaning of sections 43-202 (2) and 43-209 (2), R. S. Supp., 1974, and that it was in the best interests of Carmencita that the appellant's parental rights be terminated.

"An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, is heard in this court by trial de

novo upon the record." State v. Kinkner, 191 Neb. 367, 216 N. W. 2d 165 (1974). See, also, Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361 (1967). However, even though trial is de novo upon the record, the findings of fact made by the trial court will be accorded great weight. This is because the trial court heard and observed the parties and witnesses. State v. Kinkner, *supra;* Mingus v. Stuchlick, 185 Neb. 139, 174 N. W. 2d 194 (1970).

The evidence in this case, as revealed by the record, is: At the adjudication hearing the following facts were stipulated between the parties. On February 24, 1974, Carmencita was observed with two scratches on her right hip, two bruises in the middle of her back, and an approximately 1-inch round sore on her calf. On April 16, 1974, Carmencita was observed with bruises on her stomach and upper arms. On May 3, 1974, Carmencita had bruises and red welts on her back, upper arm, and right calf. On all three of these occasions, Carmencita indicated that her mother had inflicted the injuries with an electrical cord. On direct examination regarding the first incident, the appellant testified that she whipped Carmencita because she had lied about wetting herself and this made her mad. Concerning the third incident, the appellant testified that she did it "out of sheer anger." On why she used an electrical cord for the whippings, the appellant testified, "I don't keep belts and stuff, you know, around the house because I know how I am." She testified that she was in no position to govern the children with caseworkers constantly there because they say something every time they see a mark on the child, and, also, the "Day Care" preaches to her constantly every time they see these marks.

On cross-examination, appellant admitted that she had previously been in court for inflicting injuries to her children, and the court had found that on December 8, 1971, Carmencita suffered various bone fractures and

bone trauma. She also admitted the court had found that on January 27, 1971, both Carmencita and Bridgette suffered severe scratches and scars over their legs and backs. She further admitted that on September 2, 1971, she called her caseworker and told her to get her kids because she felt like she could have killed them. She also testified that on the Sunday prior to the hearing, the kids went off and she could not find one of them, that it upset her, and "I could have killed her when I got to her," but a neighbor had talked to her and calmed her down.

At the disposition hearing, reports from the Juvenile Court, child protective services, and the Douglas County welfare administration were received into evidence. The authors of these reports were extensively cross-examined. These reports reveal that the appellant has repeatedly refused to cooperate with counseling which was offered in an attempt to solve her problem with her children, her finances, and her housing. During a 12-month period from 1974 to 1975, the appellant lived in six different places, and was evicted from three of these. Occasionally, the appellant would run out of food for herself and her children and would have to call for assistance. During the period that Carmencita had been in foster care, the appellant visited her about seven times, and did not want an ongoing, regular visitation schedule. At the time of the hearing, she was living, with her two remaining children, in a two-bedroom apartment with two men whom she described as her "room mates." The appellant has been for the most part unemployed, and did not think that she would be working in the future.

The above evidence was more than sufficient to support the Juvenile Court's findings that Carmencita was a neglected child within the meaning of sections 43-202 (2) and 43-209 (2), R. S. Supp., 1974.

We turn now to the Juvenile Court's determination that the best interests of Carmencita required the ter-

mination of the appellant's parental rights. "A court may terminate parental rights when it finds such action to be in the best interests of the child and it appears from the evidence that the parent has substantially, continuously and repeatedly neglected the child and refused to give the child the necessary parental care and protection." Healey v. Hartman, 188 Neb. 682, 199 N. W. 2d 26 (1972). See, also, Hubbard v. Loewenstein, 181 Neb. 96, 147 N. W. 2d 164 (1966). In cases involving child custody determinations in Juvenile Court, the findings of the trial court, both as to evaluation of the evidence and as to its judgment as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601 (1975); State v. Randall, 187 Neb. 64, 187 N. W. 2d 586 (1971); Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544 (1968).

There was no abuse of discretion by the Juvenile Court in making the determination that it did. The record shows a lengthy and repeated history of violence by the appellant against this child. She has been noncooperative with attempts to solve her problems. In the last few years there seems to be little, if any, possible change in her attitude or life-style. The record shows that Carmencita is now 7 years old. She was in foster care from February 14, 1972, until March 24, 1973, and has been in foster care from May 28, 1974, until the present, almost 4 years, and appears to be doing well in her foster home. The findings and determination of the Juvenile Court that the appellant's parental rights should be terminated are without error.

The judgment of the Separate Juvenile Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD RAYMOND ELL, APPELLANT.
246 N. W. 2d 594

Filed November 3, 1976. No. 40539.

1. **Due Process: Juries: Criminal Law: Trial: Constitutional Law.** Due process requires that the accused receive a trial by an impartial jury free from outside influences.
2. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous unless the record discloses an abuse of discretion.
3. **Continuances: Criminal Law.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof.
4. **Venue: Criminal Law.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown.
5. **Trial: Criminal Law: Juries.** The issue of whether or not a jury should be sequestered during a criminal trial is left to the discretion of the trial court, and unless the defendant makes a showing of prejudice or the record discloses an abuse of discretion, denial of sequestration is not error.
6. ———: ———: ———. A party ordinarily has no right to examine a prospective juror out of the presence of all other prospective jurors.
7. **Trial: Evidence.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry.

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

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

BRODKEY, J.

In count I of a four count information, the defendant, Ronald Raymond Ell, was charged with killing Michael Kellogg in the perpetration of or attempt to perpetrate a robbery, which constitutes first degree murder under section 28-401, R. R. S. 1943; and in counts II, III, and IV, he was charged with maliciously shooting Russell Wolf, George E. Allen, and Joseph Nepodal, respectively, with the intent to kill, wound, or maim each of those individuals, under section 28-410, R. R. S. 1943. Trial to a jury commenced July 21, 1975; and on August 1, 1975, the jury found Ell guilty of shooting police officers George E. Allen and Joseph Nepodal with intent to kill, wound, or maim, as charged in counts III and IV of the information, but the jury was unable to reach a verdict on count I of the information charging the defendant with murder in the perpetration or attempt to perpetrate a robbery, and also was unable to reach a verdict on count II of the information, which charged defendant with shooting at Officer Russell Wolf with intent to kill, wound, or maim.

The court thereupon declared a mistrial as to counts I and II, and the defendant was retried as to those counts commencing October 24, 1975. The jury in the second trial returned a verdict of guilty on counts I and II. On November 10, 1975, the defendant was sentenced to life imprisonment in the Nebraska Penal and Correctional Complex on count I, and to terms of 16 2/3 to 50 years imprisonment on each of the other three counts. The latter sentences were ordered to be served concurrently with each other, but consecutively to the sentence of life imprisonment imposed on count I. Defendant Ell has now appealed his convictions and sentences to this court. We affirm.

In support of his appeal, defendant makes two assignments of error which he contends were prejudicial and require reversal of his convictions in the trial court. We set them out verbatim as they appear in his brief:

"I. The District Court committed reversible error in both the first and second trial in not granting the defendant's motion for a continuance, for a change of venue, for total sequestration of the jury during voir dire, and for sequestering the jury during trial, all for the reason that pre-trial publicity prior to trial and the probability of such adverse publicity during trial prevented the defendant from receiving a fair trial, requiring his convictions be reversed. II. The District Court committed reversible error in overruling defense objections to the admissibility of Exhibit 16 for lack of foundation as it relates to the charge of shooting at Officer Allen."

The evidence shows that on February 21, 1975, two persons entered a Hinky Dinky Store at 30th and Weber Streets in Omaha during business hours and took approximately $2,100 in checks, cash, and food stamps. Both persons were armed, and removed the described property at gunpoint. A store manager observed the individuals fleeing in a 1965 Chevrolet, noted the license number, and called the police. The manager, some of the store employees, and several police officers then pursued the robbers.

During the chase, several shots were fired from the suspects' automobile, driven by a third person, at the pursuing police officers, striking one of their vehicles. The chase ended at 25th and Iowa Streets in Omaha, where the gun battle continued between the officers and the suspects, who had left their vehicle and had run between houses in the neighborhood. Michael Kellogg, a civilian who lived in the neighborhood, had armed himself and joined the police in firing at the suspects.

During the gun battle, two police officers were wounded. One of the suspects was shot and killed by the police. Witnesses observed one of the suspects, John Edward Rust, later named as a co-defendant in this case, as he shot and killed Michael Kellogg. Defendant Ell was eventually apprehended in some bushes, after re-

quests to come out. Police found a pistol, a sawed-off shotgun, and the property taken from Hinky Dinky in the defendant's hiding place.

At the time of the robbery in February, several newspaper articles were published describing the chase and subsequent shootings. One of these articles showed a picture of defendant Rust in the hospital; another consisted of an interview with one of the wounded police officers. There was also television and radio coverage of the robbery, although the defendant introduced no evidence as to the nature or extent of that coverage. On the day prior to the beginning of the voir dire at the first trial, another newspaper article appeared announcing that the case was to go to trial, and describing the robbery and shootings. The defendants' pictures appeared in this article. Although there was undoubtedly more media coverage of the case during and subsequent to the first trial and prior to the second, the defendant has not brought such publicity to the attention of either the trial court or this court.

Prior to both trials, the defendant moved for a continuance, a change of venue, individual and separate examination of each prospective juror during the voir dire, and sequestration of the jury during trial. The ground for these motions was that the pretrial publicity described above jeopardized the defendant's right to a fair and impartial trial.

The specific ground for defendant's motion for a continuance was the appearance of the newspaper article describing the case on the day prior to the beginning of the voir dire. The trial court overruled this motion because it concluded that such publicity would arise whenever the case actually went to trial, and therefore a continuance would not obviate this kind of publicity.

The motion for a change of venue was overruled because the trial court concluded that granting a change of venue and moving the case to an adjoining county pursuant to section 29-1301, R. R. S. 1943, would do

nothing to minimize the effects of publicity, since media coverage of the case was just as broad in adjoining counties as it was in Douglas County, the place of trial.

The trial court overruled the motion for sequestration of the jury during trial because it concluded that sequestration would not effectively achieve the goal of insulating jurors from any publicity that might arise during trial. The court noted that the jury would have to be sequestered in a hotel or motel, where it would have access to radio, television, and newspaper coverage of the trial. The trial court pursued an alternate course of instructing the jury at both trials not to read or listen to any news coverage of the case during the trial.

The trial court did uphold the motion for separate examination of jurors during the voir dire at the first trial. Examination of the first 27 prospective jurors proceeded separately. The court then concluded that publicity was not a significant factor in the case, and concluded the voir dire by examination of the talesmen in four groups of 6, and one last group of 18. The defendant, however, was permitted to question each prospective juror individually, even when the court proceeded with the group examinations. There is no record of the actual voir dire of the jury for the second trial, but the voir dire was conducted, challenges exercised, and jury selected in 1 day, a much shorter period than for the first trial, which suggests that no unusual trouble was experienced in selecting the second jury.

It is fundamental that: "Due process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). In Sheppard the court held that where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the trial court should take steps such as a continuance, a change of venue, or sequestration of the jury to protect its processes from prejudicial out-

side interferences. The question in this case, then, is whether there was such prejudicial pretrial publicity that the defendant was denied a fair trial because of the trial court's failure to take the protective steps requested by the defendant in his pretrial motions, described above. We will discuss each motion separately.

It has long been the rule in this state that an application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous unless the record discloses an abuse of discretion. It is no abuse of discretion to deny a continuance unless it clearly appears that the defendant suffered prejudice. State v. Lee, 195 Neb. 348, 237 N. W. 2d 880 (1976); State v. Newton, 193 Neb. 129, 225 N. W. 2d 562 (1975); Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689 (1951); Maher v. State, 144 Neb. 463, 13 N. W. 2d 641 (1944). In this case, the ground for the defendant's motion for a continuance was that a newspaper article appeared 1 day prior to the voir dire at the first trial. The newspaper article itself was in no way inflammatory and could not be said to have prejudiced prospective jurors. It merely described the robbery and shootings, and stated that the defendant was one of the persons charged with the crimes. In fact, the information in the newspaper article was essentially the same as that given to each talesman before questioning at the voir dire. The defendant has made no showing that he suffered prejudice as a result of the trial court denying a continuance. The denial of the defendant's motion was clearly not an abuse of discretion, and the trial court was correct in concluding that whenver the case did come to trial such media coverage would likely arise. Therefore we hold that the overruling of the defendant's motion was not error. State v. Newton, *supra*.

In regard to change of venue, a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be

disturbed unless a clear abuse of discretion is shown. State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595 (1974); State v. Goham, 187 Neb. 34, 187 N. W. 2d 305 (1971); Sundahl v. State, *supra*. See, also, Robinson v. Wolff, 349 F. Supp. 514 (Neb., 1972). A survey of cases throughout the United States shows that among the relevant factors considered in determining whether a change of venue should be granted due to pretrial publicity are the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn. See Annotation, Pretrial Publicity in Criminal Case as Ground for Change of Venue, 33 A. L. R. 3d 17.

In this case, defendant points to no publicity that was inflammatory or prejudicial in nature. There was no vendetta against the defendant in the media. In fact, the defendant points to little publicity about the case at all other than the descriptions of the robbery and shootings at the time they occurred. The publicity here bears not the slightest resemblance to the publicity in Sheppard v. Maxwell, *supra*, a case where the very jury which heard the case was exposed to highly inflammatory media coverage both prior to and during the trial. Defendant points to no publicity between the time of the robbery and the newspaper article appearing just prior to the first trial in July 1975. Thus the nature and degree of the publicity complained of did little to support defendant's motion for a change of venue.

Finally, as previously stated, the trial court took great care in selecting the jury, and that of the 69 talesmen in the venire at the first trial, only 11 were dismissed

for cause because they had formed an opinion as to the innocence or guilt of the defendant due to pretrial publicity. Had the pretrial publicity been as adverse and pervasive as the defendant now suggests in his brief, there would certainly have been more difficulty in finding prospective jurors who had not formed such an opinion. No problems of this nature arose during the trial.

In reviewing the record we find nothing to indicate that the trial court abused its discretion in denying a change of venue, and defendant has in no way demonstrated how he was prejudiced by the denial. Therefore the ruling of the trial court was not error. State v. Irwin, *supra;* Sundahl v. State, *supra.*

With regard to sequestering the jury during trial, the applicable rule of law is that whether or not a jury is kept together during a criminal trial is left to the discretion of the court. State v. Bautista, 193 Neb. 476, 227 N. W. 2d 835 (1975). If a criminal defendant makes no showing of prejudice due to failure of the trial court to sequester the jury during trial, or if the record discloses no abuse of discretion on the part of the trial judge, denial of sequestration is not error. State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970); Smith v. State, 111 Neb. 432, 196 N. W. 633 (1923).

The defendant has not brought to the attention of this court any publicity during either trial that might have prejudiced the jurors, let alone evidence that any of the jurors were actually exposed to publicity and prejudiced thereby. The trial court explicitly instructed the jurors during both trials not to read or listen to any media coverage of the case from the time of their questioning at the voir dire to the time of the verdict. The defendant makes no showing of prejudice, and no abuse of discretion appears in the record. Therefore we hold that it was not error to overrule defendant's motion for sequestration of the jury during his trials.

The final issue relevant to publicity is whether the court erred in not examining each prospective juror

separately and individually during the voir dire. It is a well-established rule that in the selection of a jury a party ordinarily has no right to examine a juror out of the presence of all other jurors. State v. Fiegl, 184 Neb. 704, 171 N. W. 2d 643 (1969); State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970). Defendant contends that this case is not "ordinary" because of the pretrial publicity, and because the case involved a capital offense. We have already discussed the nature and degree of the pretrial publicity, and do not find it to be such a significant factor as to require separate and individual examination of all talesmen. The fact that this case involved a capital offense also is not sufficient, even in conjunction with the publicity that existed in this case, to take this case out of the rule described above, particularly in light of the extreme care the trial court took in selecting the jury.

We note that the trial court began the voir dire at the first trial by separately examining each talesman. The first 27 prospective jurors were examined separately, a process which took 2 full days, and only 4 of these jurors were dismissed for cause due to having formed opinions as a result of pretrial publicity. At this point the trial court concluded that pretrial publicity was not a significant factor in the case, and concluded the voir dire in groups. Of the remaining 42 talesmen, only 7 were dismissed for cause due to having formed opinions about the case because of publicity. Although a majority of the jurors actually chosen for trial had read or heard about the robbery at the time it occurred, most had only vague recollections; and each and every one stated that he or she had formed no opinion as to the innocence or guilt of the defendant. An examination of the voir dire shows that the trial court used great care in insuring that no jurors ultimately selected for the jury were prejudiced because of pretrial publicity.

Defendant points to no facts showing that he was

prejudiced because of the procedures used to select his jury at both trials. No abuse of discretion appears on the record, and therefore we conclude that the trial court committed no error in conducting the voir dire as he did, and in following the general rule described above. State v. Kirby, *supra*.

We have also examined defendant's other assignment that the court erred in admitting exhibit 16 because of lack of foundation. Exhibit 16 was a photograph depicting a bullet hole in a tree behind which Officer Allen was allegedly taking cover. The applicable rule is that photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court and unless an abuse of discretion is shown, error may not be predicated thereon. State v. Radcliff, 188 Neb. 236, 196 N. W. 2d 119 (1972). A photograph proved to be a true representation of what it depicts may properly be received in evidence if a proper foundation is laid. State v. Williams, 182 Neb. 372, 155 N. W. 2d 189 (1967).

We note in passing that at the time the photograph in question was admitted in evidence, a police officer had testified that the photograph was a true and accurate representation of the tree, and it showed a bullet hole which the officer had himself seen. No objection was made to this testimony. The person who took the photograph also testified that it was a true representation of the tree, and that it showed a fresh injury to the tree. No objection was made to this testimony. The photograph, therefore, merely illustrated prior testimony of witnesses; and this provided an adequate foundation for the admission of the photograph in evidence. The trial court clearly did not abuse its discretion in admitting the photograph into evidence.

The contentions of the defendant in this appeal are

without merit, and the judgment of the trial court must be affirmed.

AFFIRMED.

BEVERLY J. STENDER, APPELLEE, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.
246 N. W. 2d 643

Filed November 3, 1976. No. 40579.

1. **Implied Consent Law: Intoxicating Liquors: Motor Vehicles.** There is no requirement in our law that the request for a chemical test must be made at the scene of the arrest.
2. **Statutes: Courts.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
3. **Implied Consent Law: Intoxicating Liquors: Motor Vehicles.** In Heffernan v. Kissack (1974), 192 Neb. 637, 223 N. W. 2d 486, we held that a single request to submit to a chemical test is sufficient. However, we did not mean to imply, and the law does not require, that only one request can be made.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellant.

Arlen D. Magnuson of Magnuson & Magnuson, for appellee.

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

SPENCER, J.

The motor vehicle operator's license of appellee, Beverly J. Stender, was revoked for failure to comply with the provisions of the Nebraska Implied Consent Act. On appeal to the District Court the order revoking the

license was reversed. The Director of the Department of Motor Vehicles prosecutes this appeal. The question presented is whether the trial court erred in ruling that the arresting officer should have informed the appellee of the implied consent law at the scene of the arrest and made a single request for a chemical test at that point. We hold he did err, and reverse.

Appellee was arrested while operating a motor vehicle on the city streets of O'Neill, Nebraska. The testimony is in dispute as to what transpired at the time of arrest. It is undisputed appellee was not requested to give a breath or chemical test at the scene of the arrest. She was immediately taken to the sheriff's office in the county courthouse in O'Neill. There the arresting officer read her the implied consent advisement.

It is appellee's testimony she was not told the consequences of her refusal to submit to the test at the sheriff's office. The appellee signed the advisement form, which is in the record. The officer testified she appeared to understand it. The advisement form specifically enumerated the penalties for a first, second, and third or subsequent offense.

The officer testified that after reading the advisement form, he asked the appellee several times to submit to a chemical test of her blood or urine. Initially she refused to do so, but when informed by the officer that he was going to place her in jail, she stated she would submit to a test. The arresting officer and another officer took appellee to a local hospital for the purpose of obtaining the test. After arriving at the hospital appellee was asked to sign an authorization to the hospital to draw blood. Appellee refused to sign. At the hospital the officer asked her several times to submit to a blood or urine test. After reminding her it was the last chance to submit, the officer decided to take her to the courthouse jail. When leaving the hospital, appellee told the officer she would submit to the test but he informed her he was going to take her to jail.

At the conclusion of the hearing the trial court asked the following: "I have one question, Officer Williams. Did you offer her the chance to take a test at the scene of the arrest? It is clear that you offered her a chance to take the test and read her rights to her when you brought her from the scene of the arrest up to the courthouse, but did you, at the time of the arrest, explain her rights and offer her an opportunity to take a blood or urine test out there at the scene of the arrest?"

The question was answered in the negative. It is clear from the above that the trial court found appellee was offered a chance to take the test and her rights were read to her when she was brought from the scene of arrest to the courthouse.

After the officer answered the question of the trial court, the judge stated: "Gentlemen, I am going to render a decision here that I am going to find that the Plaintiff had grounds to refuse to give the test. It is my view of the evidence that she should have been asked at the scene of the arrest, and asked once. It appears that she was harassed for a period of an hour and a half or two hours for this test, and I don't think that is right. So, I am finding in favor of the Plaintiff. That is all."

The trial court was in error. There is no requirement in our law that the request for a chemical test must be made at scene of the arrest. Neither is there any requirement in our law that only one request may be made to secure a defendant's consent to take the test. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Bachus v. Swanson (1965), 179 Neb. 1, 136 N. W. 2d 189.

Appellee reads too much into Heffernan v. Kissack (1974), 192 Neb. 637, 223 N. W. 2d 486. We there held that a single request to submit to a test is sufficient and there is no requirement that a second request be made if the person arrested refuses the initial request.

However, we did not mean to imply and the law does not require that only one request can be made. It is definitely to a defendant's advantage to be given an opportunity to avoid the consequences of a hasty decision. We do not condemn multiple requests by law enforcement officers to obtain a chemical test. In many instances the person arrested is in some state of confusion and more than one request may be desirable. The officer's attempt to convince appellee to submit to a test by multiple requests was not harassment but indicated due consideration for her condition. In no way can it be held to provide the appellee with reasonable ground for refusal.

The trial court was in error. The appellee refused to submit to a chemical test and she failed to meet her burden of showing that her refusal was reasonable. There is nothing in the record which even remotely suggests any reasonable grounds for her refusal.

The judgment of the District Court is reversed and the cause is remanded with directions to enter a judgment affirming the revocation of the appellee's motor vehicle operator's license and privileges under the Nebraska Implied Consent Act.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RODNEY L. BERNTH, APPELLANT.
246 N. W. 2d 600

Filed November 3, 1976. No. 40611.

1. **Searches and Seizures: Affidavits: Probable Cause.** It has long been the rule that reasonable grounds for the issuance of a search warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described.
2. ———: ———: ———. Affidavits for search warrants must

be tested and interpreted by magistrates and courts in common-sense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in the area.

3. ———: ———: ———. Where circumstances are detailed in an affidavit for a search warrant, and where reason for crediting the source of the information is given, and where a magistrate has found probable cause, courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical rather than in a common-sense manner.
4. ———: ———: ———. Although in a particular case it may not be easy to determine when an affidavit for a search warrant demonstrates existence of probable cause, resolution of doubtful or marginal cases in the area should be largely determined by preference to be accorded to warrants.
5. **Criminal Law: Words and Phrases.** A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
6. **Criminal Law: Controlled Substances.** Possession of a controlled substance is an included offense within a charge of possession with intent to distribute.

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

Cunningham, Blackburn, VonSeggern & Livingston, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

NEWTON, J.

The defendant, on trial to the court, was convicted of possession of marijuana, and possession of marijuana with intent to distribute it. He was sentenced to 2 years probation and a fine of $150 on each count.

Two propositions are presented on appeal. Should evidence of the marijuana found pursuant to a search warrant be suppressed? Do the two counts contained in

the information set out two separate offenses or is one a lesser included offense?

The search warrant is challenged solely on the ground that the affidavit therefor failed to sufficiently indicate that the marijuana was kept at defendant's residence, the locale of the search. The affidavit stated that the defendant had informed a concedely reliable informant that he had "pounds of grass for sale." The affidavit further stated that the informant had identified defendant's place of residence and that affiant believed the controlled substance was situated there. Is this sufficient identification of the situs of the marijuana?

It has long been the rule that reasonable grounds for the issuance of a search warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described. See, Dumbra v. United States, 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032; United States v. Stewart, 79 F. Supp. 313; United States v. Rahn, 511 F. 2d 290 (10th Cir., 1975).

In Bastida v. Henderson, 487 F. 2d 860 (5th Cir., 1973), involving a search for pistols used in a robbery there was no definite information as to the situs of the pistols but the search was held to have been made on probable cause. The court stated: "In issuing a search warrant the magistrate must exercise his own judgment as to whether the facts alleged in the affidavit constitute probable cause for issuance of the warrant, he must act on the entire picture disclosed to him, he is entitled to use his common sense, and the courts have gone so far as to say that when this is done his determination is conclusive in the absence of arbitrariness. * * *

"They feared that they had killed their victim but they had not thrown away their pistols. A very likely place to find them thereafter would either be on the persons of the assailants or about the premises where they lived. In any event, it was not unreasonable or

arbitrary for the magistrate to find that there was probable cause to believe such to be the case. It necessarily follows that a statement of the informer (repeated in the affidavit) that the pistols would 'still be within the apartment on April 17' was not an indispensable prerequisite to the validity of the warrant issued in reliance upon its allegations."

In United States v. Mulligan, 488 F. 2d 732 (9th Cir., 1973), it was held: "Although there was no direct evidence that any evidence from the burglary was inside Dinsio's residence, there was sufficient evidence from which the magistrate could use his common sense to infer that the loot and tools, if not buried, were probably in the house."

In Agnellino v. State of New Jersey, 493 F. 2d 714 (3d Cir., 1974), it was held: "Probable cause for issuance of search warrant existed where, accepting as reliable underlying facts appearing in affidavit, a man of reasonable caution would have been warranted in believing that defendant was concealing stolen television sets, and that one of sets had previously been transferred to informant at a place within close proximity to a business establishment which was owned and operated by defendant and was of sufficient size and character to conveniently conceal televisions." See, also, United States v. Lucarz, 430 F. 2d 1051 (9th Cir., 1970); United States v. Rahn, *supra*.

In United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, it was held: Affidavits for search warrants must be tested and interpreted by magistrates and courts in commonsense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in the area. Where circumstances are detailed in affidavit for search warrant, and where reason for crediting source of information is given, and where magistrate has found probable cause, courts should not invalidate warrant by interpreting affidavit in hypertechnical

rather than in commonsense manner. Though in particular case it may not be easy to determine when affidavit for search warrant demonstrates existence of probable cause, resolution of doubtful or marginal cases in area should be largely determined by preference to be accorded to warrants.

An individual's residence is a private area inaccessible to all others. Its contents can only be determined by persons other than the occupants or invitees on the basis of observation of the inhabitants, their actions, and remarks. Seldom can an affiant seeking a search warrant state positively that a certain residence contains contraband. Such a conclusion can only be arrived at by a magistrate on consideration of known facts and common-sense probabilities. Controlled substances are of considerable value on the street, much sought after by users, and, unless kept in a safe place, subject to theft. Wide experience over the years has demonstrated that such items are usually kept in a dealer's place of residence and under constant surveillance or supervision. The defendant was obviously a dealer. He had "pounds" of marijuana. Such a quantity would not be carried on his person or left unprotected in an automobile. Where then does logic and common sense dictate that it would be kept? There is only one answer, his residence. A magistrate is not required to ignore the lessons of experience or to disregard logic and common sense. We conclude that the affidavit for a search warrant was sufficient and the motion to suppress evidence properly overruled.

The second issue presents the question of whether "possession" is a separate or included offense in regard to "possession with intent to distribute." We have held that a lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. See, State v. Jones, 186 Neb. 303, 183 N. W. 2d 235; State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152.

Possession and possession for sale or distribution of controlled substances are generally treated as one offense. In United States v. Upthegrove, 504 F. 2d 682 (6th Cir., 1974), it was held that possession of a controlled substance is a lesser included offense within a charge of possession with intent to distribute. To the same effect are State v. Johnson, 112 Ohio App. 124, 165 N. E. 2d 814; Jerskey v. State (Wyo.), 546 P. 2d 173; People v. Brown, 185 Colo. 272, 523 P. 2d 986. There are also a number of cases which hold that possession of a controlled substance is a lesser included offense in a charge of sale or transporation. See, State v. Morales (Ore. App.), 537 P. 2d 109; Fairman v. State, 83 Nev. 137, 425 P. 2d 342; Layton v. State (Fla. App.), 309 So. 2d 204; People v. Droz, 360 N. Y. S. 2d 681, 46 App. Div. 2d 751. There are some cases holding to the contrary where charges of possession of a controlled substance and of sale or transportation of such substance are involved. See, State v. Davis, 68 N. J. 69, 342 A. 2d 841; State v. Cameron, 283 N. C. 191, 195 S. E. 2d 481; Brock v. Commonwealth (Ky. App.), 479 S. W. 2d 644; People v. Stewart, 46 Mich. App. 282, 207 N. W. 2d 907.

It is apparent that the same evidence is sufficient to sustain a charge of possession of a controlled substance and possession with intent to distribute. The only distinction is one of intent. Intent is a mental process which is ordinarily inferred from the surrounding circumstances and in drug cases the quantity of the drug on hand is often determinative, although evidence of former sales and the fact that the defendant is not a user of the drug may be important considerations. In any event, proof of possession with intent to distribute necessarily proves simple possession. "Possession" includes the identical elements contained in a charge of "possession with intent to distribute" except for the element of intent. We therefore conclude that the charge of "possession" was a lesser included offense within the charge of "possession with intent to distribute."

The judgment of the District Court is affirmed with the exception that it is reversed as to the conviction and sentence on the charge of simple possession.

AFFIRMED IN PART, AND IN PART REVERSED.

McCOWN, J., dissenting.

The majority opinion here goes far beyond any prior decisions of this court, or of any other court, in emasculating the Fourth Amendment protection against unreasonable searches and seizures. This court now holds that if an affidavit for a search warrant shows only that a "reliable" informer reported that a named individual orally stated that he "had pounds of grass for sale," that information standing alone is sufficient to establish probable cause for the issuance of a warrant to search the residence of the individual who reportedly made the statement. The holding necessarily means that a search warrant could also have been properly issued to search the individual's automobile, office, place of business, or any other place under his control. There is no case cited in the majority opinion, nor have we found one anywhere, in which the affidavit for the search warrant contained nothing more than the bare report of an informer that a suspect had stated that he had contraband.

The law is clear that in passing on the validity of a search warrant, the court may consider only information brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which he also concluded that the informant was credible. See, Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85; State v. Glouser, 193 Neb. 190, 226 N. W. 2d 328; State v. LeDent, 185 Neb. 380,

176 N. W. 2d 21. It is conceded in this case that the informer was reliable.

A recital of some of the underlying circumstances in the affidavit for a search warrant is essential if the magistrate is to perform his function. Mere affirmance of belief or suspicion is not sufficient. See State v. Holloway, *supra*. The affidavit here recited a bare conclusion reflecting only suspicion. It recited none of the underlying circumstances from which either the informer or the affiant concluded that the marijuana was located in the residence of the defendant. There was no information against the defendant before the magistrate except the quoted statement from the affidavit, nor was any other information presented at the suppression hearing. There is no information in the affidavit that the defendant had ever been associated with drug or criminal activities, or had ever possessed, sold, or used marijuana. There is no information or circumstance of any kind to support any such assumption, except for the fact that the defendant reportedly made the quoted statement. Yet the majority opinion says: "The defendant was obviously a dealer." If that be true, then the same conclusion would necessarily follow as to any citizen who was reliably reported to have made the same statement, even if the statement was made in jest. As the trial court said at the original suppression hearing: "Well, I guess I'd better not tell anyone that I have marijuana in my home, or I may be invaded by the police."

The Fourth Amendment to the Constitution of the United States and Article I section 7, of the Constitution of Nebraska, provide: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant(s) shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person(s) or thing(s) to be seized."

The decision of this court effectively destroys the protection afforded to every citizen under the specific terms of the Constitution of the United States and the Constitution of Nebraska. It also sets out a new and unique basis for determining what constitutes probable cause for the issuance of a search warrant. If the home of any citizen is open to police search whenever a reliable informer reports that the citizen made a statement implicating himself in the possession of illegal substances or things, the dread spectre of a police state is all too close and real. Constitutional freedoms should never be so easily discarded. The trial court's determination at the original suppression hearing was eminently correct, and should have been approved by this court.

CLINTON, J., dissenting.

I dissent because the affidavit recites none of the underlying circumstances from which either the informer or the affiant concluded that the marijuana was located in the residence of the defendant.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM OWEN KING, APPELLANT.
246 N. W. 2d 477

Filed November 3, 1976. No. 40659.

Criminal Law: Sentences. Proportionality in sentencing ought to mean, among other things, that the more serious offenses generally merit the greater punishment, and that those offenders who offer the greatest menace to society deserve the greater punishment.

Appeal from the District Court of Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

John R. Hall of McDermott & Hall, for appellant.

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

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

CLINTON, J.

The defendant was found guilty by a jury on a charge of burglary. He was also found guilty by the court on a second count as being an habitual criminal and was sentenced to a term of not less than 20 nor more than 30 years in the Nebraska Penal and Correctional Complex. He appeals and contends the sentence is excessive. We reduce the sentence to not less than 10 (the mandatory minimum required by section 29-2221, R. R. S. 1943), nor more than 30 years.

The defendant was 47 years of age at the time of trial. He had served six previous terms of varying duration, all for burglary. He is an alcoholic. He has never been involved in a crime of violence and his psychiatric examination indicates he has no tendency to violence. The burglary of which he was convicted in the present instance consisted of breaking the glass door of an automobile service station, then entering and opening a vending machine which apparently contained no coins. One previous burglary also involved a service station and vending machine. The nature of the other burglaries is not disclosed. In the present case he was observed in the act of the burglary and was apprehended when he fled. About 1½ months before the date of his present offense he had been released from his last prison term. Following that he sought employment, but found none, and at the time of the current offense had about $1 in his pocket.

His social history includes the following: His father died when he was 7 years old. He quit school during the seventh grade. School records indicate that he was slow, dependable, industrious and respectful, but that he attended school only irregularly and thus failed. Discipline was lacking in the family after his father's death. He began to consume alcohol at age 14. His mother

died when he was 17. His only work has been as a laborer at very low wages. He does his time in the penitentiary well and causes no problems.

Although he is average or above average in intelligence, he has what is described as a passive-dependent type of personality and is characterized as indecisive, fearful of assertion, and timid. He fails to learn either from experience or punishment.

Presumably one of the reasons this court is empowered by statute to reduce sentences is to afford some additional opportunity at the appellate level of achieving proportionality in sentencing. Proportionality ought to mean, among other things, that the more serious offenses generally merit the greater punishment, and that those offenders who offer the greatest menace to society deserve the greater punishment.

Despite the defendant's long criminal record and his apparent inability to learn either from experience or from punishment, we do not think that society's expression of outrage in this case ought to be the same as in the cases of rape, kidnapping, murder, and deliberate shooting with intent to kill. A look at some recent cases before this court will aid our perspective: State v. Leonard, *ante* p. 731, 246 N. W. 2d 68 (burglary of the prison store by an inmate, habitual criminal charge added, sentence 10 years); State v. Houston, *ante* p. 724, 246 N. W. 2d 63 (robbery, use of firearm, shooting with intent to kill, 10 to 25 years); State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610 (kidnapping, rape, and sodomy, consecutive terms totaling 14 to 19 years); State v. Barajas, 195 Neb. 502, 238 N. W. 2d 913 (murder in the second degree, 25 years; by virtue of the operation of section 83-1,105, R. S. Supp., 1976, actually 10 to 25).

The minimum portion of the indeterminate sentence imposed in this case, 20 years, is actually the longest minimum that could be imposed under the provisions of the pertinent statutes, section 29-2221, R. R. S. 1943, and section 83-1,105(1), R. S. Supp., 1976, i.e., one-third

of the 60-year maximum. We know that as a practical matter the minimum portion of an indeterminate sentence is that which measures the severity of the sentence. If the longest minimum is imposed in cases such as this, then there is no room for more severe punishment of habitual criminals whose crimes constitute a greater menace to society and who are more morally reprehensible, e.g., as in the case of the armed robber who repeatedly endangers life. Leeway must be left to effectuate proportionality as best we can.

It may well be that the defendant must be warehoused for the rest of his life, but this can be best judged at a later time by those who have charge of supervising his incarceration and determining the time of his release as permitted or required by law. We ought not to unduly tie their hands in this case. Society's expression of moral condemnation does not, in our judgment, require a minimum term of 20 years, but rather the statutory minimum. See our comments in State v. Houston, *supra*.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS L. MANN, APPELLANT.
246 N. W. 2d 604

Filed November 3, 1976. No. 40717.

Motor Vehicles: Sentences: Statutes: Criminal Law. The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

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

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

MCCOWN, J.

The defendant entered a plea of guilty to a charge of "speeding 100 M.P.H. in a 55 zone" on December 28, 1975, at a point 2 miles east of Springfield, in Sarpy County, Nebraska. The Sarpy County court imposed a fine of $100 and costs and suspended the defendant's motor vehicle operator's license for a period of 60 days. The county court denied defendant's motion to modify sentence by eliminating that portion of the sentence suspending the operator's license of defendant. On appeal to the District Court the judgment of the county court was affirmed and this appeal followed.

This case turns on an interpretation of a portion of section 60-427, R. R. S. 1943. The statute generally authorizes a judge, in his discretion, to suspend a motor vehicle operator's license for not less than 10 days nor more than a year upon conviction for a traffic violation under the conditions set forth in the statute. The critical first portion of that statute reads: "Upon conviction of any person in any court within this state of any violation of (1) any law of this state pertaining to the operation of motor vehicles or (2) any city or village ordinance pertaining to the operation of a motor vehicle in such a manner as to endanger life, limb, or property, * * *." The only change in this portion of the statute since 1947 occurred in 1957, when the numbers (1) and (2) were inserted at the positions shown above. No subsequent changes of this portion of the statute have been made since. The 1957 amendment made substantial changes and additions in the latter portions

of section 60-427, R. R. S. 1943, with respect to drunken driving offenses. These changes will be discussed later.

The critical issue on this appeal is whether or not the 1957 amendment of section 60-427, R. R. S. 1943, was intended to, or did, overrule a 1955 opinion of this court, Olson v. State, 160 Neb. 604, 71 N. W. 2d 124. The holding in Olson was based upon the language quoted above but without the addition of the "(1)" and "(2)." Olson held that the discretionary power to suspend an operator's license under section 60-427, R. R. S. 1943, was limited to charges of operating a motor vehicle in such a manner as to endanger life, limb, or property, or while under the influence of alcoholic liquor or any drug, brought under appropriate statutes or ordinances and did not apply to a simple charge of speeding. Olson specifically held that where there was no allegation in a speeding charge that a defendant operated a motor vehicle in such a manner as to endanger life, limb, or property, the statute, being criminal in nature, must be strictly construed and may not be extended by implication.

Olson also reaffirmed this court's previous holding that where a person is charged and convicted under an applicable statute for operating a motor vehicle "in such a manner as to endanger life, limb, or property," his license may be suspended pursuant to the provisions of section 60-427, R. R. S. 1943, unless a greater period of suspension is mandatory under the charging statute. The Olson court specifically rejected the contention by the State that the words "in such a manner as to endanger life, limb, or property" should be applied only to violations of city or village ordinances and not to violations of "any law of this state." The State now makes the same identical arguments here. The State contends that a conviction under any state statute pertaining to the operation of motor vehicles is sufficient to justify the suspension of an operator's license under section 60-427, R. R. S. 1943. The State concedes that

allegations and proof that a violation was "in such a manner as to endanger life, limb, or property" are required before a license may be suspended for a violation of city or village ordinances pertaining to the operation of motor vehicles. Nevertheless, the State contends that the 1957 amendment of section 60-427 evidenced the Legislature's intent to overrule Olson and to authorize license suspensions for state law violations upon conviction alone, and upon a wholly different basis than similar violations of city or village ordinances. We cannot agree.

Until 1957, section 60-427, R. R. S. 1943, had not been changed since 1947, and during that time, by its specific terms, it applied not only to operation of vehicles in such a manner as to endanger life, limb, or property in violation of either state law or local ordinances, but also specifically applied to operating a vehicle while under the influence of alcoholic liquor, both under the state statutes and under any city or village ordinances. Until 1953, there were no statutes authorizing suspension or revocation of an operator's license for drunken driving except section 60-427, R. R. S. 1943. Until 1953, the penalty section for a drunken driving conviction under state law had no provision authorizing the suspension or revocation of an operator's license. The section simply directed the court to order a convicted defendant not to drive for periods of time varying from 30 days to 2 years, with the exact time generally left to the discretion of the court. In 1953, for the first time, section 39-727, R. R. S. 1943, authorized the court to revoke or suspend an operator's license upon conviction for violation of the state drunken driving law. In 1953, for the first time, section 39-727, R. R. S. 1943, required a mandatory revocation of a driver's license for specified periods of time for first, second, or third offenses of drunken driving. From 1953 until 1957, both section 60-427 and 39-727, R. R. S. 1943, authorized suspension or revocation of an operator's license for violation of state drunken

driving law. At the same time section 60-427, R. R. S. 1943, remained the only section authorizing suspension of an operator's license for a drunken driving conviction under city or village ordinances. License suspensions under section 60-427, R. R. S. 1943, were discretionary while suspensions under section 39-727, R. R. S. 1943, were mandatory, and the time periods specified were also different.

This extensive history is pertinent in view of the statement of purpose by the judiciary committee on L.B. 388 to amend section 60-427, R. R. S. 1943, in the 1957 session of the Legislature. That statement of purpose read: "This bill clarifies the question of when an operator's license may be suspended for a conviction of drunken driving. Presently the penalty for such conviction for violation of a state law is different than for violation of a city ordinance. The bill makes the revocation of a license period for drunken driving the same, whether the charge be brought under a city ordinance or a state law."

L.B. 388 completely changed the application of section 60-427, R. R. S. 1943, to drunken driving violations by excepting operation of a motor vehicle while under the influence of alcoholic liquor or any drug from the discretionary suspension of license provisions entirely. It also specifically provided that upon conviction in any court in the state for violation of any city or village ordinance pertaining to the operation of a motor vehicle while under the influence of alcoholic liquor or any drug the judge shall suspend the motor vehicle operator's license for a period of 6 months. That provision then coincided with the penalty for a first offense drunken driving conviction for violation of a state statute under section 39-669.07, R. R. S. 1943, formerly section 39-727. Those changes in section 60-427, R. R. S. 1943, where the only material or substantial changes that were made unless it can be said that the housekeeping addition of (1) and (2) was a substantial change.

It is quite clear that the Legislature had no intention to change any material portions of section 60-427 except those dealing with the drunken driving provisions. It is undisputed that the Legislature made extensive language changes in the law for the stated purpose of making license suspension penalties for drunken driving identical, whether the violation charged was under state law or under city or village ordinances. It is unrealistic to assume that by the mere insertion of (1) and (2) the Legislature intended to change authorized license suspension penalties for all other offenses to make them different, depending on whether the prosecutions were brought under state or under city or village ordinances. Any such assumption is not only unsupported by the record but is wholly unreasonable.

In the case at bar the charge was speeding. There was no allegation that the violation was in such a manner as to endanger life, limb, or property, and under a plea of guilty there was no evidence. Olson v. State, 160 Neb. 604, 71 N. W. 2d 124, has not been overruled, either by this court or by the Legislature, and its reasoning is still valid.

The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone.

The rule is that when part of a sentence is illegal, an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. Olson v. State, *supra*.

The order of the District Court is modified and that part of the sentence suspending the defendant's license to operate a motor vehicle is stricken.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because I do not believe that Olson v. State (1955), 160 Neb. 604, 71 N. W. 2d 124, even if correctly decided, is controlling herein. The Olson decision was filed by this court on June 17, 1955, the same day the Sixty-seventh Legislature adjourned sine die. The amendments to section 60-427, R. R. S. 1943, here in question were made by the Sixty-eighth Legislature, which convened January 1, 1957, the earliest possible opportunity to alter section 60-427 following the ruling in Olson.

As we stated in Ledwith v. Bankers Life Ins. Co. (1952), 156 Neb. 107, 54 N. W. 2d 409: "The change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended."

The statute before amendment read, so far as material herein: "Upon conviction in any court within this state of any violation of any law of this state pertaining to the operation of motor vehicles or of any city or village ordinance pertaining to the operation of a motor vehicle in such a manner as to endanger life, limb or property, or while under the influence of alcoholic liquor or any drug * * * the magistrate or judge of such court may, in his discretion, suspend the license of such convicted person to operate a motor vehicle."

Section 60-427, R. R. S. 1943, now reads: "Upon conviction of any person in any court within this state of any violation of (1) any law of this state pertaining to the operation of motor vehicles or (2) any city or village ordinance pertaining to the operation of a motor vehicle in such a manner as to endanger life, limb, or property, except for operating a motor vehicle while under the influence of alcoholic liquor or any drug, the judge of such court may, in his discretion, suspend the license of such convicted person to operate a motor vehicle * * *."

The general rule with regard to the interpretation

of an amended statute is that the amended act is ordinarily to be construed as if the original statute had been repealed and a new and independent act in the amended form had been adopted in its stead. In the Olson case the State contended that the phrase "in such a manner as to endanger life, limb, or property," as then written, applied only to violations of city or village ordinances contained in such provisions and not to violations of any law of this state. In that case, this court rejected that interpretation, stating: "There is nothing in the grammatical construction of the sentence nor its punctuation to suggest such a meaning." The Legislature then amended the statute to specifically separate the two provisions so that now it should be apparent that the phrase "in such a manner as to endanger life, limb, or property" applies only to violations of city or village ordinances and *not* to any law of this state pertaining to the operation of motor vehicles.

It seems to me the majority opinion ignores the obvious when it holds the Olson case controlling herein. The statutory alteration in this case was by direct and specific act of the Legislature, at the earliest time it was possible to do so after the filing of the Olson opinion. To hold as the court now does, in my judgment, specifically ignores the action of the Legislature and the grammatical construction of the sentence and its punctuation.

The defendant was charged with driving 100 miles per hour in a 55 mile per hour speed zone at night for a distance of at least 2 miles. This offense in my judgment merited the penalty imposed, and I would affirm the judgment of the trial court.

WHITE, C. J., and BOSLAUGH, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. SAMMY HOWELL, APPELLANT.
246 N. W. 2d 479

Filed November 3, 1976. No. 40721.

1. **Criminal Law: Trial: Evidence.** Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession.
2. **Criminal Law: Controlled Substances: Words and Phrases.** Unlawful delivery of a controlled substance includes both actual and constructive delivery. It is not necessary for the State to show actual physical transfer of the controlled substance from the defendant.
3. **Criminal Law: Trial: Prosecuting Attorneys: Records.** Statements constituting alleged misconduct of counsel in argument to the jury should be taken by the court reporter at the trial together with the objections made and the ruling of the trial court.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

Walter J. Matejka, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of three counts of delivering a controlled substance. The first count involved LSD. The other two counts involved marijuana. The defendant has appealed and contends the evidence was not sufficient to support the conviction; the trial court erred in receiving certain exhibits; and the trial court erred in failing to declare a mistrial.

All three counts involved the sale of a controlled substance to an undercover agent employed by the State. The first transaction took place on November 21, 1974. The agent testified he purchased two "lids" of marijuana from the defendant for $30. The agent gave the money

to the defendant and a short time later an accomplice, Kenny Rhodes, returned and delivered the marijuana to the agent.

The second transaction took place on November 23, 1974. On this occasion the defendant handed four capsules of LSD to Larry Alberts, an accomplice, who in turn delivered the capsules to the agent.

The third transaction took place on December 13, 1974, when the agent purchased a bag of marijuana for $20. On this occasion the defendant personally handed the marijuana to the agent.

After each transaction the agent delivered the controlled substance to a police officer who placed it in an evidence locker until it was delivered to the state laboratory for testing. After the tests were completed the controlled substance involved in each transaction was kept in a police evidence locker until the trial. The evidence as to identification and chain of possession was sufficient foundation to permit the exhibits to be received in evidence. See State v. Guetierrez, 187 Neb. 383, 191 N. W. 2d 164.

The evidence was also sufficient to permit the jury to find that the defendant participated in each transaction although in two instances the controlled substance was handed to the agent by an accomplice of the defendant. Such facts do not constitute a defense to a charge of delivery. The statute punishes both actual and constructive delivery whether or not there is an agency relationship. § 28-4,115 (13), R. R. S. 1943. See State v. Guyott, 195 Neb. 593, 239 N. W. 2d 781.

The third assignment of error relates to alleged misconduct of the county attorney in closing argument. The argument was not recorded and there is no basis upon which the ruling of the trial court on the motion for a mistrial can now be reviewed in this court. Statements made in argument to which objection is made should be recorded by the court reporter. See, Peery v.

State, 165 Neb. 752, 87 N. W. 2d 378; Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID WILLIAMS, APPELLANT.

246 N. W. 2d 480

Filed November 3, 1976. No. 40737.

Criminal Law: Sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Miles W. Johnston, Jr., for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

WHITE, C. J.

The sole issue in this case is whether or not the defendant received an excessive sentence.

The defendant entered a plea of guilty to a felony charge of robbery. The District Court accepted the defendant's plea and sentenced him to 3 years imprisonment in the Nebraska Penal and Correctional Complex.

On December 1, 1975, the defendant went to the house of a companion, Forrest Lohmeier. There, Lohmeier and Mark Hicks, another of the defendant's companions, were discussing robbing a nearby service station. They asked the defendant to join them. He agreed. The trio then walked a few blocks to the service station and forcibly robbed the attendant of several

hundred dollars. The defendant's companions brandished pellet guns, and the defendant a knife, during the course of the robbery. The defendant had no physical contact with the robbery victim nor did he say anything. After the robbery, the trio returned to Lohmeier's house and divided the money.

The defendant argues that under the circumstances of this case the sentence imposed by the District Court is excessive, and suggests in his brief that a more appropriate disposition would be either probation or an evaluational commitment to the Youth Development Center at Kearney.

The defendant received the minimum sentence within statutory limits for the offense. In his remarks at the time of sentencing, the District Judge indicated that he had given consideration to other alternatives, such as probation, before deciding that imprisonment was warranted. The presentence report shows that this was not the defendant's first run-in with the law. His juvenile record indicates auto theft, shoplifting, purse snatching, and assaulting a police officer.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, *ante* p. 563, 244 N. W. 2d 177 (1976). We have carefully reviewed the record in this case and find no abuse of discretion.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD J. BORYCA, APPELLANT.
246 N. W. 2d 482

Filed November 3, 1976. No. 40814.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

NEWTON, J.

The defendant was charged with a second offense of operating a motor vehicle while under the influence of alcoholic liquor. Following his plea of guilty defendant was sentenced to 10 days in jail, a fine of $300, and his driver's license was suspended for 1 year. He maintains that the sentence is excessive.

The defendant could have been charged with a third offense on this occasion. His record shows two prior convictions on the same charge and one of driving while his license was suspended. It is apparent that no abuse of discretion occurred and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD M. COX, APPELLANT.

246 N. W. 2d 482

Filed November 3, 1976. No. 40815.

Criminal Law: Sentences: Probation and Parole. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

SPENCER, J.

Defendant was sentenced to 1 to 2 years in the Nebraska Penal and Correctional Complex after pleading guilty to the offense of delivering a controlled substance. Defendant prosecutes this appeal, contending the sentence is excessive and requesting probation. We affirm.

Defendant pled guilty to the sale of amphetamine tablets to an undercover agent. A second count in the information, charging a subsequent offense of delivery of a controlled substance, was dismissed pursuant to a plea bargain.

Edward M. Cox first came to the attention of the authorities as a juvenile. During the time he was under special supervision he was picked up for forgery, drinking, and glue sniffing, but was continued under special supervision. During 1969 and 1970, he was charged and convicted on 22 separate offenses, one of which was a complaint for sniffing glue, one for assault and battery, and one for forcibly resisting a police officer. The others involved traffic offenses. In addition to an assault and battery charge in 1971, defendant spent 60 days in jail in 1972 for delivering a controlled substance. In 1973, he was convicted of visiting a place where controlled substances were being used.

Defendant argues that imprisoning him will be of no benefit to him or to the interest of society. Suffice it to say, the authorities have been particularly lenient with the defendant. He has demonstrated the need for incarceration. His record is such there is no other alternative.

Defendant could have been sentenced to a term of not less than 1 year nor more than 5 years in the Nebraska Penal and Correctional Complex. In view of his previous record, a sentence of 1 to 2 years is in the minimal

range. He will be eligible for release after he has served 1 year, less any good time he is able to earn.

We have repeatedly held this court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Schleis (1976), *ante* p. 327, 243 N. W. 2d 50. From the foregoing it is apparent there has been no abuse of discretion herein.

The judgment is affirmed.

AFFIRMED.

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1. Ordinarily, an account stated should be set aside if the case is to be tried on the original claims upon which it is based. B. C. Christopher & Co. v. Danker 518
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Account Stated.

Ordinarily, an account stated should be set aside if the case is to be tried on the original claims upon which it is based. B. C. Christopher & Co. v. Danker 518

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Actions.

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posing strict liability for sale of liquor in Nebraska. Holmes v. Circo 496
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11. In the absence of legislation specifically so providing, a tavern owner or operator in Nebraska is not liable to third parties injured by intoxicated persons to whom the tavern owner has served liquor in violation of section 53-180, R. R. S. 1943. Holmes v. Circo 496
12. A violation of section 53-180, R. R. S. 1943, does not constitute negligence, or evidence thereof, of which injured third parties may avail themselves in actions against a tavern owner or operator. Holmes v. Circo 496
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18. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the

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Administrative Law.

1. In passing on claims for a refund of taxes, a county board acts quasi-judicially. Svoboda v. Hahn 21
2. Section 71-7,132.29, R. R. S. 1943, provides that the Board of Nursing of the State of Nebraska "shall have power to deny . . . any license . . . applied for . . . upon proof that the person . . . (6) is guilty of unprofessional conduct." Scott v. State ex rel. Board of Nursing 681
3. A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Scott v. State ex rel. Board of Nursing . 681
4. Section 71-1,132.34, R. R. S. 1943, as so construed does not provide for a de novo review in the District Court in the sense that the court may substitute its own judgment for that of the Board of Nursing. Scott v. State ex rel. Board of Nursing 681
5. The appropriate constitutional standard of review is restricted to considering whether the order of the board is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Scott v. State ex rel. Board of Nursing 681
6. Section 71-1,132.34, R. R. S. 1943, provides a specific method of appeal to the District Court from orders of the Board of Nursing of the State of Nebraska. Scott v. State ex rel. Board of Nursing 681
7. The certification of a copy of an order suspending a motor vehicle operator's license is a ministerial act. State v. Applegarth 773
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Adverse Possession.

1. Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Valder v. Wallis 222
2. Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate have the burden of showing that the use was permissive. Smith v. Bixby 235
3. To establish a road or highway by prescription, there must be use by the general public under a claim of right adverse to the owner of the land of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Smith v. Bixby 235
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5. The width of a public highway acquired by prescription must be determined as a question of fact by the character and extent of the use. Smith v. Bixby 235
6. If the public has acquired the right to a highway by prescription the right is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel. Smith v. Bixby 235

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1. The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime. Malec v. Malec 533
2. It has long been the rule that reasonable grounds for the issuance of a search warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described. State v. Bernth 813

3. Affidavits for search warrants must be tested and interpreted by magistrates and courts in common-sense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in the area. State v. Bernth 813
4. Where circumstances are detailed in an affidavit for a search warrant, and where reason for crediting the source of the information is given, and where a magistrate has found probable cause, courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical rather than in a common-sense manner. State v. Bernth 813
5. Although in a particular case it may not be easy to determine when an affidavit for a search warrant demonstrates existence of probable cause, resolution of doubtful or marginal cases in the area should be largely determined by preference to be accorded to warrants. State v. Bernth 813

Agents.

1. The power to sell bonds includes the power to employ a broker or agent to effect the sale for a customary commission or fee. Hayes v. Sanitary & Improvement Dist. No. 194 653
2. Where a fiscal agent for the sale of bonds of a sanitary and improvement district purchases the bonds privately from the district at par, payment of a fee for fiscal services to such purchaser constitutes a sale of the bonds at less than par in violation of section 31-755, R. R. S. 1943. Hayes v. Sanitary & Improvement Dist. No. 194 653
3. Ordinarily contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statutes to the contrary. Hayes v. Sanitary & Improvement Dist. No. 194 653
4. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. Hayes v. Sanitary & Improvement Dist. No. 194 653
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Aiders and Abettors.

1. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. State v. Dirgo 36
2. A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act. State v. Dirgo 36
3. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. State v. Foster 332

Airports and Landing Fields.

1. The propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. Zoning permitting a contemplated use is not a condition precedent to a taking. Seward County Board of Commissioners v. City of Seward 266
2. Section 18-1716, R. R. S. 1943, was designed to eliminate overlapping in municipal extraterritorial zoning. Seward County Board of Commissioners v. City of Seward . 266
3. The power of eiminent domain is inherently superior to the exercise of the zoning power, and the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulation. Seward County Board of Commissioners v. City of Seward 266
4. Although the governmental proprietary distinction may be a useful device for limiting governmental tort immunity, it is not appropriate for the resolution of zoning conflicts. Seward County Board of Commissioners v. City of Seward 266
5. Under sections 25-2501 to 25-2506, R. S. Supp., 1974, the uniform procedure for acquiring private property for

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1. The fixing of alimony rests in each case within the sound discretion of the trial court. Abbott v. Abbott ... 97 Van Bloom v. Van Bloom 792
2. In determining whether alimony should be awarded, the ultimate test is one of reasonableness. Baird v. Baird 124
3. Section 42-365, R. S. Supp., 1974, provides orders for alimony may be modified or revoked for good cause shown. Howard v. Howard 351
4. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement. Howard v. Howard .. 351
5. There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement. Howard v. Howard 351
6. 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. Howard v. Howard 351
7. In an action for dissolution of marriage, the court has the power to consider all property accumulated by the joint efforts of both the husband and wife, and to adjust their property rights, no matter how such property is legally titled as between the parties. Snyder v. Snyder 383
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1. In an appeal in an equity action, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the District Court. However, if there is an irreconcilable conflict in a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying. Kolc v. Krystyniak 16
2. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Abbott v. Abbott 97
3. The action of the board under section 79-403, R. R. S. 1943, is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo and also upon appeal from District Court to this court, it is triable de novo as in any other equitable action. Klecan v. Schmal 100
4. Even when a case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight. Klecan v. Schmal 100
5. Only those assignments of error which are argued and discussed will be considered by this court on appeal. Stungis v. Union Packing Co. of Omaha, Inc 126
6. When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion. Cape Co. v. Wiebe 204
7. Where in an equity case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Cape Co. v. Wiebe 204
8. Section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of the judgment or the making of the final order complained of. Marcotte v. City of Omaha 217
9. Under the provision of section 25-1905, R. R. S. 1943, the petitioner in error must file with his petition a certified transcript of the proceedings containing the final judg-

ment or order sought to be reversed, vacated, or modified. The filing of such transcript is jurisdictional unless failure to file is without fault on the part of the petitioner and is caused solely by failure of the public official required by law to furnish such transcript to perform his public duty. Marcotte v. City of Omaha 217

10. The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken. Marcotte v. City of Omaha 217

11. A failure of the clerk to comply with section 25-1301.01, R. S. Supp., 1974, will not defeat a party's right to move for a new trial or appeal, but such failure does not render the judgment void. Pofahl v. Pofahl 347

12. A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. School Dist. of Gering v. Stannard 367

13. We consider only assignments of error discussed by appellant in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974. State v. Downtown Books, Inc. .. 473

14. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490

15. An action to reform a written instrument is equitable in nature and on appeal to this court is triable de novo. Hohneke v. Ferguson 505

16. In workmen's compensation cases, where the new review procedures of section 48-185, R. S. Supp., 1975, are not applicable, the judgment, order, or award will not be modified on appeal for insufficiency of evidence, if there is reasonable competent evidence to support findings of fact in the trial court. Voycheske v. Osborn ... 510

17. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme

Court in accordance with ordinary rules governing the burden of proof, and competency and materiality of the evidence. Von Seggern v. Von Seggern 545

18. When credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Von Seggern v. Von Seggern 545

19. Even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight. Von Seggern v. Von Seggern 545

20. The appropriate constitutional standard of review is restricted to considering whether the order of the board is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Scott v. State ex rel. Board of Nursing 681

21. Section 71-1,132.34, R. R. S. 1943, provides a specific method of appeal to the District Court from orders of the Board of Nursing of the State of Nebraska. Scott v. State ex rel. Board of Nursing 681

22. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699

23. On an appeal to this court in a criminal prosecution it is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. State v. Leonard 731

24. It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict. Brandt v. Mayer 751

25. Assignments of error on grounds available to the defendant in the District Court must first have been presented to the District Court. State v. Lewis 778

26. The discretion of the trial court with respect to awarding or changing the custody and support 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. Chilese v. Chilese 784

Architects.

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2. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law. Palmer v. Dorn 360

Arrest.

1. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor. State v. Thompson 55
2. The use of binoculars by police as an aid in performing surveillance is not unlawful. State v. Thompson 55

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Attorney and Client.

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2. Communications between client and attorney made in the presence of others do not constitute privileged communications. State v. Lynch 372
3. In the absence of conflicting interests, two or more defendants may be represented by the same counsel in a criminal prosecution. State v. Parker 762

Attorneys at Law.

The taxation of attorney's fees and expenses of a party other than the executor or administrator of the estate may be appropriate in a particular case, either against the estate generally or against the executor or administrator personally. Roberts v. Snow Redfern Memorial Foundation 139

Bonds.

1. A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. Slocum v. Hevelone 482
2. A fidelity bond is an indemnity insurance contract whereby insurer agrees to indemnify the insured against loss arising from want of integrity, fidelity, or honesty of employees or other persons holding positions of trust. Foxley Cattle Co. v. Bank of Mead 587
3. For the insurer to be liable to its insured on a contract of employee fidelity insurance, the insured must sustain an actual loss of the nature insured against. Foxley Cattle Co. v. Bank of Mead 587
4. An insurer under a fidelity bond is liable only in event of loss sustained by the insured. Foxley Cattle Co. v. Bank of Mead 587
5. Legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket honesty bond to such third party. Foxley Cattle Co. v. Bank of Mead 587
6. Contracting parties are presumed to act for themselves and an intent to benefit a third person should be clearly expressed in the contract. Foxley Cattle Co. v. Bank of Mead 587
7. In contracts of indemnity against loss, an insurer does not become liable until the insured has suffered proven loss. Foxley Cattle Co. v. Bank of Mead 587
8. In a special proceeding to determine the legality and validity of a bond issue of a sanitary and improvement district, a decree approving and confirming the proceedings for the issuance of the bonds validates the bonds and forecloses any question as to the right to issue bonds and of compliance with any conditions precedent required by law. It is conclusive so as to protect the bonds in the hands of anyone insofar as the validity of any proceedings relating to the issuance of the bonds

is concerned. Hayes v. Sanitary & Improvement Dist. No. 194 653
9. The decree confirming the legality and validity of a bond issue does not determine the validity or invalidity of all contracts made by the sanitary and improvement district in connection with the project which the bond issue was designed to finance. Hayes v. Sanitary & Improvement Dist. No. 194 653
10. The power to sell bonds includes the power to employ a broker or agent to effect the sale for a customary commission or fee. Hayes v. Sanitary & Improvement Dist. No. 194 653
11. Where a fiscal agent for the sale of bonds of a sanitary and improvement district purchases the bonds privately from the district at par, payment of a fee for fiscal services to such purchaser constitutes a sale of the bonds at less than par in violation of section 31-755, R. R. S. 1943. Hayes v. Sanitary & Improvement Dist. No. 194 653
12. Ordinarily contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statute to the contrary. Hayes v. Sanitary & Improvement Dist. No. 194 653
13. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. Hayes v. Sanitary & Improvement Dist. No. 194 653

Boundaries.

1. Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States. Valder v. Wallis 222
2. Where a river changes its main channel, not by slowly excavating and gradually passing over the intervening

space to a new position, but changes it by flowing around intervening land, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed at the original main channel remains, under such conditions, in that original channel. Valder v. Wallis 222

3. Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Valder v. Wallis 222

4. Where the accretion commences with the shore of an island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact. Valder v. Wallis 222

5. Under Nebraska law, titles to riparian lands run to the thread of the contiguous stream. Valder v. Wallis 222

Brands and Marks.

The purpose of section 54-116, R. S. Supp., 1969, was to afford protection to the owners of brands and not to protect those who make fraudulent misrepresentations. Foxley Cattle Co. v. Bank of Mead 1

Brokers.

1. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Cornett v. Nathan 277

2. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency, including statements made without knowledge or known to be false, is guilty of fraud and bad faith. Lee v. Brodbeck 393

3. Where a broker fails to execute a customer's orders or executes them improperly or at variance with the instructions given, the customer may treat the transaction as a nullity. If a customer elects to repudiate a transaction because it took place contrary to his in-

structions he has no liability to the broker as a result of the transaction. B. C. Christopher & Co. v. Danker ... 518
4. Section 81-875.01, R. R. S. 1943, was regulatory and in the nature of a penal statute. It did not grant a new civil remedy against real estate brokers in addition to the penalties imposed by statute. Eggerling v. Cuhel . 745
5. Where a real estate broker has paid over a buyer's deposit or downpayment on a real estate contract to the broker's disclosed principal, or in good faith changed his position before he learns of the buyer's claim or demand for refund, the broker cannot be held liable for the return of the funds in the absence of an intention to impose personal liability on the broker as shown by the circumstances and the agreement of the parties. Eggerling v. Cuhel 745

Certificate of Title Act.
1. Under the Nebraska Certificate of Title Act, sections 60-102 to 60-117, R. R. S. 1943, a certificate of title is the exclusive method provided by statute for the transfer of title to an automobile, but it is not conclusive of ownership. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
2. A certificate of title to a motor vehicle conveys no greater interest than the grantor has. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
3. A thief can acquire no title to an automobile stolen by him, nor can title to such vehicle be acquired through another's larceny or theft. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
4. The Nebraska Certificate of Title Act does not prevent owners of stolen vehicles from reclaiming them; and rights acquired by subsequent bona fide purchasers of the stolen vehicles are subject to those of the true owners. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. . 595

Chilling Right to Appeal.
An unsuccessful attempt to chill a right to appeal is harmless error. State v. Goodloe 381

Civil Rights.
1. The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Knoefler Honey Farms v. County of Sherman 435
2. The equal protection clause of the Fourteenth Amend-

ment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. Knoefler Honey Farms v. County of Sherman .. 435

Collective Bargaining.

Collective bargaining by County of Lancaster, Nebraska, Division of Public Welfare, is not possible without the inclusion of the State Department of Public Welfare because the activities of the county are jointly controlled by and interrelated with the state department. American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster 89

Colleges and Universities.

1. Where a tenured college faculty member is employed using annual reappointment letters or forms which do not set forth in full the terms and conditions of employment, the employment policies, rules, and regulations of the college become a part of the employment contract between the college and the faculty member. Brady v. Board of Trustees of Nebraska State Colleges 226
2. A tenured professor has a sufficient property interest in continued employment to entitle him to the protection of procedural due process. Brady v. Board of Trustees of Nebraska State Colleges 226
3. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Technical Com. Col. Area v. Tallon 603
4. Chapter 79, article 26, R. S. Supp., 1975, is not unconstitutional on the ground it violates Article VIII, section 1A, of the Constitution of Nebraska. State ex rel. Western Technical Com. Col. Area v. Tallon 603

Conflict of Laws.

A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would

work an injury to this state or its citizens. Diamond Match Div. of Diamond International Corp. v. Bernstein 452

Constitutional Law.

1. Section 28-4,127, R. S. Supp., 1974, which provides that "(1) It shall be unlawful for any person: * * * (g) To visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of sections 28-459 and 28-4,115 to 28-4,142, if the person has knowledge that such activity is occurring; * * *" is unconstitutionally vague and overbroad. State v. Adkins 76
2. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adkins 76
3. The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Adkins 76
4. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught. State v. Adkins 76
5. Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States. Valder v. Wallis 222
6. The power of eminent domain is an attribute of sover-

eignty which exists independently of constitutional provision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant. Father Flanagan's Boys' Home v. Millard School Dist. 299

7. The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state acting through the department or agency authorized to exercise the power, may proceed at will. Father Flanagan's Boys' Home v. Millard School Dist. 299
8. The right to free speech under the First Amendment to the Constitution of the United States is not unlimited and unqualified but may be reasonably restricted in the public interest. State v. Guy 308
9. The resort to epithets or personal abuse is not a communication of information or opinion safeguarded by the Constitution and the punishment thereof as a criminal act raises no question under the Constitution. State v. Guy 308
10. Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance; an ordinance prohibiting such conduct is not unconstitutionally vague. State v. Guy 308
11. Section 25-1601, R. S. Supp., 1974, excluding 19 and 20 year olds from petit and grand jury service does not violate constitutional due process guarantees, as those who are 19 and 20 years old do not comprise a cognizable class. State v. Foster 332
12. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. 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. State v. Jefferson 340
13. The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Wright 377
14. A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. State v. Wright 377
15. The purpose of the equal protection clause of the Four-

teenth Amendment is to secure every person within the states jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Knoefler Honey Farms v. County of Sherman 435

16. The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. Knoefler Honey Farms v. County of Sherman .. 435

17. The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590. State v. American Theatre Corp. 461, 467

18. In order for the state Constitution to restrict plenary power of the Legislature to tax, the language of the restriction must be clear. State ex rel. Meyer v. County of Banner 565

19. A statute authorizing or requiring a county to levy a property tax for purposes substantially local does not contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes. State ex rel. Meyer v. County of Banner 565

20. The adoption of Article VIII, section 1A, Constitution of Nebraska, was not intended to disturb traditional and historical property tax support from counties or other local taxing subdivisions for continuing governmental activities commingling state and local purposes. State ex rel. Meyer v. County of Banner 565

21. Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court; a District Court; prosecuting criminal law violations; and conducting state and national elections do not contravene Article VIII, section 1A, Constitution of Nebraska, prohibiting the State from levying a property tax for state purposes. State ex rel. Meyer v. County of Banner 565

22. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. Taylor v. Karrer 581

23. While it is competent for the Legislature to classify for

purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Taylor v. Karrer 581

24. It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. Taylor v. Karrer 581

25. In construing a constitutional provision, effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions. State ex rel. Western Technical Com. Col. Area v. Tallon 603

26. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Technical Com. Col. Area v. Tallon 603

27. Chapter 79, article 26, R. S. Supp., 1975, is not unconstitutional on the ground it violates Article VIII, section 1A, of the Constitution of Nebraska. State ex rel. Western Technical Com. Col. Area v. Tallon 603

28. Where an element of the crime charged is possession of the property seized, "ownership in or right to possession of the premises" or the interests of a "lessee" or "licensee" is not necessary to confer standing to challenge the legality under the Fourth Amendment of a search and seizure. State v. Schrader 632

29. Open fields outside the curtilage are not within the protection of the Fourth Amendment. State v. Schrader .. 632

30. Where a seizure invades no right of privacy of the person or premises of the accused, his Fourth Amendment rights have not been violated. State v. Schrader 632

31. A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Scott v. State ex rel. Board of Nursing . 681

32. In construing a statute, it is the duty of the court to give

a statute an interpretation which meets constitutional requirements if it can be reasonably done. Scott v. State ex rel. Board of Nursing 681

33. Section 71-1,132.34, R. R. S. 1943, as so construed does not provide for a de novo review in the District Court in the sense that the court may substitute its own judgment for that of the Board of Nursing. Scott v. State ex rel. Board of Nursing 681

34. The appropriate constitutional standard of review is restricted to considering whether the order of the board is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Scott v. State ex rel. Board of Nursing 681

35. Section 48-816, R. R. S. 1943, in classifying officers of municipal police and fire departments differently in regard to membership in bargaining units from officers of other public departments is not thereby rendered unconstitutional as special legislation. Local Union No. 647 v. City of Grand Island 693

36. The fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal Constitutions. State v. Houston 724

37. Due process requires that the accused receive a trial by an impartial jury free from outside influences. State v. Ell 800

Contempt.

1. Contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction. Malec v. Malec 533

2. The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime. Malec v. Malec 533

3. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Malec v. Malec 533

4. Before a person may be said to be in contempt of court for failure to comply with a restraining order, the evidence must disclose not only the failure to comply with the order but also that the failure was willful. Malec v. Malec 533

5. A party is not in contempt of court for a failure to comply with an order directing him to pay money unless it is shown that he had sufficient ability to pay, and that his refusal was willful, contumacious, and without just and reasonable grounds. Malec v. Malec 533

Continuances.

1. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous unless the record discloses an abuse of discretion. State v. Ell 800
2. There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof. State v. Ell 800

Contracts.

1. Section 2-204(1), U. C. C., provides that a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. Crane Co. v. Roberts Supply Co. 67
2. "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in the Uniform Commercial Code. Crane Co. v. Roberts Supply Co. 67
3. An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Crane Co. v. Roberts Supply Co. 67
4. A contract to convey the homestead of a married person is invalid and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. McIntosh v. Borchers 109
5. Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property. McIntosh v. Borchers 109
6. Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the

parties; nor impose new conditions; nor will it require specific performance of a contract which does not contain the substance of the agreement made. McIntosh v. Borchers 109
7. Where there has been substantial performance of a construction contract but the owner has been damaged by defective material or workmanship, the measure of damage is the cost of remedying the defects. Groeteke v. Stubbs 114
8. The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it has entailed. Stungis v. Union Packing Co. of Omaha, Inc. 126
9. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Stungis v. Union Packing Co. of Omaha, Inc. . 126
10. In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
11. A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties. Younker Brothers, Inc. v. Westroads, Inc. 168
12. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. Younker Brothers, Inc. v. Westroads, Inc. 168
13. To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. Farmers Coop. Assn. v. Klein 180
14. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming

the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory, and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. Farmers Coop. Assn. v. Klein 180

15. Where defects in a building being constructed under a building contract are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. Wilson Concrete Co. v. A. S. Battiato Constr. Co. 185

16. If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount. Wilson Concrete Co. v. A. S. Battiato Constr. Co. 185

17. Where a tenured college faculty member is employed using annual reappointment letters or forms which do not set forth in full the terms and conditions of employment, the employment policies, rules, and regulations of the college become a part of the employment contract between the college and the faculty member. Brady v. Board of Trustees of Nebraska State Colleges 226

18. A tenured professor has a sufficient property interest in continued employment to entitle him to the protection of procedural due process. Brady v. Board of Trustees of Nebraska State Colleges 226

19. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Cornett v. Nathan 277

20. An architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction. Palmer v. Dorn 360

21. It is ordinarily for a jury to say whether the actual cost

is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law. Palmer v. Dorn 360
22. In an action for dissolution of marriage, agreements between husband and wife, not made in connection with the separation of the parties or the dissolution of their marriage, are not binding on the court. Snyder v. Snyder 383
23. In order to charge the seller with the particular loss it must be one that ordinarily follows the breach of the contract in the usual course of events or that reasonable men in the position of the parties would have foreseen as a probable result of the breach. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424
24. A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
25. The laws of the State of New York, like those of the State of Nebraska, provide for the enforcement of reasonable contracts in restraint of trade by injunction when necessary to protect the interests of a former employer. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
26. A restrictive covenant will not be enforced where the effect would be to protect plaintiff from ordinary competition rather than to protect plaintiff's business against competition by improper and unfair methods. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
27. In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
28. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the per-

formance of personal services. Diamond Match Div. of Diamond International Corp. v. Bernstein 452

29. Where a contract is ambiguous, the court must determine the intent of the parties and resolve the ambiguity to give effect to that intent. Spencer-O'Neill House, Inc. v. Denbeck 456

30. Where a contract is a typed one, writing in longhand in the contract subsequent to the typing controls the typed provisions of the contract where there is a conflict between the typed and the written portions of the instrument. Spencer-O'Neill House, Inc. v. Denbeck 456

31. A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. Slocum v. Hevelone 482

32. A contract must receive a reasonable construction consistent with the intention of the parties existing at the time it was entered into. Gunset v. Mossman 529

33. Through construction, the court seeks to enforce the contract made by the parties, not to create a new one. Gunset v. Mossman 529

34. Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing. Farmland Service Coop, Inc. v. Klein 538

35. Promissory estoppel applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee. Farmland Service Coop, Inc. v. Klein 538

36. The memorandum required by the statute of frauds is evidence of the oral contract and must contain the essential terms of the contract. Generally, the memorandum should contain the names of the parties, a description of the land, the price, the general terms of the agreement, and the signature of the vendor. David v. Tucker 575

37. Ordinarily, time for performance is not an essential term of the contract, but it must be included in the memorandum to be enforceable. If omitted from the memorandum, the time for performance is not enforceable but the legal efficacy of the memorandum is not destroyed. David v. Tucker 575

38. Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite. David v. Tucker 575
39. For the insurer to be liable to its insured on a contract of employee fidelity insurance, the insured must sustain an actual loss of the nature insured against. Foxley Cattle Co. v. Bank of Mead 587
40. Legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket honesty bond to such third party. Foxley Cattle Co. v. Bank of Mead 587
41. Contracting parties are presumed to act for themselves and an intent to benefit a third person should be clearly expressed in the contract. Foxley Cattle Co. v. Bank of Mead 587
42. In contracts of indemnity against loss, an insurer does not become liable until the insured has suffered proven loss. Foxley Cattle Co. v. Bank of Mead 587
43. The decree confirming the legality and validity of a bond issue does not determine the validity or invalidity of all contracts made by the sanitary and improvement district in connection with the project which the bond issue was designed to finance. Hayes v. Sanitary & Improvement Dist. No. 194 653
44. Ordinarily contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statute to the contrary. Hayes v. Sanitary & Improvement Dist. No. 194 653
45. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. Hayes v. Sanitary & Improvement Dist. No. 194 653
46. For purposes of application of res judicata, a petition in quantum meruit is a restatement of the same cause of action as that in a petition on express contract, where both petitions are based on the same services; and as such, an earlier judgment in a case on express contract acts as a bar to a later action in quantum meruit. Vantage Enterprises, Inc. v. Caldwell 671
47. In a contract calling for delivery of goods by a seller at

a specified place, tender ordinarily requires physical delivery of the goods at the destination specified in the contract. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699

48. Where a seller fails to make delivery of goods under a contract to sell, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for the goods due from seller, and in such event the buyer may recover from seller, as damages, the difference between the cost of cover and the contract price. Farmer's Co-op Co. of Mead v. Flamme Brothers 699

49. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents. C. G. Smith Constr. Co. v. Cobleigh Electric Co. 711

50. Where a real estate broker has paid over a buyer's deposit or downpayment on a real estate contract to the broker's disclosed principal, or in good faith changed his position before he learns of the buyer's claim or demand for refund, the broker cannot be held liable for the return of the funds in the absence of an intention to impose personal liability on the broker as shown by the circumstances and the agreement of the parties. Eggerling v. Cuhel 745

Controlled Substances.

1. Section 28-4,127, R. S. Supp., 1974, which provides that "(1) It shall be unlawful for any person: * * * (g) To visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of sections 28-459 and 28-4,115 to 28-4,142, if the person has knowledge that such activity is occurring; * * *" is unconstitutionally vague and overbroad. State v. Adkins 76

2. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Foster 332

3. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Foster 332

4. Possession of a controlled substance is an included offense within a charge of possession with intent to distribute. State v. Bernth 813

5. Unlawful delivery of a controlled substance includes both actual and constructive delivery. It is not necessary for the State to show actual physical transfer of the controlled substance from the defendant. State v. Howell 832

Corporations.

1. Section 21-2096, R. R. S. 1943, provides that the District Court has the power to dissolve any corporation when, in an action brought by a shareholder, it is established that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered. Kollbaum v. K & K Chevrolet, Inc. 555
2. A corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears. The corporate fiction may be disregarded when its retention would produce injustice and inequitable consequences. Hayes v. Sanitary & Improvement Dist. No. 194 653
3. The separate corporate existence of parent and subsidiary or affiliated corporations will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation. Hayes v. Sanitary & Improvement Dist. No. 194 653

Costs.

1. An architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction. Palmer v. Dorn 360
2. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law. Palmer v. Dorn 360

Counties.

The number, nature, and duration of the powers conferred upon a county rest in the absolute discretion of the state. City of Grand Island v. County of Hall 282

Courts.

1. It is not the court's duty, nor within its province, es-

specially in the absence of any evidence of legislative intent, to read a meaning into a statute that is not warranted by the legislative language. State v. Adkins 76

2. Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed to ascertain its meaning and this court is without authority to change the language. City of Grand Island v. County of Hall .. 282
3. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. City of Grand Island v. County of Hall 282
4. An interpretation of a statute which has the effect of repealing or nullifying another statute will not be adopted by this court unless such interpretation is made necessary by the evident intent of the Legislature. City of Grand Island v. County of Hall 282
5. Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned. Father Flanagan's Boys' Home v. Millard School Dist. 299
6. A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Scott v. State ex rel. Board of Nursing . 681
7. The juvenile court may terminate the parental rights of a parent who is unable to discharge parental responsibility because of mental illness or mental deficiency, if there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. § 43-209(5), R. S. Supp., 1976. State v. O'Tool 708
8. In sentencing a defendant after conviction, the trial court has a broad discretion as to the source and type of evidence it may use to assist it in determining the kind and extent of punishment to be imposed within the limits fixed by statute. State v. Bridgmon 714
9. It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict. Brandt v. Mayer 751

10. In cases involving child custody, determinations of Juvenile Court findings, both as to the evaluation of the evidence and to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of evidence. State v. Johnson 795
11. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Stender v. Sullivan 810

Covenants.

1. Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Pool v. Denbeck 27
2. While the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation thereof, such right is not lost if the violations acquiesced in are trivial and do not materially affect those acquiescing. The right to enforce such covenants remains where the violation is in close proximity to the land of those seeking enforcement thereof and is especially and directly injurious to them. Pool v. Denbeck 27

Covenants, Conditions, and Restrictions.

1. It is generally recognized that insofar as a covenant against encumbrances is concerned, an easement is an encumbrance. Cape Co. v. Wiebe 204
2. A covenant against encumbrances is broken when made if an encumbrance exists. Cape Co. v. Wiebe ... 204
3. An action for damages, for the breach of the covenants of warranty contained in a deed conveying land, is an action upon a specialty. Cape Co. v. Wiebe 204
4. Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument they are separate and independent covenants and one does not embrace the other. Cape Co. v. Wiebe 204

Cover.

Where a seller fails to make delivery of goods under a contract to sell, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for the goods due from seller, and in such event the buyer may recover from seller, as damages, the difference between the cost of cover and the contract price. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699

Criminal Law.

1. This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Dirgo 36
2. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. State v. Dirgo 36
3. A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act. State v. Dirgo 36
4. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor. State v. Thompson 55
5. The use of binoculars by police as an aid in performing surveillance is not unlawful. State v. Thompson 55
6. Section 28-4,127, R. S. Supp., 1974, which provides that "(1) It shall be unlawful for any person: * * * (g) To visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of sections 28-459 and 28-4,115 to 28-4,142, if the person has knowledge that such activity is occurring; * * *" is unconstitutionally vague and overbroad. State v. Adkins 76
7. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adkins 76
8. The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the lan-

guage may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Adkins 76

9. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught. State v. Adkins 76

10. Probable cause to justify search and seizure without a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Aden 149

11. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. State v. Aden 149

12. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Braasch 240
State v. Wright 377
State v. Coleman 721
State v. DeLeon 776
State v. Williams 834

13. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Tweedy, Melvin, ... 246
State v. Tweedy, Albert, ... 251
State v. Keen 291
State v. Bridgmon 714
State v. Ronfeldt 771

14. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Tweedy, Melvin, ... 246

15. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on

appeal. State v. Tweedy, Melvin, ... 248
State v. Tweedy, Albert, ... 253
State v. Gillham 563
State v. Betts 572

16. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Tweedy, Melvin, ... 248
State v. Tweedy, Albert, ... 251

17. No fixed rule with respect to the disclosure of the name of an informant is justifiable. The problem is one that calls for balancing all public interest in protecting the flow of information against the individual's right to prepare his defense. State v. Wenzel 255

18. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the public significance of the informer's testimony, and other relevant factors. State v. Wenzel 255

19. Ordinarily, if the informer's identity is either known by the defendant or else disclosed through the testimony of other witnesses, no prejudice results from nondisclosure. State v. Wenzel 255

20. This State is committed to the dogma that in balancing the interests of the State against that of the accused, the burden of proof is on the defendant to show need for the disclosure. State v. Wenzel 255

21. Disclosure of the identity of an informer is a matter of judicial discretion. State v. Wenzel 255

22. A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional. State v. Feagin 261

23. An order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion. State v. Keen 291
State v. Bridgmon 714
State v. Ronfeldt 771

24. The resort to epithets or personal abuse is not a communication of information or opinion safeguarded by the Constitution and the punishment thereof as a criminal act raises no question under the Constitution. State v. Guy 308

25. A custom or usage of failing to enforce a statute by prosecution is not a defense to a prosecution finally brought. State v. Guy 308

26. This court will not overturn an order or sentence of the

trial court which denies probation unless there has been an abuse of discretion. State v. Schleis 327
State v. Cox 836
27. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Foster 332
28. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Foster 332
29. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. State v. Foster 332
30. In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Foster 332
31. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. 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. State v. Jefferson 340
32. In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate? State v. Jefferson 340
33. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. State v. Jefferson 340
34. The standard for determining probable cause for search and seizure is practical and not technical. State v. Jefferson 340
35. Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an

abuse of discretion the determination of the trial court will not be disturbed on appeal. State v. Lynch 372
36. A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. State v. Wright 377
37. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Goodloe 381
38. An unsuccessful attempt to chill a right to appeal is harmless error. State v. Goodloe 381
39. Any error in the ruling on a plea in abatement alleging that the evidence at the preliminary hearing was insufficient to support a finding of probable cause is cured if the evidence at the trial is sufficient to sustain a finding of guilty. State v. Bolden 388
40. An identification based in part upon photographs of the defendant shown to the victim of the crime is not objectionable because the officer stated at the time the photographs included a photograph of a suspect. State v. Bolden 388
41. The publications involved herein are clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. State v. American Theatre Corp. 461
State v. Downtown Books, Inc. 473
42. Where the covers of the magazines, front and back, are occupied with pictures of nude individuals engaged in sexual acts or prominently displaying their genitals, it can hardly be said the jury could not infer knowledge of their contents by the defendant and its intent to sell obscene materials. State v. American Theatre Corp. 461
43. By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. State v. American Theatre Corp. 461, 467
44. The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590. State v. American Theatre Corp. 461, 467
45. We find both films, "The Cunning Stunt," and "Bang Bash," to be hard-core pornography and obscene under the tests enunciated in Miller v. California (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. State v. American Theatre Corp. 461

46. The result in this case is governed by our opinion in State v. Little Art Corp. (1973), 189 Neb. 681, 204 N. W. 2d 574. State v. American Theatre Corp. 467
47. We consider only assignments of error discussed by appellant in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974. State v. Downtown Books, Inc. .. 473
48. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Betts 572
State v. Applegarth 773
49. It is settled law in Nebraska that a motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Betts .. 572
50. Where an element of the crime charged is possession of the property seized, "ownership in or right to possession of the premises" or the interests of a "lessee" or "licensee" is not necessary to confer standing to challenge the legality under the Fourth Amendment of a search and seizure. State v. Schrader 632
51. Open fields outside the curtilage are not within the protection of the Fourth Amendment. State v. Schrader 632
52. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Schrader 632
53. Where a seizure invades no right of privacy of the person or premises of the accused, his Fourth Amendment rights have not been violated. State v. Schrader 632
54. The exclusionary rule ought not be applied where its deterrent purpose to discourage illegal police conduct will not be served. State v. Schrader 632
55. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Foutch 644
56. Section 29-2308, R. R. S. 1943, gives this court the authority to reduce a sentence rendered by the District Court when it appears to be excessive. State v. Foutch 644
57. The punishment for a criminal act should in all circum-

stances be commensurate with the offense. State v. Foutch 644
58. In sentencing a defendant after conviction, the trial court has a broad discretion as to the source and type of evidence it may use to assist it in determining the kind and extent of punishment to be imposed within the limits fixed by statute. State v. Bridgmon 714
59. Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged. State v. Coleman 721
60. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is substantial evidence to support it. State v. Coleman 721
61. The fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal Constitutions. State v. Houston 724
62. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Cooper 728
63. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Cooper 728
64. **It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury** his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. State v. Leonard 731
65. Section 29-2260, R. R. S. 1943, which lists grounds to be considered by the trial court in sentencing a defendant, does not control the trial court's discretion in imposing a sentence. State v. Machmuller 734
66. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Machmuller 734
67. The granting of probation is discretionary with the trial court. In the absence of an abuse of discretion, a denial of probation is not error. State v. Morrow 739
68. Circumstantial evidence which is substantial is sufficient to support a finding of guilty. State v. Von Suggs 757

69. Informal detention for the purpose of investigation may be lawful even though probable cause sufficient to authorize a formal arrest may not exist. State v. Von Suggs 757
70. 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. State v. Von Suggs 757
71. Kidnapping includes unlawful imprisonment or a holding against the will of the person held for the purpose of compelling the performance of any act by such person. § 28-417, R. R. S. 1943. State v. Parker 762
72. In a prosecution for rape, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Parker 762
73. In the absence of conflicting interests, two or more defendants may be represented by the same counsel in a criminal prosecution. State v. Parker 762
74. The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. State v. Addison 768
75. An essential element of a crime may be proved solely by circumstantial evidence. State v. Addison 768
76. An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. State v. Applegarth 773
77. Assignments of error on grounds available to the defendant in the District Court must first have been presented to the District Court. State v. Lewis 778
78. Due process requires that the accused receive a trial by an impartial jury free from outside influences. State v. Ell 800
79. There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result thereof. State v. Ell 800
80. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Ell 800
81. The issue of whether or not a jury should be sequestered during a criminal trial is left to the discretion of the

trial court, and unless the defendant makes a showing of prejudice or the record discloses an abuse of discretion, denial of sequestration is not error. State v. Ell .. 800

82. A party ordinarily has no right to examine a prospective juror out of the presence of all other prospective jurors. State v. Ell 800

83. A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Bernth 813

84. Possession of a controlled substance is an included offense within a charge of possession with intent to distribute. State v. Bernth 813

85. Proportionality in sentencing ought to mean, among other things, that the more serious offenses generally merit the greater punishment, and that those offenders who offer the greatest menace to society deserve the greater punishment. State v. King 821

86. The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone. State v. Mann 824

87. Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession. State v. Howell 832

88. Unlawful delivery of a controlled substance includes both actual and constructive delivery. It is not necessary for the State to show actual physical transfer of the controlled substance from the defendant. State v. Howell 832

89. Statements constituting alleged misconduct of counsel in argument to the jury should be taken by the court reporter at the trial together with the objections made and the ruling of the trial court. State v. Howell 832

Crops.

A testamentary direction to an executor to sell farmland and pay the proceeds, after payment of debts and administrative expenses, over to named beneficiaries in shares, does not constitute a disposition of landlord's share of crops growing thereon, absent any indication of such a testamentary intent. Roberts v. Snow Redfern Memorial Foundation 139

Customs and Usages.

1. "Agreement" means the bargain of the parties in fact

as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in the Uniform Commercial Code. Crane Co. v. Roberts Supply Co. 67
2. An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Crane Co. v. Roberts Supply Co. 67
3. A custom or usage of failing to enforce a statute by prosecution is not a defense to a prosecution finally brought. State v. Guy 308
4. In order to charge the seller with the particular loss it must be one that ordinarily follows the breach of the contract in the usual course of events or that reasonable men in the position of the parties would have foreseen as a probable result of the breach. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

Damages.
1. It is just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth. Oberhelman v. Blount .. 42
2. Life expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other activities. Oberhelman v. Blount 42
3. Where there has been substantial performance of a construction contract but the owner has been damaged by defective material or workmanship, the measure of damage is the cost of remedying the defects. Groeteke v. Stubbs 114
4. The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it has entailed. Stungis v. Union Packing Co. of Omaha, Inc. .. 126
5. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Stungis v. Union Packing Co. of Omaha, Inc. 126
6. Where defects in a building being constructed under a

building contract are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. Wilson Concrete Co. v. A. S. Battiato Constr. Co. 185

7. If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount. **Wilson Concrete Co. v. A. S. Battiato Constr. Co.** 185

8. Under section 2-715, U. C. C., consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements or needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

9. In order to charge the seller with the particular loss it must be one that ordinarily follows the breach of the contract in the usual course of events or that reasonable men in the position of the parties would have foreseen as a probable result of the breach. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

10. Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action has the burden of both pleading and establishing the mitigation. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

11. An insurer under a fidelity bond is liable only in event of loss sustained by the insured. Foxley Cattle Co. v. Bank of Mead 587

12. In contracts of indemnity against loss, an insurer does not become liable until the insured has suffered proven loss. Foxley Cattle Co. v. Bank of Mead 587

13. Loss of earning capacity, as distinct from loss of wages, salary, or earnings is a separate element of damage. Washington v. American Community Stores Corp. 624

14. A loss of past earnings is an item of special damage and must be specifically pleaded and proved. Washington v. American Community Stores Corp. 624

15. Impairment of earning capacity is an item of general damage and proof may be had under general allega-

tions of injury and damage. Washington v. American Community Stores Corp. 624
16. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Washington v. American Community Stores Corp. 624
17. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Washington v. American Community Stores Corp. 624
18. It is within the province of the jury to weigh all the elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings. Washington v. American Community Stores Corp. 624
19. Where a seller fails to make delivery of goods under a contract to sell, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for the goods due from seller, and in such event the buyer may recover from seller, as damages, the difference between the cost of cover and the contract price. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699

Declaratory Judgments.

1. The granting of declaratory relief is discretionary with the trial court. Svoboda v. Hahn 21
2. A declaratory judgment action is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court. Zarybnicky v. County of Gage 210
3. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. Zarybnicky v. County of Gage 210
4. Jurisdiction should be assumed in a declaratory judgment action only where the court is satisfied that the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts alleged and proved. Zarybnicky v. County of Gage 210
5. Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law. Zarybnicky v. County of Gage 210

Deeds.

1. An action for damages, for the breach of the covenants

of warranty contained in a deed conveying land, is an action upon a specialty. Cape Co. v. Wiebe 204
2. Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument they are separate and independent covenants and one does not embrace the other. Cape Co. v. Wiebe 204

Delivery.
1. "Delivery" is the voluntary transfer of possession. Goosic Constr. Co. v. City Nat. Bank of Crete 86
2. For a delivery, or tender of delivery, to be effective, a buyer or his agent must be able to take possession of conforming goods in a peaceful manner, without interference from third parties. Goosic Constr. Co. v. City Nat. Bank of Crete 86

Demurrer.
1. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover. Lee v. Brodbeck 393
2. If facts pleaded in a petition are sufficient to plead an excuse to the operation of the statute limiting actions based on fraud, a general demurrer will be defeated. Lee v. Brodbeck 393

Descent and Distribution.
A resulting trust does not end with the death of the trustee and heirs of the trustee take the property subject to the trust. Jirka v. Prior 416

Discovery.
1. No fixed rule with respect to the disclosure of the name of an informant is justifiable. The problem is one that calls for balancing all public interest in protecting the flow of information against the individual's right to prepare his defense. State v. Wenzel 255
2. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the public significance of the informer's testimony, and other relevant factors. State v. Wenzel 255
3. Ordinarily, if the informer's identity is either known by

the defendant or else disclosed through the testimony of other witnesses, no prejudice results from nondisclosure. State v. Wenzel 255
4. This State is committed to the dogma that in balancing the interests of the State against that of the accused, the burden of proof is on the defendant to show need for the disclosure. State v. Wenzel 255
5. Disclosure of the identity of an informer is a matter of judicial discretion. State v. Wenzel 255

Dismissal.

1. In an action in equity, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Marco v. Marco 313
2. Where it appears that a dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. Marco v. Marco 313

Dissolution.

Section 21-2096, R. R. S. 1943, provides that the District Court has the power to dissolve any corporation when, in an action brought by a shareholder, it is established that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered. Kollbaum v. K & K Chevrolet, Inc. 555

Disturbance of Meetings.

Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance; an ordinance prohibiting such conduct is not unconstitutionally vague. State v. Guy 308

Divorce.

1. When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Knight v. Knight 63
2. As we interpret our present divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. Knight v. Knight 63

3. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Knight v. Knight 63
4. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, 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. Knight v. Knight 63
5. This court is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record. Abbott v. Abbott 97
Van Bloom v. Van Bloom 792
6. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Abbott v. Abbott 97
7. The fixing of alimony rests in each case within the sound discretion of the trial court. Abbott v. Abbott ... 97
Van Bloom v. Van Bloom 792
8. In determining whether alimony should be awarded, the ultimate test is one of reasonableness. Baird v. Baird 124
9. Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being. Miller v. Miller 146
10. The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the rights of fit, proper, and suitable parents. Miller v. Miller 146
11. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Miller v. Miller ... 146
12. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Miller v. Miller 146
13. Jurisdiction of the court in matters relating to divorce

and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. Sosso v. Sosso 242
14. The judgment of the trial court as to visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing, or by this court de novo upon the record. King v. King 289
15. In cases involving determination of rights of visitation, as well as child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of visitation or custody, will not be disturbed on appeal unless there is a clear abuse of discretion, or the findings are contrary to the evidence. King v. King 289
16. Custody and visitation of a minor child shall be determined on the basis of the child's best interest. Peterson v. Peterson 328
17. In cases involving determinations of child custody, the findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal if the findings are in conformity with the pertinent statutes, are not a clear abuse of discretion, or are not clearly against the weight of the evidence. Peterson v. Peterson 328
18. Section 42-365, R. S. Supp., 1974, provides orders for alimony may be modified or revoked for good cause shown. Howard v. Howard 351
19. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement. Howard v. Howard .. 351
20. There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement. Howard v. Howard ... 351
21. 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. Howard v. Howard 351
22. In an action for dissolution of marriage, agreements between husband and wife, not made in connection with the separation of the parties or the dissolution of their marriage, are not binding on the court. Snyder v. Snyder 383
23. In an action for dissolution of marriage, the court has

the power to consider all property accumulated by the joint efforts of both the husband and wife, and to adjust their property rights, no matter how such property is legally titled as between the parties. Snyder v. Snyder 383

24. Upon dissolution of a marriage where the parties cannot agree upon a division of property, it is incumbent on the court to make an order for such division of the property as is conscionable and fair under the circumstances of the marriage. § 42-366(2), (3), R. R. S. 1943. Cozette v. Cozette 780

25. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation irrespective of how legal title is held. Cozette v. Cozette 780

26. While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the court in determining what is in the best interests of the child. Chilese v. Chilese 784

27. The discretion of the trial court with respect to awarding or changing the custody and support 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. Chilese v. Chilese 784

28. The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case. Van Bloom v. Van Bloom 792

29. While an action for a dissolution of marriage is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Van Bloom v. Van Bloom 792

Drugs.

1. Under the doctrine of strict liability, an unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective,

nor is it *unreasonably* dangerous. McDaniel v. McNeil Laboratories, Inc. 190

2. A drug, properly tested, labeled with appropriate directions and warnings, approved by the United States Food and Drug Administration, and marketed properly under federal regulation, is presumptively a reasonably safe product, in the absence of clear and convincing evidence to the contrary. McDaniel v. McNeil Laboratories, Inc. 190
3. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared and distributed, and accompanied by appropriate directions and warnings, is not defective nor unreasonably dangerous, as a matter of law, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions or extensions thereof. McDaniel v. McNeil Laboratories, Inc. 190
4. Where there are appropriate directions and warnings, a manufacturer of a properly prepared drug may not be held liable either on a breach of warranty theory or a strict liability in tort theory. McDaniel v. McNeil Laboratories, Inc. 190
5. The standard of reasonable care never varies but the degree of care required varies with the danger involved in the act and is proportionate to it. McDaniel v. McNeil Laboratories, Inc. 190

Due Process.

1. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adkins 76
2. The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Adkins 76

3. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught. State v. Adkins 76
4. A tenured professor has a sufficient property interest in continued employment to entitle him to the protection of procedural due process. Brady v. Board of Trustees of Nebraska State Colleges 226
5. Due process requires that the accused receive a trial by an impartial jury free from outside influences. State v. Ell 800

Easements.

1. It is generally recognized that insofar as a covenant against encumbrances is concerned, an easement is an encumbrance. Cape Co. v. Wiebe 204
2. Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate have the burden of showing that the use was permissive. Smith v. Bixby 235
3. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. Smith v. Bixby 235
4. The width of a public highway acquired by prescription must be determined as a question of fact by the character and extent of the use. Smith v. Bixby 235
5. If the public has acquired the right to a highway by prescription the right is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel. Smith v. Bixby 235

Electricity.

This court cannot interfere with a decision of the Power Review Board unless there is no evidence to sustain the action of the board or, for some other reason, the record shows the action of the board is arbitrary and unreasonable. Omaha P. P. Dist. v. Nebraska P. P. Project 477

Eminent Domain.

1. The propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the

zoning regulations. Zoning permitting a contemplated use is not a condition precedent to a taking. Seward County Board of Commissioners v. City of Seward 266
2. The power of eminent domain is inherently superior to the exercise of the zoning power, and the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulation. Seward County Board of Commissioners v. City of Seward 266
3. Under sections 25-2501 to 25-2506, R. S. Supp., 1974, the uniform procedure for acquiring private property for public use act, the hearing is not a hearing to justify the taking itself, but is in the nature of a "town meeting" to explain the taking and to inform landowners of their procedural rights. Seward County Board of Commissioners v. City of Seward 266
4. The power of eminent domain is an attribute of sovereignty which exists independently of constitutional provision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant. Father Flanagan's Boys' Home v. Millard School Dist. 299
5. The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state acting through the department or agency authorized to exercise the power, may proceed at will. Father Flanagan's Boys' Home v. Millard School Dist. 299
6. The power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken. Father Flanagan's Boys' Home v. Millard School Dist. 299
7. Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned. Father Flanagan's Boys' Home v. Millard School Dist. 299

Encumbrances.

1. It is generally recognized that insofar as a covenant against encumbrances is concerned, an easement is an encumbrance. Cape Co. v. Wiebe 204
2. A covenant against encumbrances is broken when made if an encumbrance exists. Cape Co. v. Wiebe ... 204
3. Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument they are separate and independent

covenants and one does not embrace the other. Cape Co. v. Wiebe 204

Equity.

1. In an appeal in an equity action, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the District Court. However, if there is an irreconcilable conflict in a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying. Kolc v. Krystyniak 16
2. Where a trial judge, in the exercise of equity jurisdiction, may submit questions of fact to a jury, its finding is purely advisory and not binding on the trial court. Farmers Coop. Assn. v. Klein 180
3. When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion. Cape Co. v. Wiebe 204
4. Where in an equity case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Cape Co. v. Wiebe 204
5. Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. Cape Co. v. Wiebe 204
6. In an action in equity, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. Marco v. Marco 313
7. In an action in equity, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Marco v. Marco 313

8. Where it appears that a dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. Marco v. Marco 313
9. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. If one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title and so obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. Marco v. Marco 313
10. An action to reform a written instrument is equitable in nature and on appeal to this court is triable de novo. Hohneke v. Ferguson 505
11. A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent. Hohneke v. Ferguson 505
12. Equity will not allow the statute of frauds to be used as an instrument of fraud. Farmland Service Coop, Inc. v. Klein 538
13. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with ordinary rules governing the burden of proof, and competency and materiality of the evidence. Von Seggern v. Von Seggern 545
14. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Hull v. Bahensky . 648

Estates.

1. The taxation of attorney's fees and expenses of a party

other than the executor or administrator of the estate may be appropriate in a particular case, either against the estate generally or against the executor or administrator personally. Roberts v. Snow Redfern Memorial Foundation 139
2. Generally, an executor or administrator has an obligation to make known to the court controversies which exist between the parties, and to obtain directions of the court as to his responsibilities in that regard, and no more. Roberts v. Snow Redfern Memorial Foundation 139
3. In a situation, reasonably subject to controversy, an executor or administrator has no obligation to adopt or pursue, at his risk or at the risk of the estate, that position which may ultimately prevail. Roberts v. Snow Redfern Memorial Foundation 139
4. In appropriate circumstances, an executor or administrator may have discretion, or perhaps even an obligation, to adopt a position, although generally no such discretion or obligation will exist, other participating parties having an obligation to pursue their own interests. Roberts v. Snow Redfern Memorial Foundation 139
5. Conduct by a party other than the executor or administrator may operate to relieve the executor or administrator of whatever obligation he might otherwise have. Roberts v. Snow Redfern Memorial Foundation 139

Estoppel.

1. The estoppel created by the first judgment may not be extended beyond the issues necessarily determined by it. Where it does not appear that evidence showing the liability of the third person was necessarily involved in the determination of the original action and passed upon by the court in rendering judgment, such judgment is not conclusive as to the liability of the defendant in the second action to the defendant in the first action. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
2. Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing. Farmland Service Coop, Inc. v. Klein 538
3. Promissory estoppel applies only in cases where there is a promise or representation as to an intended aban-

donment by the promisor of a legal right which he holds or will hold against the promisee. Farmland Service Coop, Inc. v. Klein 538
4. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation as to the exercise of governmental functions, but the doctrine will be held to apply where right and justice demand it. Hayes v. Sanitary & Improvement Dist. No. 194 653

Evidence.
1. In an appeal in an equity action, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the District Court. However, if there is an irreconcilable conflict in a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying. Kolc v. Krystyniak 16
2. This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Dirgo 36
3. A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act. State v. Dirgo 36
4. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. Oberhelman v. Blount 42
5. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Oberhelman v. Blount 42
6. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings but which have not been supported by any evidence. Oberhelman v. Blount 42
7. Life expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other activities. Oberhelman v. Blount 42
8. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circum-

stances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. Younker Brothers, Inc. v. Westroads, Inc. 168

9. To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. Farmers Coop. Assn. v. Klein 180

10. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory, and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. Farmers Coop. Assn. v. Klein 180

11. The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken. Marcotte v. City of Omaha 217

12. Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate have the burden of showing that the use was permissive. Smith v. Bixby 235

13. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Foster 332

14. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Foster 332

15. In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Foster 332

16. Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements. State v. Lee 344
17. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated. State v. Lee 344
18. The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict. State v. Lee 344
19. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Palmer v. Dorn 360
20. The burden of showing the material and substantial difference in the facts is upon the party who asserts the difference. School Dist. of Gering v. Stannard 367
21. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. State v. Lynch 372
22. The trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Lynch 372
23. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Goodloe 381
24. Any error in the ruling on a plea in abatement alleging that the evidence at the preliminary hearing was insufficient to support a finding of probable cause is cured if the evidence at the trial is sufficient to sustain a finding of guilty. State v. Bolden 388
25. An identification based in part upon photographs of the defendant shown to be the victim of the crime is not objectionable because the officer stated at the time the photographs included a photograph of a suspect. State v. Bolden 388
26. Before a person may be said to be in contempt of court

for failure to comply with a restraining order, the evidence must disclose not only the failure to comply with the order but also that the failure was willful. Malec v. Malec 533

27. A party is not in contempt of court for a failure to comply with an order directing him to pay money unless it is shown that he had sufficient ability to pay, and that his refusal was willful, contumacious, and without just and reasonable grounds. Malec v. Malec 533

28. When credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Von Seggern v. Von Seggern 545

29. Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite. David v. Tucker 575

30. A party alleging undue influence has the burden to prove that the party influenced was a person who would be subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence, and that the result was the effect of undue influence. David v. Tucker ... 575

31. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Washington v. American Community Stores Corp. 624

32. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Washington v. American Community Stores Corp. 624

33. A party who objects to the evidence and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded. Washington v. American Community Stores Corp. 624

34. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but

may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Schrader 632

35. In sentencing a defendant after conviction, the trial court has a broad discretion as to the source and type of evidence it may use to assist it in determining the kind and extent of punishment to be imposed within the limits fixed by statute. State v. Bridgmon 714

36. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is substantial evidence to support it. State v. Coleman 721

37. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. State v. Rotella 741

38. It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict. Brandt v. Mayer 751

39. Circumstantial evidence which is substantial is sufficient to support a finding of guilty. State v. Von Suggs 757

40. In a prosecution for rape, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Parker 762

41. An essential element of a crime may be proved solely by circumstantial evidence. State v. Addison 768

42. An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. State v. Applegarth 773

43. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. State v. Ell 800

44. Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession. State v. Howell 832

Exclusionary Rule.

The exclusionary rule ought not be applied where its deterrent purpose to discourage illegal police conduct will not be served. State v. Schrader 632

Executors and Administrators.

1. Generally, an executor or administrator has an obligation to make known to the court controversies which exist between the parties, and to obtain directions of the court as to his responsibilities in that regard, and no more. Roberts v. Snow Redfern Memorial Foundation 139
2. In a situation, reasonably subject to controversy, an executor or administrator has no obligation to adopt or pursue, at his risk or at the risk of the estate, that position which may ultimately prevail. Roberts v. Snow Redfern Memorial Foundation 139
3. In appropriate circumstances, an executor or administrator may have discretion, or perhaps even an obligation, to adopt a position, although generally no such discretion or obligation will exist, other participating parties having an obligation to pursue their own interests. Roberts v. Snow Redfern Memorial Foundation 139
4. Conduct by a party other than the executor or administrator may operate to relieve the executor or administrator of whatever obligation he might otherwise have. Roberts v. Snow Redfern Memorial Foundation 139

Fees.

1. The taxation of attorney's fees and expenses of a party other than the executor or administrator of the estate may be appropriate in a particular case, either against the estate generally or against the executor or administrator personally. Roberts v. Snow Redfern Memorial Foundation 139
2. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Cornett v. Nathan 277
3. The power to sell bonds includes the power to employ a broker or agent to effect the sale for a customary commission or fee. Hayes v. Sanitary & Improvement Dist. No. 194 653
4. Where a fiscal agent for the sale of bonds of a sanitary and improvement district purchases the bonds privately from the district at par, payment of a fee for fiscal services to such purchaser constitutes a sale of the bonds at less than par in violation of section 31-755, R. R. S. 1943. Hayes v. Sanitary & Improvement Dist. No. 194 653
5. Ordinarily contracts or agreements for the perform-

ance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statute to the contrary. Hayes v. Sanitary & Improvement Dist. No. 194 653

6. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. Hayes v. Sanitary & Improvement Dist. No. 194 653

Forgery.

The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. State v. Addison 768

Fraud.

1. A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of defendant. Foxley Cattle Co. v. Bank of Mead 1
2. Where ordinary prudence would prevent deception, an action for fraud perpetrated by deception will not lie, but this rule has no application where the defects are latent. Foxley Cattle Co. v. Bank of Mead 1
3. The purpose of section 54-116, R. S. Supp., 1969, was to afford protection to the owners of brands and not to protect those who make fraudulent misrepresentations. Foxley Cattle Co. v. Bank of Mead 1
4. The undue influence which will void a deed (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to

confuse the judgment and control the will of the donor. Kolc v. Krystyniak 16

5. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. If one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title and so obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. Marco v. Marco 313
6. Representations of fair market value of farm land made to a buyer who is himself a farmer and who has examined the land in the absence of the seller have been held not to constitute actionable fraud. Lee v. Brodbeck 393
7. A representation must concern a known, existing fact and cannot be a mere promise to be performed in the future. Lee v. Brodbeck 393
8. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency, including statements made without knowledge or known to be false, is guilty of fraud and bad faith. Lee v. Brodbeck 393
9. If facts pleaded in a petition are sufficient to plead an excuse to the operation of the statute limiting actions based on fraud, a general demurrer will be defeated. Lee v. Brodbeck 393

Frauds, Statute of.

1. Equity will not allow the statute of frauds to be used as an instrument of fraud. Farmland Service Coop, Inc. v. Klein 538
2. Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim

that such oral modification is invalid because not in writing. Farmland Service Coop, Inc. v. Klein 538
3. Promissory estoppel applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee. Farmland Service Coop, Inc. v. Klein 538
4. The memorandum required by the statute of frauds is evidence of the oral contract and must contain the essential terms of the contract. Generally, the memorandum should contain the names of the parties, a description of the land, the price, the general terms of the agreement, and the signature of the vendor. David v. Tucker 575
5. Ordinarily, time for performance is not an essential term of the contract, but it must be included in the memorandum to be enforceable. If omitted from the memorandum, the time for performance is not enforceable but the legal efficacy of the memorandum is not destroyed. David v. Tucker 575
6. Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite. David v. Tucker 575

Gifts.

1. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee. Kolc v. Krystyniak 16
2. The undue influence which will void a deed (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. Kolc v. Krystyniak 16
3. When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefore, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. Marco v. Marco 313

Governmental Subdivisions.

1. A statute authorizing or requiring a county to levy a property tax for purposes substantially local does not

contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes. State ex rel. Meyer v. County of Banner 565
2. The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy. State ex rel. Meyer v. County of Banner 565
3. The adoption of Article VIII, section 1A, Constitution of Nebraska, was not intended to disturb traditional and historical property tax support from counties or other local taxing subdivisions for continuing governmental activities commingling state and local purposes. State ex rel. Meyer v. County of Banner 565
4. Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court; a District Court; prosecuting criminal law violations; and conducting state and national elections do not contravene Article VIII, section 1A, Constitution of Nebraska, prohibiting the State from levying a property tax for state purposes. State ex rel. Meyer v. County of Banner 565

Guilty Plea.

1. A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional. State v. Feagin 261
2. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Cooper 728
3. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Cooper 728

Guilty Verdict.

This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Dirgo 36

Health.

1. Section 71-7,132.29, R. R. S. 1943, provides that the Board of Nursing of the State of Nebraska "shall have power to deny . . . any license . . . applied for . . . upon

proof that the person . . . (6) is guilty of unprofessional conduct." Scott v. State ex rel. Board of Nursing 681
2. The licensing and regulation of the health profession and other matters dealing with health is a legislative function which that branch of government ordinarily carries out through administrative agencies created by it. Scott v. State ex rel. Board of Nursing 681
3. "Unprofessional conduct" is conduct which violates those standards of professional behavior which through professional experience have become established, by the concensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest and includes acts of a nature likely to jeopardize the interests of the public. Scott v. State ex rel. Board of Nursing 681
4. Section 71-1,132.34, R. R. S. 1943, provides a specific method of appeal to the District Court from orders of the Board of Nursing of the State of Nebraska. Scott v. State ex rel. Board of Nursing 681

Highways.

1. To establish a road or highway by prescription, there must be use by the general public under a claim of right adverse to the owner of the land of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Smith v. Bixby 235
2. The width of a public highway acquired by prescription must be determined as a question of fact by the character and extent of the use. Smith v. Bixby 235
3. If the public has acquired the right to a highway by prescription the right is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel. Smith v. Bixby 235

Homesteads.

1. A contract to convey the homestead of a married person is invalid and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. McIntosh v. Borchers 109
2. Once established, a homestead is not abandoned until there is both an intent to abandon and actual abandonment. McIntosh v. Borchers 109
3. Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required

by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property. McIntosh v. Borchers 109

4. Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the parties; nor impose new conditions; nor will it require specific performance of a contract which does not contain the substance of the agreement made. McIntosh v. Borchers 109
5. Upon the death of one of the joint tenants, the survivor takes the entire title, and any interest that the survivor would otherwise take under the homestead law is merged in the new title of the survivor. David v. Tucker 575

Homicide.

In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another. State v. Rotella 741

Husband and Wife.

When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. Marco v. Marco 313

Implied Consent Law.

1. There is no requirement in our law that the request for a chemical test must be made at the scene of the arrest. Stender v. Sullivan 810
2. In Heffernan v. Kissack (1974), 192 Neb. 637, 223 N. W. 2d 486, we held that a single request to submit to a chemical test is sufficient. However, we did not mean to imply, and the law does not require, that only one request can be made. Stender v. Sullivan 810

Incompetent Persons.

Special findings by a jury that a testatrix was incompe-

tent to make a will and also that the will was procured by undue influence are not conflicting, and do not invalidate a general verdict denying the validity of the will. Anderson v. Claussen 787

Indemnity.

In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158

Infants.

1. It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser. Davis v. Cunningham 8
2. The attractive nuisance doctrine requires that the condition resulting in injury must be one that involves an unreasonable risk of death or serious bodily harm to a child, and one which should be foreseen. Davis v. Cunningham 8
3. A property owner is not an insurer of the safety of persons who may come upon his land as invitees, licensees, or trespassers, nor is he under a duty to make his land child-proof. Davis v. Cunningham 8
4. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Davis v. Cunningham 8
5. In its application the principles of the attractive nuisance doctrine should not be extended. Davis v. Cunningham 8
6. When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Knight v. Knight 63
7. As we interpret our present divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. Knight v. Knight 63
8. In determining the question of who should have the care and custody of a child upon the dissolution of a

marriage, the paramount consideration must be the best interests and welfare of the child. Knight v. Knight 63

9. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, 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. Knight v. Knight 63

10. Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being. Miller v. Miller 146

11. The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the rights of fit, proper, and suitable parents. Miller v. Miller 146

12. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Miller v. Miller 146

13. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Miller v. Miller 146

14. The judgment of the trial court as to visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing, or by this court de novo upon the record. King v. King 289

15. In cases involving determination of rights of visitation, as well as child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of visitation or custody, will not be disturbed on appeal unless there is a clear abuse of discretion, or the findings are contrary to the evidence. King v. King ... 289

16. Custody and visitation of a minor child shall be determined on the basis of the child's best interests. Peterson v. Peterson 328

17. In cases involving determinations of child custody, the findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal if the findings are in conformity with the pertinent statutes, are not a clear abuse of discre-

tion, or are not clearly against the weight of the evidence. Peterson v. Peterson 328
18. The juvenile court may terminate the parental rights of a parent who is unable to discharge parental responsibility because of mental illness or mental deficiency, if there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. § 43-209(5), R. S. Supp., 1976. State v. O'Tool . 708
19. While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the court in determining what is in the best interests of the child. Chilese v. Chilese 784
20. The discretion of the trial court with respect to awarding or changing the custody and support 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. Chilese v. Chilese 784
21. Under section 43-209(2), R. S. Supp., 1974, the court may terminate parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Johnson 795
22. In cases involving child custody, determinations of Juvenile Court findings, both as to the evaluation of the evidence and to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of evidence. State v. Johnson 795

Informants.

1. No fixed rule with respect to the disclosure of the name of an informant is justifiable. The problem is one that calls for balancing all public interest in protecting the flow of information against the individual's right to prepare his defense. State v. Wenzel 255
2. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the public significance of the informer's testimony, and other relevant factors. State v. Wenzel 255
3. Ordinarily, if the informer's identity is either known by the defendant or else disclosed through the testimony of

other witnesses, no prejudice results from nondisclosure. State v. Wenzel 255
4. This State is committed to the dogma that in balancing the interests of the State against that of the accused, the burden of proof is on the defendant to show need for the disclosure. State v. Wenzel 255
5. Disclosure of the identity of an informer is a matter of judicial discretion. State v. Wenzel 255

Injunction.

1. Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Pool v. Denbeck 27
2. While the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation thereof, such right is not lost if the violations acquiesced in are trivial and do not materially affect those acquiescing. The right to enforce such covenants remains where the violation is in close proximity to the land of those seeking enforcement thereof and is especially and directly injurious to them. Pool v. Denbeck 27
3. The laws of the State of New York, like those of the State of Nebraska, provide for the enforcement of reasonable contracts in restraint of trade by injunction when necessary to protect the interests of a former employer. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
4. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Diamond Match Div. of Diamond International Corp. v. Bernstein 452

Instructions.

1. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. Oberhelman v. Blount 42
2. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings but which have not been supported by any evidence. Oberhelman v. Blount 42

3. It is not error to refuse a requested instruction if the legal principles announced therein are either incorrectly stated or inapplicable to the issues involved. McDaniel v. McNeil Laboratories, Inc. 190
4. When the general charge fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining. State v. Lynch 372
5. It is not error to refuse an instruction on an issue which is not supported by the evidence. State v. Wright 377
6. The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Bolden 388

Insurance.

1. An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
2. In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
3. Generally, no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. Stetina v. State Farm Mut. Auto. Ins. Co. 441
4. An insurer may be subrogated to its insured's claim against a third party who tortuously causes the loss, but no subrogation exists against the insured or coinsured whose negligence caused the loss. Stetina v. State Farm Mut. Auto. Ins. Co. 441
5. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Jelinek v. Nebraska Nat. Gas Co. 488
6. A fidelity bond is an indemnity insurance contract whereby insurer agrees to indemnify the insured against loss arising from want of integrity, fidelity, or honesty of employees or other persons holding positions of trust. Foxley Cattle Co. v. Bank of Mead 587

7. For the insurer to be liable to its insured on a contract of employee fidelity insurance, the insured must sustain an actual loss of the nature insured against. Foxley Cattle Co. v. Bank of Mead 587
8. An insurer under a fidelity bond is liable only in event of loss sustained by the insured. Foxley Cattle Co. v. Bank of Mead 587
9. Legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket honesty bond to such third party. Foxley Cattle Co. v. Bank of Mead 587
10. Contracting parties are presumed to act for themselves and an intent to benefit a third person should be clearly expressed in the contract. Foxley Cattle Co. v. Bank of Mead 587
11. In contracts of indemnity against loss, an insurer does not become liable until the insured has suffered proven loss. Foxley Cattle Co. v. Bank of Mead 587

Intent.

1. A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act. State v. Dirgo 36
2. Where a contract is ambiguous, the court must determine the intent of the parties and resolve the ambiguity to give effect to that intent. Spencer-O'Neill House, Inc. v. Denbeck 456
3. Where a contract is a typed one, writing in longhand in the contract subsequent to the typing controls the typed provisions of the contract where there is a conflict between the typed and the written portions of the instrument. Spencer-O'Neill House, Inc. v. Denbeck 456
4. Where the covers of the magazines, front and back, are occupied with pictures of nude individuals engaged in sexual acts or prominently displaying their genitals, it can hardly be said the jury could not infer knowledge of their contents by the defendant and its intent to sell obscene materials. State v. American Theatre Corp. 461
5. By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. State v. American Theatre Corp. 461, 467
6. The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590. State v. American Theatre Corp. 461, 467

7. Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged. State v. Coleman 721

Interest.

1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Foxley Cattle Co. v. Bank of Mead ... 1
2. If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount. Wilson Concrete Co. v. A. S. Battiato Constr. Co. 185

Intervention.

Ordinarily, an intervener takes the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or the informalities or defects in the proceedings between the original parties. School Dist. of Gering v. Stannard 367

Intoxicating Liquors.

1. There is no longer a dram shop or civil liability act imposing strict liability for sale of liquor in Nebraska. Holmes v. Circo 496
2. Section 53-180, R. R. S. 1943, does not create a civil cause of action in favor of, or duty toward, third parties injured as a result of violations of section 53-180. Holmes v. Circo 496
3. In the absence of legislation specifically so providing, a tavern owner or operator in Nebraska is not liable to third parties injured by intoxicated persons to whom the tavern owner has served liquor in violation of section 53-180, R. R. S. 1943. Holmes v. Circo 496
4. A violation of section 53-180, R. R. S. 1943, does not constitute negligence, or evidence thereof, of which injured third parties may avail themselves in actions against a tavern owner or operator. Holmes v. Circo 496
5. There is no requirement in our law that the request for a chemical test must be made at the scene of the arrest. Stender v. Sullivan 810
6. In Heffernan v. Kissack (1974), 192 Neb. 637, 223 N. W. 2d 486, we held that a single request to submit to a

chemical test is sufficient. However, we did not mean to imply, and the law does not require, that only one request can be made. Stender v. Sullivan 810

Intoxication.

Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged. State v. Coleman 721

Issue Preclusion.

The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158

Joint Tenancy.

1. When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. Marco v. Marco 313
2. Upon the death of one of the joint tenants, the survivor takes the entire title, and any interest that the survivor would otherwise take under the homestead law is merged in the new title of the survivor. David v. Tucker 575

Judgments.

1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Foxley Cattle Co. v. Bank of Mead ... 1
2. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co. .. 67
   Palmer v. Dorn 360
3. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Valentine Production Credit Assn. v. Spencer Foods, Inc. 119
4. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Miller v. Miller 146
5. The estoppel created by the first judgment may not be

extended beyond the issues necessarily determined by it. Where it does not appear that evidence showing the liability of the third person was necessarily involved in the determination of the original action and passed upon by the court in rendering judgment, such judgment is not conclusive as to the liability of the defendant in the second action to the defendant in the first action. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158

6. The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158

7. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. The exercise of the authority is a matter of legal discretion. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158

8. A judgment or order is rendered by an inferior tribunal within the meaning of section 25-1931, R. R. S. 1943, when the decision is announced under the law and the facts. Marcotte v. City of Omaha 217

9. Section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of the judgment or the making of the final order complained of. Marcotte v. City of Omaha 217

10. Under the provision of section 25-1905, R. R. S. 1943, the petitioner in error must file with his petition a certified transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified. The filing of such transcript is jurisdictional unless failure to file is without fault on the part of the petitioner and is caused solely by failure of the public official required by law to furnish such transcript to perform his public duty. Marcotte v. City of Omaha 217

11. The judgment of the trial court as to visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing, or by this court de novo upon the record. King v. King 289

12. In cases involving determination of rights of visitation, as well as child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of visitation or custody, will not be disturbed on appeal unless there is a clear abuse of discretion, or the findings are contrary to the evidence. King v. King ... 289

13. Where a law action is tried to the court without a jury,

the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. State v. Foster 332

14. A District Court may vacate or modify its own judgments after the term at which they were entered for, among other things, mistake, neglect, or omission of the clerk and a proceeding to vacate on this ground may be brought within 3 years. Pofahl v. Pofahl 347

15. Section 25-2003, R. R. S. 1943, states that the proper proceeding to correct omissions of the clerk is by motion and notice. Pofahl v. Pofahl 347

16. A District Court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. Pofahl v. Pofahl 347

17. After the term, section 25-2001, R. R. S. 1943, governs the vacation or modification of judgments. Pofahl v. Pofahl 347

18. Normally the proceedings required in section 25-2003, R. R. S. 1943, must be followed notwithstanding judgment was entered without prior notice to the parties or opportunity for a hearing, or that the purpose of section 25-1301.01, R. S. Supp., 1974, has been defeated by the failure of the clerk to give the required notice of the entry of judgment. Pofahl v. Pofahl 347

19. A failure of the clerk to comply with section 25-1301.01, R. S. Supp., 1974, will not defeat a party's right to move for a new trial or appeal, but such failure does not render the judgment void. Pofahl v. Pofahl 347

20. After the term at which it is entered expires, a failure to move for the vacation of a judgment within the time required by statute ordinarily deprives the District Court of authority to reopen or vacate the judgment. Pofahl v. Pofahl 347

21. The sole and only scope and purpose of a nunc pro tunc order or decree is to make the record speak the truth, not to change or amend it. Howard v. Howard 351

22. Section 42-365, R. S. Supp., 1974, provides orders for alimony may be modified or revoked for good cause shown. Howard v. Howard 351

23. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Palmer v. Dorn 360

24. Ordinarily, an intervener takes the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or the informali-

ties or defects in the proceedings between the original parties. School Dist. of Gering v. Stannard 367
25. A party who objects to the evidence and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded. Washington v. American Community Stores Corp. 624
26. The rules of res judicata are not applicable where the judgment is not a final judgment. Hull v. Bahensky ... 648
27. An order or judgment of a court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination. Hull v. Bahensky 648
28. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Hull v. Bahensky 648
29. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Hull v. Bahensky 648
30. In a special proceeding to determine the legality and validity of a bond issue of a sanitary and improvement district, a decree approving and confirming the proceedings for the issuance of the bonds validates the bonds and forecloses any question as to the right to issue bonds and of compliance with any conditions precedent required by law. It is conclusive so as to protect the bonds in the hands of anyone insofar as the validity of any proceedings relating to the issuance of the bonds is concerned. Hayes v. Sanitary & Improvement Dist. No. 194 653
31. The decree confirming the legality and validity of a bond issue does not determine the validity or invalidity of all contracts made by the sanitary and improvement district in connection with the project which the bond issue was designed to finance. Hayes v. Sanitary & Improvement Dist. No. 194 653
32. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699
33. Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the modified judgment is not required. Brandt v. Mayer 751
34. It is the function of this court to independently determine if sufficient evidence was presented to sustain the

trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict. Brandt v. Mayer 751

35. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Brandt v. Mayer 751

36. While an action for a dissolution of marriage is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Van Bloom v. Van Bloom 792

Juries.

1. Where a trial judge, in the exercise of equity jurisdiction, may submit questions of fact to a jury, its finding is purely advisory and not binding on the trial court. Farmers Coop. Assn. v. Klein 180

2. Section 25-1601, R. S. Supp., 1974, excluding 19 and 20 year olds from petit and grand jury service does not violate constitutional due process guarantees, as those who are 19 and 20 years old do not comprise a cognizable class. State v. Foster 332

3. The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Wright 377

4. A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. State v. Wright 377

5. It is within the province of the jury to weigh all the elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings. Washington v. American Community Stores Corp. 624

6. Due process requires that the accused receive a trial by an impartial jury free from outside influences. State v. Ell 800

7. The issue of whether or not a jury should be sequestered during a criminal trial is left to the discretion of the trial court, and unless the defendant makes a showing of prejudice or the record discloses an abuse of discretion, denial of sequestration is not error. State v. Ell 800

8. A party ordinarily has no right to examine a prospec-

tive juror out of the presence of all other prospective jurors. State v. Ell. 800

Jurisdiction.

1. The District Court of the county wherein real estate is situated is not without jurisdiction to hear and determine proceedings brought to quiet title to, or obtain partition of, that real estate. Page v. Buchfinck 135
2. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. Sosso v. Sosso 242
3. Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. Sosso v. Sosso 242

Jurors.

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2. The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Wright 377
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Kidnapping.

Kidnapping includes unlawful imprisonment or a holding against the will of the person held for the purpose of compelling the performance of any act by such person. § 28-417, R. R. S. 1943. State v. Parker 762

Labor and Labor Relations.

1. Collective bargaining by County of Lancaster, Nebraska, Division of Public Welfare, is not possible without the inclusion of the State Department of Public Welfare because the activities of the county are jointly controlled by and interrelated with the state department. American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster 89
2. Section 48-816, R. R. S. 1943, in classifying officers of municipal police and fire departments differently in regard to membership in bargaining units from officers

of other public departments is not thereby rendered unconstitutional as special legislation. Local Union No. 647 v. City of Grand Island 693
3. The provisions of section 48-813, R. S. Supp., 1974, that the Court of Industrial Relations should hear each case within 60 days from the date of filing the petition and enter an order thereon within 30 days after the hearing is directory and not mandatory. Local Union No. 647 v. City of Grand Island 693
4. It is unlawful for the employer of a public employee to exert pressure upon him to refrain from joining a recognized bargaining unit. Local Union No. 647 v. City of Grand Island 693

Laches.

Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. Cape Co. v. Wiebe 204

Larceny.

1. A thief can acquire no title to an automobile stolen by him, nor can title to such vehicle be acquired through another's larceny or theft. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
2. The Nebraska Certificate of Title Act does not prevent owners of stolen vehicles from reclaiming them; and rights acquired by subsequent bona fide purchasers of the stolen vehicles are subject to those of the true owners. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. . 595

Legislature.

1. It is not the court's duty, nor within its province, especially in the absence of any evidence of legislative intent, to read a meaning into a statute that is not warranted by the legislative language. State v. Adkins ... 76
2. An interpretation of a statute which has the effect of repealing or nullifying another statute will not be adopted by this court unless such interpretation is made necessary by the evident intent of the Legislature. City of Grand Island v. County of Hall 282
3. The Legislature is clothed with full power and control over the disposition of revenue derived from taxation by political subdivisions of the state, subject only to constitutional restrictions. City of Grand Island v. County of Hall 282

4. The number, nature, and duration of the powers conferred upon a county rest in the absolute discretion of the state. City of Grand Island v. County of Hall 282
5. In order for the state Constitution to restrict plenary power of the Legislature to tax, the language of the restriction must be clear. State ex rel. Meyer v. County of Banner 565
6. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. Taylor v. Karrer 581
7. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Taylor v. Karrer 581
8. The licensing and regulation of the health profession and other matters dealing with health is a legislative function which that branch of government ordinarily carries out through administrative agencies created by it. Scott v. State ex rel. Board of Nursing 681
9. A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Scott v. State ex rel. Board of Nursing . 681

Licenses and Permits.

1. Section 71-7,132.29, R. R. S. 1943, provides that the Board of Nursing of the State of Nebraska "shall have power to deny . . . any license . . . applied for . . . upon proof that the person . . . (6) is guilty of unprofessional conduct." Scott v. State ex rel. Board of Nursing 681
2. The licensing and regulation of the health profession and other matters dealing with health is a legislative function which that branch of government ordinarily carries out through administrative agencies created by it. Scott v. State ex rel. Board of Nursing 681

Limitations of Actions.

1. Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own in-

herent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. Cape Co. v. Wiebe 204
2. An action on a specialty can only be brought within 5 years. Cape Co. v. Wiebe 204
3. An action for trespass must be brought within 4 years. Cape Co. v. Wiebe 204
4. If facts pleaded in a petition are sufficient to plead an excuse to the operation of the statute limiting actions based on fraud, a general demurrer will be defeated. Lee v. Brodbeck 393
5. The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust. The time when the statute of limitations commences to run must be determined upon the facts in each case. Jirka v. Prior 416
6. A wrongful death action cannot be maintained under the provisions of sections 30-809 and 30-810, R. R. S. 1943, unless commenced within 2 years of the death. United Materials, Inc. v. Landreth 525
7. Section 25-222, R. S. Supp., 1974, provides that an action for professional negligence must be brought within 2 years provided that if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Taylor v. Karrer 581
8. A cause of action for medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, that an act of malpractice occurred. Taylor v. Karrer 581

Malpractice.

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sonable diligence should have discovered, that an act of malpractice occurred. Taylor v. Karrer 581

Master and Servant.

It is unlawful for the employer of a public employee to exert pressure upon him to refrain from joining a recognized bargaining unit. Local Union No. 647 v. City of Grand Island 693

Misdemeanors.

A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor. State v. Thompson 55

Motions, Rules, and Orders.

1. In an action in equity, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. Marco v. Marco 313
2. In an action in equity, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Marco v. Marco 313
3. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490
4. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Malec v. Malec 533
5. A party is not in contempt of court for a failure to comply with an order directing him to pay money unless it

is shown that he had sufficient ability to pay, and that his refusal was willful, contumacious, and without just and reasonable grounds. Malec v. Malec 533
6. The purpose of a new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceedings. Brandt v. Mayer 751
7. Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the modified judgment is not required. Brandt v. Mayer 751

Motor Vehicles.

1. A motor vehicle operator on the right and approaching an intersection at about the same time as a vehicle on the intersecting road to the left does not have an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with the underlying purpose of the rules which is to prevent collisions. Peterson v. Deprez 304
2. Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine be the head of the family, it is settled that it is an indispensable element of recovery under Nebraska law. Ramsey v. Rimpley 516
3. Under the Nebraska Certificate of Title Act, sections 60-102 to 60-117, R. R. S. 1943, a certificate of title is the exclusive method provided by statute for the transfer of title to an automobile, but it is not conclusive of ownership. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
4. A certificate of title to a motor vehicle conveys no greater interest than the grantor has. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
5. A thief can acquire no title to an automobile stolen by him, nor can title to such vehicle be acquired through another's larceny or theft. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. 595
6. The Nebraska Certificate of Title Act does not prevent owners of stolen vehicles from reclaiming them; and rights acquired by subsequent bona fide purchasers of the stolen vehicles are subject to those of the true owners. First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co. . 595

7. In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another. State v. Rotella 741
8. The certification of a copy of an order suspending a motor vehicle operator's license is a ministerial act. State v. Applegarth 773
9. Administrative authority vested in the Director of Motor Vehicles by the statute may be exercised in the name of the director by properly designated subordinates. State v. Applegarth 773
10. An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. State v. Applegarth 773
11. There is no requirement in our law that the request for a chemical test must be made at the scene of the arrest. Stender v. Sullivan 810
12. In Heffernan v. Kissack (1974), 192 Neb. 637, 223 N. W. 2d 486, we held that a single request to submit to a chemical test is sufficient. However, we did not mean to imply, and the law does not require, that only one request can be made. Stender v. Sullivan 810
13. The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone. State v. Mann 824

Municipal Corporations.

1. Section 18-1716, R. R. S. 1943, was designed to eliminate overlapping in municipal extraterritorial zoning. Seward County Board of Commissioners v. City of Seward . 266
2. Although the governmental proprietary distinction may be a useful device for limiting governmental tort immunity, it is not appropriate for the resolution of zoning conflicts. Seward County Board of Commissioners v. City of Seward 266

Municipalities.

1. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation as to the exercise of governmental functions, but the doctrine will be held to apply where right and justice demand it. Hayes v. Sanitary & Improvement Dist. No. 194 653
2. The power to sell bonds includes the power to employ a broker or agent to effect the sale for a customary commission or fee. Hayes v. Sanitary & Improvement Dist. No. 194 653
3. Where a fiscal agent for the sale of bonds of a sanitary and improvement district purchases the bonds privately from the district at par, payment of a fee for fiscal services to such purchaser constitutes a sale of the bonds at less than par in violation of section 31-755, R. R. S. 1943. Hayes v. Sanitary & Improvement Dist. No. 194 653
4. Ordinarily contracts or agreements for the performance of reasonably necessary fiscal services of benefit to a municipal corporation in connection with the issuance of its securities and the carrying out of its governmental functions are authorized in the absence of statute to the contrary. Hayes v. Sanitary & Improvement Dist. No. 194 653
5. Ordinarily a sanitary and improvement district may contract to pay a reasonable fee to a financial institution which will agree to purchase or place at par any construction warrants issued to contractors by the district in payment for goods or services furnished in connection with construction projects of the district. Hayes v. Sanitary & Improvement Dist. No. 194 653
6. Section 48-816, R. R. S. 1943, in classifying officers of municipal police and fire departments differently in regard to membership in bargaining units from officers of other public departments is not thereby rendered unconstitutional as special legislation. Local Union No. 647 v. City of Grand Island 693

Negligence.

1. It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser. Davis v. Cunningham 8
2. The attractive nuisance doctrine requires that the condition resulting in injury must be one that involves an unreasonable risk of death or serious bodily harm to a child, and one which should be foreseen. Davis v. Cunningham 8
3. A property owner is not an insurer of the safety of per-

sons who may come upon his land as invitees, licensees, or trespassers, nor is he under a duty to make his land child-proof. Davis v. Cunningham 8
4. In its application the principles of the attractive nuisance doctrine should not be extended. Davis v. Cunningham 8
5. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. Oberhelman v. Blount 42
6. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Oberhelman v. Blount 42
7. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. Oberhelman v. Blount 42
8. The standard of reasonable care never varies but the degree of care required varies with the danger involved in the act and is proportionate to it. McDaniel v. McNeil Laboratories, Inc. 190
9. If an act involves a risk of death or serious bodily harm and is capable of causing such results to a number of persons, the highest attention and caution are required, even if the act has a very considerable utility. McDaniel v. McNeil Laboratories, Inc. 190
10. A motor vehicle operator on the right and approaching an intersection at about the same time as a vehicle on the intersecting road to the left does not have an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with the underlying purpose of the rules which is to prevent collisions. Peterson v. Deprez 304
11. A violation of section 53-180, R. R. S. 1943, does not constitute negligence, or evidence thereof, of which injured third parties may avail themselves in actions against a tavern owner or operator. Holmes v. Circo 496
12. Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine

be the head of the family, it is settled that it is an indispensable element of recovery under Nebraska law. Ramsey v. Rimpley 516

13. In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another. State v. Rotella 741

New Trial.

1. A failure of the clerk to comply with section 25-1301.01, R. S. Supp., 1974, will not defeat a party's right to move for a new trial or appeal, but such failure does not render the judgment void. Pofahl v. Pofahl 347
2. A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. School Dist. of Gering v. Stannard 367
3. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Betts 572
4. It is settled law in Nebraska that a motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Betts .. 572
5. The purpose of a new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceedings. Brandt v. Mayer 751
6. Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the modified judgment is not required. Brandt v. Mayer 751
7. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Applegarth 773

Notice.

1. Normally the proceedings required in section 25-2003,

R. R. S. 1943, must be followed notwithstanding judgment was entered without prior notice to the parties or opportunity for a hearing, or that the purpose of section 25-1301.01, R. S. Supp., 1974, has been defeated by the failure of the clerk to give the required notice of the entry of judgment. Pofahl v. Pofahl 347

2. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
3. An oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
4. The requirement of a written notice eliminates all possibility of dispute as to whether notice was actually given and establishes what notice was given. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
5. To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
6. A creditor who uses a private sale form for public sales violates section 9-504(3), U. C. C. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
7. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490

Nuisances.

1. The attractive nuisance doctrine requires that the condition resulting in injury must be one that involves an unreasonable risk of death or serious bodily harm to a child, and one which should be foreseen. Davis v. Cunningham 8
2. A property owner is not an insurer of the safety of persons who may come upon his land as invitees, licensees, or trespassers, nor is he under a duty to make his land child-proof. Davis v. Cunningham 8

3. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Davis v. Cunningham 8
4. In its application the principles of the attractive nuisance doctrine should not be extended. Davis v. Cunningham 8

Nurses.

1. Section 71-7,132.29, R. R. S. 1943, provides that the Board of Nursing of the State of Nebraska "shall have power to deny . . . any license . . . applied for . . . upon proof that the person . . . (6) is guilty of unprofessional conduct." Scott v. State ex rel. Board of Nursing 681
2. "Unprofessional conduct" is conduct which violates those standards of professional behavior which through professional experience have become established, by the concensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest and includes acts of a nature likely to jeopardize the interests of the public. Scott v. State ex rel. Board of Nursing 681

Obscenity.

1. The publications involved herein are clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. State v. American Theatre Corp. 461
State v. Downtown Books, Inc. 473
2. Where the covers of the magazines, front and back, are occupied with pictures of nude individuals engaged in sexual acts or prominently displaying their genitals, it can hardly be said the jury could not infer knowledge of their contents by the defendant and its intent to sell obscene materials. State v. American Theatre Corp. 461
3. By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. State v. American Theatre Corp. 461, 467
4. The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590. State v. American Theatre Corp. 461, 467
5. We find both films, "The Cunning Stunt," and "Bang Bash," to be hard-core pornography and obscene under the tests enunciated in Miller v. California (1973), 413

U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. State v. American Theatre Corp 461
6. The result in this case is governed by our opinion in State v. Little Art Corp. (1973), 189 Neb. 681, 204 N. W. 2d 574. State v. American Theatre Corp. 467

Ordinances.

1. Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance; an ordinance prohibiting such conduct is not unconstitutionally vague. State v. Guy 308
2. A custom or usage of failing to enforce a statute by prosecution is not a defense to a prosecution finally brought. State v. Guy 308

Parent and Child.

1. When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Knight v. Knight 63
2. As we interpret our present divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. Knight v. Knight 63
3. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Knight v. Knight 63
4. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, 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. Knight v. Knight 63
5. Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being. Miller v. Miller 146
6. The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the rights of fit, proper, and suitable parents. Miller v. Miller 146

7. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Miller v. Miller 146
8. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Miller v. Miller 146
9. Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. Sosso v. Sosso 242
10. The judgment of the trial court as to visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing, or by this court de novo upon the record. King v. King 289
11. In cases involving determination of rights of visitation, as well as child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of visitation or custody, will not be disturbed on appeal unless there is a clear abuse of discretion, or the findings are contrary to the evidence. King v. King ... 289
12. Custody and visitation of a minor child shall be determined on the basis of the child's best interests. Peterson v. Peterson 328
13. In cases involving determinations of child custody, the findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal if the findings are in conformity with the pertinent statutes, are not a clear abuse of discretion, or are not clearly against the weight of the evidence. Peterson v. Peterson 328
14. The juvenile court may terminate the parental rights of a parent who is unable to discharge parental responsibility because of mental illness or mental deficiency, if there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. § 43-209(5), R. S. Supp., 1976. State v. O'Tool . 708
15. While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the court in determining what is in the best interests of the child. Chilese v. Chilese 784
16. The discretion of the trial court with respect to awarding or changing the custody and support 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. Chilese v. Chilese 784
17. Under section 43-209(2), R. S. Supp., 1974, the court may terminate parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Johnson 795
18. In cases involving child custody, determinations of Juvenile Court findings, both as to the evaluation of the evidence and to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of evidence. State v. Johnson 795

Parties.

1. Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. Jelinek v. Nebraska Nat. Gas Co. 488
2. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Jelinek v. Nebraska Nat. Gas Co. 488
3. A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent. Hohneke v. Ferguson 505
4. A purely voluntary conveyance will not be reformed at the behest of the grantee after the grantor's death as against the person who in the absence of reformation takes the property under the will of the grantor where the evidence establishes that the grantor would not have consented to the reformation had he lived. Hohneke v. Ferguson 505
5. Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine be the head of the family, it is settled that it is an indispensable element of recovery under Nebraska law. Ramsey v. Rimpley 516
6. Under the Workmen's Compensation Act, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee. United Materials, Inc. v. Landreth 525

7. An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate. United Materials, Inc. v. Landreth 525

Partition.

The District Court of the county wherein real estate is situated is not without jurisdiction to hear and determine proceedings brought to quiet title to, or obtain partition of, that real estate. Page v. Buchfinck 135

Partnership.

In an accounting action between partners, the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Von Seggern v. Von Seggern 545

Physicians and Surgeons.

1. Section 25-222, R. S. Supp., 1974, provides that an action for professional negligence must be brought within 2 years provided that if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Taylor v. Karrer 581
2. A cause of action for medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, that an act of malpractice occurred. Taylor v. Karrer 581

Plea in Abatement.

Any error in the ruling on a plea in abatement alleging that the evidence at the preliminary hearing was insufficient to support a finding of probable cause is cured if the evidence at the trial is sufficient to sustain a finding of guilty. State v. Bolden 388

Pleadings.

1. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. Oberhelman v. Blount 42
2. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving

contributory and comparative negligence. Oberhelman v. Blount 42
3. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings but which have not been supported by any evidence. Oberhelman v. Blount 42
4. Under section 25-852, R. R. S. 1943, a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. Stungis v. Union Packing Co. of Omaha, Inc. 126
5. An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
6. Section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of the judgment or the making of the final order complained of. Marcotte v. City of Omaha 217
7. Under the provision of section 25-1905, R. R. S. 1943, the petitioner in error must file with his petition a certified transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified. The filing of such transcript is jurisdictional unless failure to file is without fault on the part of the petitioner and is caused solely by failure of the public official required by law to furnish such transcript to perform his public duty. Marcotte v. City of Omaha .. 217
8. The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken. Marcotte v. City of Omaha 217
9. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover. Lee v. Brodbeck 393
10. The purpose of pleadings is to frame the issues upon which the case is to be tried and to advise the adversary what he is called upon to meet. Lee v. Brodbeck 393
11. If facts pleaded in a petition are sufficient to plead an

excuse to the operation of the statute limiting actions based on fraud, a general demurrer will be defeated. Lee v. Brodbeck 393
12. Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action has the burden of both pleading and establishing the mitigation. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424
13. Pleadings perform a useful and necessary purpose. They frame the issues upon which the cause is to be tried and advise the adversary as to what he is called upon to meet. B. C. Christopher & Co. v. Danker 518
14. A pleading should be construed with reference to the general theory upon which it proceeds, and should not be uncertain as to which of two or more theories is relied on. B. C. Christopher & Co. v. Danker 518
15. The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime. Malec v. Malec 533
16. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Malec v. Malec 533
17. A loss of past earnings is an item of special damage and must be specifically pleaded and proved. Washington v. American Community Stores Corp. 624
18. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Washington v. American Community Stores Corp. 624

Political Subdivisions.

1. The Legislature is clothed with full power and control over the disposition of revenue derived from taxation by political subdivisions of the state, subject only to constitutional restrictions. City of Grand Island v. County of Hall 282
2. In a special proceeding to determine the legality and validity of a bond issue of a sanitary and improvement district, a decree approving and confirming the proceedings for the issuance of the bonds validates the bonds and forecloses any question as to the right to issue bonds and of compliance with any conditions precedent required by law. It is conclusive so as to protect the bonds in the hands of anyone insofar as the validity of any proceedings relating to the issuance of

the bonds is concerned. Hayes v. Sanitary & Improvement Dist. No. 194 653
3. The decree confirming the legality and validity of a bond issue does not determine the validity or invalidity of all contracts made by the sanitary and improvement district in connection with the project which the bond issue was designed to finance. Hayes v. Sanitary & Improvement Dist. No. 194 653

Powers.
1. The Legislature is clothed with full power and control over the disposition of revenue derived from taxation by political subdivisions of the state, subject only to constitutional restrictions. City of Grand Island v. County of Hall 282
2. The number, nature, and duration of the powers conferred upon a county rest in the absolute discretion of the state. City of Grand Island v. County of Hall 282

Pretermissions.
1. Section 25-2003, R. R. S. 1943, states that the proper proceeding to correct omissions of the clerk is by motion and notice. Pofahl v. Pofahl 347
2. A failure of the clerk to comply with section 25-1301.01, R. S. Supp., 1974, will not defeat a party's right to move for a new trial or appeal, but such failure does not render the judgment void. Pofahl v. Pofahl 347

Principal and Agent.
1. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency, including statements made without knowledge or known to be false, is guilty of fraud and bad faith. Lee v. Brodbeck 393
2. Where a real estate broker has paid over a buyer's deposit or downpayment on a real estate contract to the broker's disclosed principal, or in good faith changed his position before he learns of the buyer's claim or demand for refund, the broker cannot be held liable for the return of the funds in the absence of an intention to impose personal liability on the broker as shown by the circumstances and the agreement of the parties. Eggerling v. Cuhel 745

Privileged Communications.
Communications between client and attorney made in the presence of others do not constitute privileged communications. State v. Lynch 372

Probable Cause.

1. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor. State v. Thompson 55
2. Probable cause to justify search and seizure without a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Aden 149
3. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. State v. Aden 149
4. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. 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. State v. Jefferson 340
5. The standard for determining probable cause for search and seizure is practical and not technical. State v. Jefferson 340
6. It has long been the rule that reasonable grounds for the issuance of a search warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described. State v. Bernth 813
7. Affidavits for search warrants must be tested and interpreted by magistrates and courts in common-sense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law

pleadings have no proper place in the area. State v. Bernth 813
8. Where circumstances are detailed in an affidavit for a search warrant, and where reason for crediting the source of the information is given, and where a magistrate has found probable cause, courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical rather than in a common-sense manner. State v. Bernth 813
9. Although in a particular case it may not be easy to determine when an affidavit for a search warrant demonstrates existence of probable cause, resolution of doubtful or marginal cases in the area should be largely determined by preference to be accorded to warrants. State v. Bernth 813

Probate and Administration.

1. The taxation of attorney's fees and expenses of a party other than the executor or administrator of the estate may be appropriate in a particular case, either against the estate generally or against the executor or administrator personally. Roberts v. Snow Redfern Memorial Foundation 139
2. Generally, an executor or administrator has an obligation to make known to the court controversies which exist between the parties, and to obtain directions of the court as to his responsibilities in that regard, and no more. Roberts v. Snow Redfern Memorial Foundation 139
3. In a situation, reasonably subject to controversy, an executor or administrator has no obligation to adopt or pursue, at his risk or at the risk of the estate, that position which may ultimately prevail. Roberts v. Snow Redfern Memorial Foundation 139
4. In appropriate circumstances, an executor or administrator may have discretion, or perhaps even an obligation, to adopt a position, although generally no such discretion or obligation will exist, other participating parties having an obligation to pursue their own interests. Roberts v. Snow Redfern Memorial Foundation 139
5. Conduct by a party other than the executor or administrator may operate to relieve the executor or administrator of whatever obligation he might otherwise have. Roberts v. Snow Redfern Memorial Foundation 139

Probation and Parole.

1. An order or sentence of the trial court denying probation will not be overturned on appeal unless there has

been an abuse of discretion. State v. Keen 291
State v. Bridgmon 714
State v. Ronfeldt 771
2. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Schleis 327
State v. Cox 836
3. Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the determination of the trial court will not be disturbed on appeal. State v. Lynch 372
4. The granting of probation is discretionary with the trial court. In the absence of an abuse of discretion, a denial of probation is not error. State v. Morrow 739

Property.
1. It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser. Davis v. Cunningham ... 8
2. The attractive nuisance doctrine requires that the condition resulting in injury must be one that involves an unreasonable risk of death or serious bodily harm to a child, and one which should be foreseen. Davis v. Cunningham 8
3. A property owner is not an insurer of the safety of persons who may come upon his land as invitees, licensees, or trespassers, nor is he under a duty to make his land child-proof. Davis v. Cunningham 8
4. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Davis v. Cunningham 8
5. In its application the principles of the attractive nuisance doctrine should not be extended. Davis v. Cunningham 8
6. This court is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record. Abbott v. Abbott 97
Van Bloom v. Van Bloom 792
7. A testamentary direction to an executor to sell farmland and pay the proceeds, after payment of debts and administrative expenses, over to named beneficiaries in shares, does not constitute a disposition of landlord's share of crops growing thereon, absent any indication of such a testamentary intent. Roberts v. Snow Redfern Memorial Foundation 139
8. A special bequest of property may operate to take that

property out of a more general testamentary direction to sell and distribute proceeds of the sale. Roberts v. Snow Redfern Memorial Foundation 139

9. Under sections 25-2501 to 25-2506, R. S. Supp., 1974, the uniform procedure for acquiring private property for public use act, the hearing is not a hearing to justify the taking itself, but is in the nature of a "town meeting" to explain the taking and to inform landowners of their procedural rights. Seward County Board of Commissioners v. City of Seward 266

10. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Cornett v. Nathan 277

11. When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. Marco v. Marco 313

12. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement. Howard v. Howard .. 351

13. There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement. Howard v. Howard 351

14. In an action for dissolution of marriage, agreements between husband and wife, not made in connection with the separation of the parties or the dissolution of their marriage, are not binding on the court. Snyder v. Snyder 383

15. In an action for dissolution of marriage, the court has the power to consider all property accumulated by the joint efforts of both the husband and wife, and to adjust their property rights, no matter how such property is legally titled as between the parties. Snyder v. Snyder 383

16. Upon dissolution of a marriage where the parties cannot agree upon a division of property, it is incumbent on the court to make an order for such division of the property as is conscionable and fair under the circumstances of the marriage. § 42-366(2), (3), R. R. S. 1943. Cozette v. Cozette 780

17. In an action for dissolution of marriage, a court may divide property between the parties in accordance with

the equities of the situation irrespective of how legal title is held. Cozette v. Cozette 780

18. The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case. Van Bloom v. Van Bloom 792

Prosecuting Attorneys.

1. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. State v. Leonard 731
2. Statements constituting alleged misconduct of counsel in argument to the jury should be taken by the court reporter at the trial together with the objections made and the ruling of the trial court. State v. Howell 832

Public Administrative Bodies.

Collective bargaining by County of Lancaster, Nebraska, Division of Public Welfare, is not possible without the inclusion of the State Department of Public Welfare because the activities of the county are jointly controlled by and interrelated with the state department. American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster 89

Public Officers and Employees.

1. In passing on claims for a refund of taxes, a county board acts quasi-judicially. Svoboda v. Hahn 21
2. Section 48-816, R. R. S. 1943, in classifying officers of municipal police and fire departments differently in regard to membership in bargaining units from officers of other public departments is not thereby rendered unconstitutional as special legislation. Local Union No. 647 v. City of Grand Island 693

Public Service Commissions.

1. This court cannot interfere with a decision of the Power Review Board unless there is no evidence to sustain the action of the board or, for some other reason, the

record shows the action of the board is arbitrary and unreasonable. Omaha P. P. Dist. v. Nebraska P. P. Project 477

2. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490

Quieting Title.

The District Court of the county wherein real estate is situated is not without jurisdiction to hear and determine proceedings brought to quiet title to, or obtain partition of, that real estate. Page v. Buchfinck 135

Rape.

In a prosecution for rape, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Parker 762

Records.

1. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Valentine Production Credit Assn. v. Spencer Foods, Inc. 119
2. The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken. Marcotte v. City of Omaha 217
3. An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. State v. Applegarth 773
4. Statements constituting alleged misconduct of counsel in argument to the jury should be taken by the court reporter at the trial together with the objections made and the ruling of the trial court. State v. Howell 832

Reformation of Instruments.

1. To decree reformation of a written instrument for a

mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. Farmers Coop. Assn. v. Klein 180

2. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory, and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. Farmers Coop. Assn. v. Klein 180
3. An action to reform a written instrument is equitable in nature and on appeal to this court is triable de novo. Hohneke v. Ferguson 505
4. A purely voluntary conveyance may not be reformed in equity at the suit of the grantee against the grantor during his lifetime without his consent. Hohneke v. Ferguson 505
5. A purely voluntary conveyance will not be reformed at the behest of the grantee after the grantor's death as against the person who in the absence of reformation takes the property under the will of the grantor where the evidence establishes that the grantor would not have consented to the reformation had he lived. Hohneke v. Ferguson 505

Res Judicata.

1. The rules of res judicata are not applicable where the judgment is not a final judgment. Hull v. Bahensky ... 648
2. For the doctrine of res judicata to be applicable, the former suit must be based on the same cause of action as the latter. Vantage Enterprises, Inc. v. Caldwell ... 671
3. For purposes of application of res judicata, a petition in quantum meruit is a restatement of the same cause of action as that in a petition on express contract, where both petitions are based on the same services; and as such, an earlier judgment in a case on express contract acts as a bar to a later action in quantum meruit. Vantage Enterprises, Inc. v. Caldwell 671
4. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot

again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not. Vantage Enterprises, Inc. v. Caldwell 671

5. The rule of res judicata is grounded, first on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause. Vantage Enterprises, Inc. v. Caldwell 671

Restraint of Trade.

1. In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
2. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Diamond Match Div. of Diamond International Corp. v. Bernstein 452

Rules of Court.

We consider only assignments of error discussed by appellant in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974. State v. Downtown Books, Inc. .. 473

Sales.

1. Section 2-204(1), U. C. C., provides that a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. Crane Co. v. Roberts Supply Co. 67
2. An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Crane Co. v. Roberts Supply Co. 67
3. "Delivery" is the voluntary transfer of possession. Goosic Constr. Co. v. City Nat. Bank of Crete 86
4. "Tender of delivery" occurs whenever a seller does everything necessary to put conforming goods com-

pletely and unconditionally at buyer's disposal. Goosic Constr. Co. v. City Nat. Bank of Crete 86

5. For a delivery, or tender of delivery, to be effective, a buyer or his agent must be able to take possession of conforming goods in a peaceful manner, without interference from third parties. Goosic Constr. Co. v. City Nat. Bank of Crete 86

6. A drug, properly tested, labeled with appropriate directions and warnings, approved by the United States Food and Drug Administration, and marketed properly under federal regulation, is presumptively a reasonably safe product, in the absence of clear and convincing evidence to the contrary. McDaniel v. McNeil Laboratories, Inc. 190

7. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared and distributed, and accompanied by appropriate directions and warnings, is not defective nor unreasonably dangerous, as a matter of law, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions or extensions thereof. McDaniel v. McNeil Laboratories, Inc. 190

8. Where there are appropriate directions and warnings, a manufacturer of a properly prepared drug may not be held liable either on a breach of warranty theory or a strict liability in tort theory. McDaniel v. McNeil Laboratories, Inc. 190

9. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Cornett v. Nathan 277

10. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398

11. An oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code. DeLay Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398

12. The requirement of a written notice eliminates all possibility of dispute as to whether notice was actually given and establishes what notice was given. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398

13. To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
14. A creditor who uses a private sale form for public sales violates section 9-504(3), U. C. C. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
15. Under the Uniform Commercial Code the adequacy or insufficiency of the price for which collateral is sold at private sale after default and repossession is one of the "terms" of the sale, and is relevant, along with other issues, in determining whether the sale was commercially reasonable. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
16. Where a creditor disposes of collateral in several transactions, if he wishes a deficiency judgment he must comply with the law in each transaction. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
17. Section 9-502(2), U. C. C., requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
18. Under section 2-715, U. C. C., consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements or needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424
19. In order to charge the seller with the particular loss it must be one that ordinarily follows the breach of the contract in the usual course of events or that reasonable men in the position of the parties would have foreseen as a probable result of the breach. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

Schools and School Districts.

1. In making its determination whether a requested transfer of land is for the best educative interest of the petitioner or petitioners under section 79-403(1), R. R. S. 1943, the court may consider significant differences in the class, accreditation, leadership, management, curricula and/or efficiency of the schools involved, as well as other relevant factors, but need not afford equal weight and significance to each of the various factors considered. Klecan v. Schmal 100

2. In making a determination to transfer land under section 79-403(1), R. R. S. 1943, it is proper for the court to take into consideration the benefits which may accrue from the continuity of schooling and curriculum, as well as the faculty and student associations resulting from continued attendance in the same school, where such children have previously been attending school in the district to which the transfer is sought. Klecan v. Schmal 100
3. The action of the board under section 79-403, R. R. S. 1943, is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo and also upon appeal from District Court to this court, it is triable de novo as in any other equitable action. Klecan v. Schmal 100
4. Even when a case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight. Klecan v. Schmal 100
5. Section 79-1254.02, R. S. Supp., 1975, is not applicable to a Class V school district. Kibbon v. School Dist. of Omaha 293
6. Sections 79-801 and 79-801.02, R. R. S. 1943, have no applicability to a transfer pursuant to section 79-402, R. R. S. 1943. Section 79-801.02 is specifically limited to the provisions of section 79-801. Corcoran v. Boone County Board of Equalization 363
7. The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive. Corcoran v. Boone County Board of Equalization 363

Searches and Seizures.

1. Probable cause to justify search and seizure without a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Aden 149
2. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. State v. Aden 149
3. In evaluation of the reasonableness of a search or sei-

zure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate? State v. Jefferson 340

4. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. State v. Jefferson 340

5. The standard for determining probable cause for search and seizure is practical and not technical. State v. Jefferson 340

6. Where an element of the crime charged is possession of the property seized, "ownership in or right to possession of the premises" or the interests of a "lessee" or "licensee" is not necessary to confer standing to challenge the legality under the Fourth Amendment of a search and seizure. State v. Schrader 632

7. Open fields outside the curtilage are not within the protection of the Fourth Amendment. State v. Schrader .. 632

8. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Schrader 632

9. Where a seizure invades no right of privacy of the person or premises of the accused, his Fourth Amendment rights have not been violated. State v. Schrader 632

10. The exclusionary rule ought not be applied where its deterrent purpose to discourage illegal police conduct will not be served. State v. Schrader 632

11. Informal detention for the purpose of investigation may be lawful even though probable cause sufficient to authorize a formal arrest may not exist. State v. Von Suggs 757

12. 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. State v. Von Suggs 757

13. It has long been the rule that reasonable grounds for the issuance of a search warrant to search specified premises exist if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent

man would be led to believe the property sought was on the premises described. State v. Bernth 813
14. Affidavits for search warrants must be tested and interpreted by magistrates and courts in common-sense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in the area. State v. Bernth 813
15. Where circumstances are detailed in an affidavit for a search warrant, and where reason for crediting the source of the information is given, and where a magistrate has found probable cause, courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical rather than in a common-sense manner. State v. Bernth 813
16. Although in a particular case it may not be easy to determine when an affidavit for a search warrant demonstrates existence of probable cause, resolution of doubtful or marginal cases in the area should be largely determined by preference to be accorded to warrants. State v. Bernth 813

Sentences.

1. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Braasch 240
State v. Wright 377
State v. Coleman 721
State v. DeLeon 776
State v. Williams 834
2. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Tweedy, Melvin, ... 246
State v. Tweedy, Albert, ... 251
State v. Keen 291
State v. Bridgmon 714
State v. Ronfeldt 771
3. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Tweedy, Melvin, ... 246
4. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Tweedy, Melvin, ... 248
State v. Tweedy, Albert, ... 253
State v. Gillham 563
State v. Betts 572
5. The action of the District Court in directing that sentences be served consecutively will not be disturbed on

appeal unless the record shows an abuse of discretion. State v. Tweedy, Melvin 248
State v. Tweedy, Albert 251
6. An order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion. State v. Keen 291
State v. Bridgmon 714
State v. Ronfeldt 771
7. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Schleis 327
State v. Cox 836
8. Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the determination of the trial court will not be disturbed on appeal. State v. Lynch 372
9. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Foutch 644
10. Section 29-2308, R. R. S. 1943, gives this court the authority to reduce a sentence rendered by the District Court when it appears to be excessive. State v. Foutch 644
11. The punishment for a criminal act should in all circumstances be commensurate with the offense. State v. Foutch 644
12. In sentencing a defendant after conviction, the trial court has a broad discretion as to the source and type of evidence it may use to assist it in determining the kind and extent of punishment to be imposed within the limits fixed by statute. State v. Bridgmon 714
13. The fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal Constitutions. State v. Houston 724
14. Section 29-2260, R. R. S. 1943, which lists grounds to be considered by the trial court in sentencing a defendant, does not control the trial court's discretion in imposing a sentence. State v. Machmuller 734
15. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Machmuller 734
16. The granting of probation is discretionary with the trial court. In the absence of an abuse of discretion, a denial of probation is not error. State v. Morrow 739

17. Proportionality in sentencing ought to mean, among other things, that the more serious offenses generally merit the greater punishment, and that those offenders who offer the greatest menace to society deserve the greater punishment. State v. King 821
18. The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone. State v. Mann 824

Speciality.

An action on a specialty can only be brought within 5 years. Cape Co. v. Wiebe 204

Specific Performance.

1. Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property. McIntosh v. Borchers 109
2. Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the parties; nor impose new conditions; nor will it require specific performance of a contract which does not contain the substance of the agreement made. McIntosh v. Borchers 109

Standing.

Where an element of the crime charged is possession of the property seized, "ownership in or right to possession of the premises" or the interests of a "lessee" or "licensee" is not necessary to confer standing to challenge the legality under the Fourth Amendment of a search and seizure. State v. Schrader 632

Statutes.

1. Section 28-4,127, R. S. Supp., 1974, which provides that "(1) It shall be unlawful for any person: * * * (g) To visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of section 28-459 and 28-4,115 to 28-4,142,

if the person has knowledge that such activity is occurring; * * *" is unconstitutionally vague and overbroad. State v. Adkins 76

2. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adkins 76

3. The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Adkins 76

4. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught. State v. Adkins 76

5. It is not the court's duty, nor within its province, especially in the absence of any evidence of legislative intent, to read a meaning into a statute that is not warranted by the legislative language. State v. Adkins 76

6. In making its determination whether a requested transfer of land is for the best educative interest of the petitioner or petitioners under section 79-403(1), R. R. S. 1943, the court may consider significant differences in the class, accreditation, leadership, management, curricula and/or efficiency of the schools involved, as well as other relevant factors, but need not afford equal weight and significance to each of the various factors considered. Klecan v. Schmal 100

7. In making a determination to transfer land under section 79-403(1), R. R. S. 1943, it is proper for the court to take into consideration the benefits which may accrue from the continuity of schooling and curriculum, as well as the faculty and student associations resulting from continued attendance in the same school, where such children have previously been attending school in

the district to which the transfer is sought. Klecan v. Schmal 100
8. A contract to convey the homestead of a married person is invalid and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. McIntosh v. Borchers 109
9. Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property. McIntosh v. Borchers 109
10. Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States. Valder v. Wallis 222
11. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. Sosso v. Sosso 242
12. Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. Sosso v. Sosso .. 242
13. Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed to ascertain its meaning and this court is without authority to change the language. City of Grand Island v. County of Hall 282
14. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. City of Grand Island v. County of Hall 282
15. An interpretation of a statute which has the effect of repealing or nullifying another statute will not be adopted by this court unless such interpretation is made necessary by the evident intent of the Legislature. City of Grand Island v. County of Hall 282
16. Special provisions of a statute in regard to a particular

subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Kibbon v. School Dist. of Omaha 293

17. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Kibbon v. School Dist. of Omaha 293

18. Section 79-1254.02, R. S. Supp., 1975, is not applicable to a Class V school district. Kibbon v. School Dist. of Omaha 293

19. Sections 79-801 and 79-801.02, R. R. S. 1943, have no applicability to a transfer pursuant to section 79-402, R. R. S. 1943. Section 79-801.02 is specifically limited to the provisions of section 79-801. Corcoran v. Boone County Board of Equalization 363

20. Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. Jelinek v. Nebraska Nat. Gas Co. 488

21. The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490

22. Section 53-180, R. R. S. 1943, does not create a civil cause of action in favor of, or duty toward, third parties injured as a result of violations of section 53-180. Holmes v. Circo 496

23. In the absence of legislation specifically so providing, a tavern owner or operator in Nebraska is not liable to third parties injured by intoxicated persons to whom the tavern owner has served liquor in violation of section 53-180, R. R. S. 1943. Holmes v. Circo 496

24. A violation of section 53-180, R. R. S. 1943, does not constitute negligence, or evidence thereof, of which injured third parties may avail themselves in actions against a tavern owner or operator. Holmes v. Circo 496

25. Section 21-2096, R. R. S. 1943, provides that the District Court has the power to dissolve any corporation when, in an action brought by a shareholder, it is established that the directors are deadlocked in the management of the corporate affairs and the shareholders are un-

able to break the deadlock, and that irreparable injury to the corporation is being suffered. Kollbaum v. K & K Chevrolet, Inc. 555

26. Statutes pertaining to the same subject matter should be construed together as if they were one law and effect given to every provision. State ex rel. Meyer v. County of Banner 565

27. A statute authorizing or requiring a county to levy a property tax for purposes substantially local does not contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes. State ex rel. Meyer v. County of Banner 565

28. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. Taylor v. Karrer 581

29. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Taylor v. Karrer 581

30. It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. Taylor v. Karrer 581

31. Chapter 79, article 26, R. S. Supp., 1975, is not unconstitutional on the ground it violates Article VIII, section 1A, of the Constitution of Nebraska. State ex rel. Western Technical Com. Col. Area v. Tallon 603

32. A statute which purports to give a court the power to review an exercise of legislative power de novo in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power is unconstitutional. Scott v. State ex rel. Board of Nursing 681

33. In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done. Scott v. State ex rel. Board of Nursing 681

34. Section 71-1,132.34, R. R. S. 1943, as so construed does not provide for a de novo review in the District Court in the sense that the court may substitute its own judgment for that of the Board of Nursing. Scott v. State ex rel. Board of Nursing 681
35. Section 29-2260, R. R. S. 1943, which lists grounds to be considered by the trial court in sentencing a defendant, does not control the trial court's discretion in imposing a sentence. State v. Machmuller 734
36. Section 81-875.01, R. R. S. 1943, was regulatory and in the nature of a penal statute. It did not grant a new civil remedy against real estate brokers in addition to the penalties imposed by statute. Eggerling v. Cuhel 745
37. Kidnapping includes unlawful imprisonment or a holding against the will of the person held for the purpose of compelling the performance of any act by such person. § 28-417, R. R. S. 1943. State v. Parker 762
38. Under section 43-209(2), R. S. Supp., 1974, the court may terminate parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Johnson 795
39. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Stender v. Sullivan 810
40. The discretionary power given to the court in section 60-427, R. R. S. 1943, to suspend a license to operate a motor vehicle is limited to a charge of operating a motor vehicle in such a manner as to endanger life, limb, or property, brought under appropriate statutes or ordinances, and does not apply to a charge of speeding standing alone. State v. Mann 824

Stop and Check.

1. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. 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. State v. Jefferson 340
2. Informal detention for the purpose of investigation may be lawful even though probable cause sufficient to

authorize a formal arrest may not exist. State v. Von Suggs 757
3. 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. State v. Von Suggs 757

Strict Liability.
1. Under the doctrine of strict liability, an unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. McDaniel v. McNeil Laboratories, Inc. 190
2. A drug, properly tested, labeled with appropriate directions and warnings, approved by the United States Food and Drug Administration, and marketed properly under federal regulation, is presumptively a reasonably safe product, in the absence of clear and convincing evidence to the contrary. McDaniel v. McNeil Laboratories, Inc. 190
3. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared and distributed, and accompanied by appropriate directions and warnings, is not defective nor unreasonably dangerous, as a matter of law, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions or extensions thereof. McDaniel v. McNeil Laboratories, Inc. 190
4. Where there are appropriate directions and warnings, a manufacturer of a properly prepared drug may not be held liable either on a breach of warranty theory or a strict liability in tort theory. McDaniel v. McNeil Laboratories, Inc. 190

Subrogation.
1. Generally, no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. Stetina v. State Farm Mut. Auto. Ins. Co. 441
2. An insurer may be subrogated to its insured's claim against a third party who tortuously causes the loss, but no subrogation exists against the insured or coinsured whose negligence caused the loss. Stetina v. State Farm Mut. Auto. Ins. Co. 441

3. Under the Workmen's Compensation Act, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependants and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee. United Materials, Inc. v. Landreth 525

Summary Judgments.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. Barnes v. Milligan ... 50
Jirka v. Prior 416
2. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Barnes v. Milligan 50
3. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of facts exists. Barnes v. Milligan 50
Jirka v. Prior 416
Farmland Service Coop, Inc. v. Klein 538
4. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Valentine Production Credit Assn. v. Spencer Foods, Inc. 119
5. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Jirka v. Prior 416
6. The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Farmland Service Coop, Inc. v. Klein 538
7. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. Farmland Service Coop, Inc. v. Klein 538

Supersedeas.

The filing of a motion for rehearing before the Public Service Commission under the provisions of section 75-137, R. R. S. 1943, is the commencement of an appeal

proceeding within the meaning of section 75-134, R. R. S. 1943, and where followed by the overruling of the motion and filing of notice of appeal and appeal to this court has the effect of putting the rate order in abeyance until a supersedeas bond is filed under the provisions of section 75-139, R. R. S. 1943. Chicago & Northwestern Transp. Co. v. Nebco, Inc. 490

Taxation.

1. In the absence of statute, taxes voluntarily paid cannot be recovered back. Svoboda v. Hahn 21
2. Generally, a tax is paid voluntarily when it is paid not under compulsion or without threat of seizure or sale of the property of the taxpayer to satisfy the tax in question. Svoboda v. Hahn 21
3. The payment of a tax before it becomes delinquent and its collection can be enforced by compulsory process is generally held to be voluntary. Svoboda v. Hahn 21
4. Before a taxpayer can recover taxes under a statutory procedure he must substantially comply with the requirements of the statute. Svoboda v. Hahn 21
5. In passing on claims for a refund of taxes, a county board acts quasi-judicially. Svoboda v. Hahn 21
6. A written claim for refund timely filed is a prerequisite to a refund of taxes under section 77-1735 or 77-1734.01, R. R. S. 1943. Svoboda v. Hahn 21
7. The Legislature is clothed with full power and control over the disposition of revenue derived from taxation by political subdivisions of the state, subject only to constitutional restrictions. City of Grand Island v. County of Hall 282
8. Sections 79-801 and 79-801.02, R. R. S. 1943, have no applicability to a transfer pursuant to section 79-402, R. R. S. 1943. Section 79-801.02 is specifically limited to the provisions of section 79-801. Corcoran v. Boone County Board of Equalization 363
9. The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive. Corcoran v. Boone County Board of Equalization 363
10. The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Knoefler Honey Farms v. County of Sherman 435
11. The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by sub-

jecting him to taxes not imposed on others of the same class. Knoefler Honey Farms v. County of Sherman .. 435

12. In order for the state Constitution to restrict plenary power of the Legislature to tax, the language of the restriction must be clear. State ex rel. Meyer v. County of Banner 565

13. A statute authorizing or requiring a county to levy a property tax for purposes substantially local does not contravene the prohibitions of Article VIII, section 1A, Nebraska Constitution, although the statute commingles state and local purposes. State ex rel. Meyer v. County of Banner 565

14. The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy. State ex rel. Meyer v. County of Banner 565

15. The adoption of Article VIII, section 1A, Constitution of Nebraska, was not intended to disturb traditional and historical property tax support from counties or other local taxing subdivisions for continuing governmental activities commingling state and local purposes. State ex rel. Meyer v. County of Banner 565

16. Statutory provisions requiring the counties to pay the costs and expenses of maintaining a county court; a District Court; prosecuting criminal law violations; and conducting state and national elections do not contravene Article VIII, section 1A, Constitution of Nebraska, prohibiting the State from levying a property tax for state purposes. State ex rel. Meyer v. County of Banner 565

17. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Technical Com. Col. Area v. Tallon 603

18. Chapter 79, article 26, R. S. Supp., 1975, is not unconstitutional on the ground it violates Article VIII, section 1A, of the Constitution of Nebraska. State ex rel. Western Technical Com. Col. Area v. Tallon 603

Tender.

1. "Tender of delivery" occurs whenever a seller does everything necessary to put conforming goods completely and unconditionally at buyer's disposal. Goosic Constr. Co. v. City Nat. Bank of Crete 86
2. For a delivery, or tender of delivery, to be effective, a buyer or his agent must be able to take possession of conforming goods in a peaceful manner, without interference from third parties. Goosic Constr. Co. v. City Nat. Bank of Crete 86
3. In a contract calling for delivery of goods by a seller at a specified place, tender ordinarily requires physical delivery of the goods at the destination specified in the contract. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699

Time.

1. When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Knight v. Knight 63
2. An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Crane Co. v. Roberts Supply Co. 67
3. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. The exercise of the authority is a matter of legal discretion. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co. 158
4. A judgment or order is rendered by an inferior tribunal within the meaning of section 25-1931, R. R. S. 1943, when the decision is announced under the law and the facts. Marcotte v. City of Omaha 217
5. Section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of the judgment or the making of the final order complained of. Marcotte v. City of Omaha 217
6. To establish a road or highway by prescription, there must be use by the general public under a claim of right adverse to the owner of the land of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Smith v. Bixby 235

7. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Kibbon v. School Dist. of Omaha 293
8. A District Court may vacate or modify its own judgments after the term at which they were entered for, among other things, mistake, neglect, or omission of the clerk and a proceeding to vacate on this ground may be brought within 3 years. Pofahl v. Pofahl 347
9. After the term at which it is entered expires, a failure to move for the vacation of a judgment within the time required by statute ordinarily deprives the District Court of authority to reopen or vacate the judgment. Pofahl v. Pofahl 347
10. To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
11. The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust. The time when the statute of limitations commences to run must be determined upon the facts in each case. Jirka v. Prior 416
12. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Betts 572
State v. Applegarth 773
13. It is settled law in Nebraska that a motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Betts .. 572
14. Ordinarily, time for performance is not an essential term of the contract, but it must be included in the memorandum to be enforceable. If omitted from the memorandum, the time for performance is not enforceable but the legal efficacy of the memorandum is not destroyed. David v. Tucker 575
15. **The provisions of section 48-813, R. S. Supp., 1974, that** the Court of Industrial Relations should hear each case within 60 days from the date of filing the petition and enter an order thereon within 30 days after the hearing is directory and not mandatory. Local Union No. 647 v. City of Grand Island 693

Torts.

1. Under the doctrine of strict liability, an unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. McDaniel v. McNeil Laboratories, Inc. 190
2. A drug, properly tested, labeled with appropriate directions and warnings, approved by the United States Food and Drug Administration, and marketed properly under federal regulation, is presumptively a reasonably safe product, in the absence of clear and convincing evidence to the contrary. McDaniel v. McNeil Laboratories, Inc. 190
3. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared and distributed, and accompanied by appropriate directions and warnings, is not defective nor unreasonably dangerous, as a matter of law, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions or extensions thereof. McDaniel v. McNeil Laboratories, Inc. 190
4. Where there are appropriate directions and warnings, a manufacturer of a properly prepared drug may not be held liable either on a breach of warranty theory or a strict liability in tort theory. McDaniels v. McNeil Laboratories, Inc. 190
5. The standard of reasonable care never varies but the degree of care required varies with the danger involved in the act and is proportionate to it. McDaniel v. McNeil Laboratories, Inc. 190
6. If an act involves a risk of death or serious bodily harm and is capable of causing such results to a number of persons, the highest attention and caution are required, even if the act has a very considerable utility. McDaniel v. McNeil Laboratories, Inc. 190
7. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Jelinek v. Nebraska Nat. Gas Co. 488

Trespass.

1. It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser. Davis v. Cunningham 8
2. A property owner is not an insurer of the safety of persons who may come upon his land as invitees, licensees,

or trespassers, nor is he under a duty to make his land child-proof. Davis v. Cunningham 8
3. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Davis v. Cunningham 8
4. An action for trespass must be brought within 4 years. Cape Co. v. Wiebe 204

Trial.

1. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. Oberhelman v. Blount 42
2. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Oberhelman v. Blount 42
3. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. Oberhelman v. Blount 42
4. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings but which have not been supported by any evidence. Oberhelman v. Blount 42
5. Life expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other activities. Oberhelman v. Blount 42
6. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co. 67
7. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Abbott v. Abbott 97
8. Even when a case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight. Klecan v. Schmal 100

9. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Valentine Production Credit Assn. v. Spencer Foods, Inc. 119
10. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Valentine Production Credit Assn. v. Spencer Foods, Inc. 119
11. Under section 25-852, R. R. S. 1943, a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. Stungis v. Union Packing Co. of Omaha, Inc. 126
12. Where a trial judge, in the exercise of equity jurisdiction, may submit questions of fact to a jury, its finding is purely advisory and not binding on the trial court. Farmers Coop. Assn. v. Klein 180
13. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory, and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. Farmers Coop. Assn. v. Klein 180
14. It is not error to refuse a requested instruction if the legal principles announced therein are either incorrectly stated or inapplicable to the issues involved. McDaniel v. McNeil Laboratories, Inc. 190
15. Where in an equity case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Cape Co. v. Wiebe 204
16. Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate have the burden of showing that the use was permissive. Smith v. Bixby 235
17. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of

each case, taking into consideration the crime charged, the possible defenses, the public significance of the informer's testimony, and other relevant factors. State v. Wenzel 255

18. Ordinarily, the informer's identity is either known by the defendant or else disclosed through the testimony of other witnesses, no prejudice results from nondisclosure. State v. Wenzel 255

19. This State is committed to the dogma that in balancing the interests of the State against that of the accused, the burden of proof is on the defendant to show need for the disclosure. State v. Wenzel 255

20. Disclosure of the identity of an informer is a matter of judicial discretion. State v. Wenzel 255

21. In an action in equity, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. Marco v. Marco 313

22. In an action in equity, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Marco v. Marco 313

23. Where it appears that a dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. Marco v. Marco 313

24. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Foster 332

25. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Foster 332

26. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. State v. Foster 332

27. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. State v. Jefferson 340

28. Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements. State v. Lee 344
29. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated. State v. Lee 344
30. The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict. State v. Lee 344
31. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Palmer v. Dorn 360
32. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Palmer v. Dorn 360
33. The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive. Corcoran v. Boone County Board of Equalization 363
34. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. State v. Lynch 372
35. The trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Lynch 372
36. When the general charge fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining. State v. Lynch 372
37. It is not error to refuse an instruction on an issue which is not supported by the evidence. State v. Wright 377
38. An identification based in part upon photographs of the defendant shown to the victim of the crime is not objectionable because the officer stated at the time the photographs included a photograph of a suspect. State v. Bolden 388

39. The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Bolden 388
40. Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action has the burden of both pleading and establishing the mitigation. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424
41. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Diamond Match Div. of Diamond International Corp. v. Bernstein 452
42. In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. Slocum v. Hevelone 482
43. Ordinarily, an account stated should be set aside if the case is to be tried on the original claims upon which it is based. B. C. Christopher & Co. v. Danker 518
44. In an accounting action between partners, the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Von Seggern v. Von Seggern 545
45. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with ordinary rules governing the burden of proof, and competency and materiality of the evidence. Von Seggern v. Von Seggern 545
46. Even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight. Von Seggern v. Von Seggern 545
47. Generally, parol evidence is admissible not to vary, contradict, or control the written contract of the parties, but to apply it to the subject matter and thereby render certain that which otherwise would be doubtful and indefinite. David v. Tucker 575
48. A party alleging undue influence has the burden to prove that the party influenced was a person who would be subject to undue influence, that there was an opportunity to exercise undue influence, that there was a dis-

position to exercise undue influence, and that the result was the effect of undue influence. David v. Tucker ... 575
49. A loss of past earnings is an item of special damage and must be specifically pleaded and proved. Washington v. American Community Stores Corp. 624
50. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Washington v. American Community Stores Corp. 624
51. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Washington v. American Community Stores Corp. 624
52. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Washington v. American Community Stores Corp. 624
53. It is within the province of the jury to weigh all the elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings. Washington v. American Community Stores Corp. 624
54. A party who objects to the evidence and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded. Washington v. American Community Stores Corp. 624
55. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Schrader 632
56. **An order or judgment of a court is not final if an issue of law or fact essential to the disposition of the action is** reserved for judicial determination. Hull v. Bahensky 648
57. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Hull v. Bahensky 648
58. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Hull v. Bahensky 648
59. Whether certain acts constitute unprofessional conduct may be established by the testimony of qualified experts. Scott v. State ex rel. Board of Nursing 681

60. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Farmer's Union Co-op Co. of Mead v. Flamme Brothers 699
61. Even though the evidence established without doubt that the defendant was intoxicated, it is for the jury to determine whether the defendant was capable of deliberation or of forming the intent to commit the crime charged. State v. Coleman 721
62. On an appeal to this court in a criminal prosecution it is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. State v. Leonard 731
63. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. State v. Leonard 731
64. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. State v. Rotella 741
65. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Brandt v. Mayer 751
66. Circumstantial evidence which is substantial is sufficient to support a finding of guilty. State v. Von Suggs 757
67. In a prosecution for rape, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Parker 762
68. An essential element of a crime may be proved solely by circumstantial evidence. State v. Addison 768
69. An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. State v. Applegarth 773
70. It is a general rule that special findings of a jury take precedence over a general verdict, and a general verdict cannot rectify improper or erroneous special findings. Anderson v. Claussen 787
71. Due process requires that the accused receive a trial by an impartial jury free from outside influences.

State v. Ell 800
72. The issue of whether or not a jury should be sequestered during a criminal trial is left to the discretion of the trial court, and unless the defendant makes a showing of prejudice or the record discloses an abuse of discretion, denial of sequestration is not error. State v. Ell 800
73. A party ordinarily has no right to examine a prospective juror out of the presence of all other prospective jurors. State v. Ell 800
74. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. State v. Ell 800
75. Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession. State v. Howell 832
76. Statements constituting alleged misconduct of counsel in argument to the jury should be taken by the court reporter at the trial together with the objections made and the ruling of the trial court. State v. Howell 832

Trusts.

1. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. If one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title and so obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. Marco v. Marco 313
2. The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust. The time when the statute of limitations commences to run must be determined upon the facts in each case. Jirka v. Prior 416
3. A resulting trust does not end with the death of the trustee and heirs of the trustee take the property sub-

ject to the trust. Jirka v. Prior 416
4. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made although the payment is not made in money. Jirka v. Prior 416
5. A resulting trust is raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance. Jirka v. Prior 416
6. Although the term "resulting trust" has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Kollbaum v. K & K Chevrolet, Inc. 555
7. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another. Kollbaum v. K & K Chevrolet, Inc. 555

Undue Influence.

1. The undue influence which will void a deed (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. Kolc v. Krystyniak 16
2. A party alleging undue influence has the burden to prove that the party influenced was a person who would be subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence, and that the result was the effect of undue influence. David v. Tucker ... 575
3. Special findings by a jury that a testatrix was incompetent to make a will and also that the will was procured by undue influence are not conflicting, and do not invalidate a general verdict denying the validity of the

will. Anderson v. Claussen 787

Uniform Commercial Code.

1. Section 2-204(1), U. C. C., provides that a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. Crane Co. v. Roberts Supply Co. 67
2. "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in the Uniform Commercial Code. Crane Co. v. Roberts Supply Co. 67
3. An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Crane Co. v. Roberts Supply Co. 67
4. "Delivery" is the voluntary transfer of possession. Goosic Constr. Co. v. City Nat. Bank of Crete 86
5. "Tender of delivery" occurs whenever a seller does everything necessary to put conforming goods completely and unconditionally at buyer's disposal. Goosic Constr. Co. v. City Nat. Bank of Crete 86
6. For a delivery, or tender of delivery, to be effective, a buyer or his agent must be able to take possession of conforming goods in a peaceful manner, without interference from third parties. Goosic Constr. Co. v. City Nat. Bank of Crete 86
7. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
8. An oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
9. The requirement of a written notice eliminates all possibility of dispute as to whether notice was actually given and establishes what notice was given. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
10. To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests. DeLay First Nat. Bank & Trust Co.

v. Jacobson Appliance Co. 398
11. A creditor who uses a private sale form for public sales violates section 9-504(3), U. C. C. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
12. Under the Uniform Commercial Code the adequacy or insufficiency of the price for which collateral is sold at private sale after default and repossession is one of the "terms" of the sale, and is relevant, along with other issues, in determining whether the sale was commercially reasonable. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
13. Where a creditor disposes of collateral in several transactions, if he wishes a deficiency judgment he must comply with the law in each transaction. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
14. Section 9-502(2), U. C. C., requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co. 398
15. Under section 2-715, U. C. C., consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements or needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424
16. Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action has the burden of both pleading and establishing the mitigation. National Farmers Organization, Inc. v. McCook Feed & Supply Co. 424

United States.

A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. Slocum v. Hevelone 482

Vendor and Purchaser.

1. Representations of fair market value of farm land made to a buyer who is himself a farmer and who has examined the land in the absence of the seller have been held not to constitute actionable fraud. Lee v. Brodbeck 393
2. A representation must concern a known, existing fact

and cannot be a mere promise to be performed in the future. Lee v. Brodbeck 393

Venue.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Ell 800

Verdicts.

1. In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Foster 332
2. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is substantial evidence to support it. State v. Coleman 721
3. It is a general rule that special findings of a jury take precedence over a general verdict, and a general verdict cannot rectify improper or erroneous special findings. Anderson v. Claussen 787
4. Special findings by a jury that a testatrix was incompetent to make a will and also that the will was procured by undue influence are not conflicting, and do not invalidate a general verdict denying the validity of the will. Anderson v. Claussen 787

Waiver.

1. While the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation thereof, such right is not lost if the violations acquiesced in are trivial and do not materially affect those acquiescing. The right to enforce such covenants remains where the violation is in close proximity to the land of those seeking enforcement thereof and is especially and directly injurious to them. Pool v. Denbeck 27
2. A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional. State v. Feagin 261
3. Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing. Farmland Service Coop, Inc. v. Klein 538
4. Promissory estoppel applies only in cases where there is a promise or representation as to an intended

abandonment by the promisor of a legal right which he holds or will hold against the promisee. Farmland Service Coop, Inc. v. Klein 538

Waters.

1. Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream. Valder v. Wallis 222
2. Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States. Valder v. Wallis 222
3. Where a river changes its main channel, not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel. Valder v. Wallis 222
4. Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Valder v. Wallis 222
5. Where the accretion commences with the shore of an island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact. Valder v. Wallis 222
6. Under Nebraska law, titles to riparian lands run to the thread of the contiguous stream. Valder v. Wallis 222

Weapons and Firearms.

Pointing an unloaded weapon at another person is an assault if the person aimed at does not know, or has no

reason to believe, that it is not loaded. State v. Machmuller 734

Wills.

1. In construing a will, the cardinal rule is that the court should give effect to the intent of the testator as that intent may be properly shown. That principal may confine, as well as direct, the court. Rules of construction in will cases are devices adopted to serve that cardinal principle. Roberts v. Snow Redfern Memorial Foundation 139
2. Rules applicable to wills drawn with the assistance of counsel may not be applicable to wills not drawn with such assistance. Roberts v. Snow Redfern Memorial Foundation 139
3. Generally, in the construction of wills, courts ought to be reluctant to add to, or enlarge upon, the language used. Roberts v. Snow Redfern Memorial Foundation 139
4. A testamentary direction to an executor to sell farmland and pay the proceeds, after payment of debts and administrative expenses, over to named beneficiaries in shares, does not constitute a disposition of landlord's share of crops growing thereon, absent any indication of such a testamentary intent. Roberts v. Snow Redfern Memorial Foundation 139
5. A special bequest of property may operate to take that property out of a more general testamentary direction to sell and distribute proceeds of the sale. Roberts v. Snow Redfern Memorial Foundation 139
6. The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. The intention is to be determined from the language of all the pertinent provisions of the will, and where applicable, the circumstances under which the will was made. Slocum v. Hevelone 482
7. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Slocum v. Hevelone 482
8. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the

words used. Slocum v. Hevelone 482
9. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator. Slocum v. Hevelone 482
10. Special findings by a jury that a testatrix was incompetent to make a will and also that the will was procured by undue influence are not conflicting, and do not invalidate a general verdict denying the validity of the will. Anderson v. Claussen 787

Witnesses.
1. Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements. State v. Lee 344
2. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated. State v. Lee 344
3. In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. Slocum v. Hevelone 482
4. When credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Von Seggern v. Von Seggern 545
5. Whether certain acts constitute unprofessional conduct may be established by the testimony of qualified experts. Scott v. State ex rel. Board of Nursing 681
6. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. State v. Rotella 741

Words and Phrases.
1. "Agreement" means the bargain of the parties in fact as found in their language or by implication from

other circumstances including course of dealing or usage of trade or course of performance as provided in the Uniform Commercial Code. Crane Co. v. Roberts Supply Co. 67
2. "Delivery" is the voluntary transfer of possession. Goosic Constr. Co. v. City Nat. Bank of Crete 86
3. "Tender of delivery" occurs whenever a seller does everything necessary to put conforming goods completely and unconditionally at buyer's disposal. Goosic Constr. Co. v. City Nat. Bank of Crete 86
4. Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream. Valder v. Wallis 222
5. An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due. The acceptance by the claimant of the substituted performance in full satisfaction of the claim discharges the indebtedness. Farmland Service Coop., Inc. v. Jack 263
6. An executed compromise settlement of a good faith controversy is an accord and satisfaction. Farmland Service Coop., Inc. v. Jack 263
7. By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. State v. American Theatre Corp. 461, 467
8. The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590. State v. American Theatre Corp. 461, 467
9. The word deliver is not ordinarily a dispositive term. Its ordinary meaning is simply to yield possession of or to hand over and does not necessarily refer to a transfer of ownership. Slocum v. Hevelone 482
10. Although the term "resulting trust" has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Kollbaum v. K & K Chevrolet, Inc. 555
11. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection

with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another. Kollbaum v. K & K Chevrolet, Inc. 555

12. A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. Taylor v. Karrer 581
13. A fidelity bond is an indemnity insurance contract whereby insurer agrees to indemnify the insured against loss arising from want of integrity, fidelity, or honesty of employees or other persons holding positions of trust. Foxley Cattle Co. v. Bank of Mead 587
14. "Unprofessional conduct" is conduct which violates those standards of professional behavior which through professional experience have become established, by the concensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest and includes acts of a nature likely to jeopardize the interests of the public. Scott v. State ex rel. Board of Nursing 681
15. A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Bernth 813
16. Unlawful delivery of a controlled substance includes both actual and constructive delivery. It is not necessary for the State to show actual physical transfer of the controlled substance from the defendant. State v. Howell 832

Workmen's Compensation.

1. In workmen's compensation cases, where the new review procedures of section 48-185, R. S. Supp., 1975, are not applicable, the judgment, order, or award will not be modified on appeal for insufficiency of evidence, if there is reasonable competent evidence to support findings of fact in the trial court. Voycheske v. Osborn ... 510
2. There is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case. Voycheske v. Osborn 510
3. Under the Workmen's Compensation Act, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents

and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee. United Materials, Inc. v. Landreth 525

4. The Workmen's Compensation Act does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action. United Materials, Inc. v. Landreth 525

Wrongful Death.

1. An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate. United Materials, Inc. v. Landreth 525
2. The Workmen's Compensation Act does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action. United Materials, Inc. v. Landreth 525
3. A wrongful death action cannot be maintained under the provisions of sections 30-809 and 30-810, R. R. S. 1943, unless commenced within 2 years of the death. United Materials, Inc. v. Landreth 525

Zoning.

1. The propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. Zoning permitting a contemplated use is not a condition precedent to a taking. Seward County Board of Commissioners v. City of Seward 266
2. Section 18-1716, R. R. S. 1943, was designed to eliminate overlapping in municipal extraterritorial zoning. Seward County Board of Commissioners v. City of Seward 266
3. The power of eminent domain is inherently superior to the exercise of the zoning power, and the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulation. Seward County Board of Commissioners v. City of Seward 266
4. Although the governmental proprietary distinction may be a useful device for limiting governmental tort immunity, it is not appropriate for the resolution of zoning

conflicts. Seward County Board of Commissioners v. City of Seward 266