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STATE OF NEBRASKA, APPELLEE, V. RICHARD D. HOLTAN, APPELLANT.

250 N. W. 2d 876

Filed February 2, 1977. No. 40638.

1. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts.
2. **Criminal Law: Homicide: Aggravating and Mitigating Circumstances: Words and Phrases.** When the act of killing is totally and senselessly bereft of any regard for human life, it is wanton, deliberate, cruel, and inexcusable.
3. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts.
4. ———: ———: ———: ———: ———. Extreme mental or emotional disturbance means such a disturbance in very great, intense, or severe degree.
5. ———: ———: ———: ———: ———. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history.
6. ———: ———: ———: ———: ———. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions.
7. **Criminal Law: Statutes: Aggravating and Mitigating Circumstances: Legislature.** Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature.
8. **Criminal Law: Statutes: Courts.** Although a penal statute is required to be strictly construed, it should be given a sensible construction, and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence.

Appeal from the District Court for Douglas County:

SAMUEL P. CANIGLIA, HERBERT A. RONIN, and ROBERT L. FLORY, Judges. Affirmed.

Frank B. Morrison, Stanley A. Krieger, David E. Kendall, Peggy C. Davis, and Anthony G. Amsterdam, 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.

NEWTON, J.

The defendant was charged with first-degree-murder in the perpetration of a robbery and with shooting with intent to kill, wound, or maim. He entered a plea of nolo contendere to both counts, was sentenced to death on the first count, and to serve 15 to 45 years on the second count. On appeal the defendant challenges the constitutionality of Nebraska laws pertaining to the death penalty, asserts the statutes were erroneously applied, and claims the death sentence is excessive. We affirm the judgment of the District Court.

The defendant entered the Dugout Bar in Omaha, Nebraska. In the bar were Larry Loder, the bartender, his friend Linda Ulshafer, and Pete Christensen, a patron. The defendant produced a gun, robbed the cash register of a considerable sum of money, herded the three people present into a restroom, ordered Loder to tie the other two, shot and killed Loder, who was struck twice, wounded Linda Ulshafer, and apparently missed Christensen. Four shots were fired.

In general, the questions regarding constitutionality presented have been dealt with in State v. Rust, *ante* p. 528, 250 N. W. 2d 867. They will not again be considered here except in regard to sections 29-2522 and 29-2523, R. R. S. 1943, dealing with aggravating and mitigating circumstances to be considered. Defendant asserts that these sections are vague, indefinite, and

subject to discriminatory application. It is true that section 29-2522, R. R. S. 1943, contemplates the weighing of the aggravating and mitigating factors and a decision on the death penalty according to which type carries the most weight. This is unavoidably a matter of judgment to be determined by the District Court subject to review. Absolute certainty in such matters is unattainable but the provision in Nebraska law for mandatory review in capital cases is a positive safeguard and insures against error.

The defendant was found to fall within the purview of several of the aggravating circumstances set out in section 29-2523 (1), R. R. S. 1943. The first is subsection (a): "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." The defendant had been previously convicted for armed robbery, first-degree assault, and three times for bank robbery. All these incidents necessarily involved a threat of violence to the person. He asserts that the terms "serious assaultive or terrorizing criminal activity" are vague and indefinite. We cannot agree. The words "serious," "assaultive," and "terrorizing" are words in common usage with meanings well-fixed and generally clearly understood. The term "substantial history" is likewise reasonably clear. "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial," as here used, refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

The court found the existence of aggravating circumstances under subsection (b) in that the murder was committed by the defendant in an apparent effort to conceal his identity as the perpetrator. Obviously no other reason for the wanton killing was present.

The crime does not qualify as an aggravating circumstance under subsection (c). It occurred during the commission of a robbery but the primary motivation for the killing was not one for pecuniary gain.

The court found that subsection (d) was also applicable in that the crime was especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. Although torture was not involved, it is clear that this element was applicable. The defendant killed, and attempted to kill, unresisting victims of the robbery. The act was totally and senselessly bereft of any regard for human life.

It was wanton, deliberate, cruel, and inexcusable.

Subsection (f) was properly found applicable. The defendant created a great risk of death to several persons. He fired upon the three victims from close range, actually killing one and wounding another. These facts were all established beyond a reasonable doubt.

In regard to mitigating circumstances enumerated in section 29-2523 (2), R. R. S. 1943, the court found that only subsection (g) existed to a small degree. As to the other parts of (2): (a) Defendant did have a significant history of prior criminal activity. (b) Refers to acts under unusual pressures or influences or under the domination of another person. The provision contemplates only outside pressures, not those created by the defendant's own acts. The only pressure present was that resulting from the willful robbery. (d) The defendant's age was not a consideration. He was not a youth or extremely aged. (e) He was not an accomplice but was the principal and sole participant. (f) The victim did not participate in or consent to his own death. (c) and (g) These factors are referable to the defendant's mental condition. There is no evidence that the robbery, assault, and murder were committed under the influence of extreme mental or emotional disturbance. They were deliberate and wanton acts. The defendant's capacity to appreciate the wrongful-

ness of his acts and to conform to legal requirements was not seriously impaired by mental illness or defect, or intoxication. Psychiatric examinations demonstrated that the defendant had an unstable, sociopathic personality but was not psychotic. He acted on impulse but was aware of the difference between right and wrong.

Defendant asserts that mitigating factors (2) (a), (c), and (d), are void as being vague and indefinite. In regard to (2)(c), he maintains that what constitutes "extreme mental or emotional disturbance" is insufficiently defined. The term "mental or emotional disturbance" is one commonly used and understood. Presumably defendant refers to the degree of such disturbance as indicated by the word "extreme." The meaning of the word as commonly used and as defined in Webster's Third New International Dictionary (Unabr.), p. 807, is existing in the highest or the greatest possible degree, very great, intense, or most severe. (2)(a) is challenged on the ground that the words "significant history" are ambiguous. The term does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history. (2)(d) is criticized because it does not fix the age to be considered or the relative importance of various ages. Again a hard and fast rule would tend to defeat the ends of justice. Youth or extreme age are suggested for consideration but the term is necessarily relative as it must be considered in the light of varying conditions. See State v. Stewart, *ante*, p. 497, 250 N. W. 2d 849. Two young persons of the same age may vary greatly in mental and physical development, experience, and criminal tendencies.

In regard to the constitutional challenges advanced there are several pertinent rules to be considered.

"Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court

should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature." State v. Reich, 186 Neb. 289, 183 N. W. 2d 223.

"Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence." State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569.

A careful review of this record reveals that the three-judge sentencing panel gave careful consideration to all aggravating and mitigating factors pertaining to this offense and correctly concluded that the aggravating factors considerably outweighed the mitigating factors. The sentence imposed cannot be held to be improper or excessive under the law.

We find that the several provisions of the challenged statutes are clear and unequivocal, not vague and indefinite. Nevertheless, in order to pin the various terms down beyond any chance for misconception, we have further clarified each of the terms criticized by the defendant. In the light of the statutes themselves and the rules above mentioned dealing with constitutionality, we find the statutes to be constitutional and valid.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLANT.
250 N. W. 2d 881

Filed February 2, 1977. No. 40642.

1. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty.** In each case in which the sen-

tencing court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

2. **Criminal Law: Jury: Sentences.** Jury sentencing in a capital case is not constitutionally required.
3. **Criminal Law: Constitutional Law: Homicide: Statutes: Death Penalty.** The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution.
4. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Proof.** The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt.
5. **Criminal Law: Homicide: Statutes: Death Penalty.** The rule enunciated in Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), on the applicability of the doctrine of reasonable doubt is not applicable to our present death penalty law.
6. **Criminal Law: Homicide: Death Penalty: Automatic Review in Supreme Court.** The Supreme Court in every case under the new death penalty statute will perform its functions of death sentence review with a maximum of rationality and consistency.
7. ———: ———: ———: ———. The Supreme Court will compare each case under review with those previous cases in which the death penalty has or has not been imposed under the new death penalty statute.
8. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty: Automatic Review in Supreme Court.** Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction.
9. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
10. ———: ———: ———: ———: ———. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.
11. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Automatic Review in Supreme Court: Words and**

Phrases. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations.

12. ———: ———: ———: ———: ———: ———. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of advanced years where senility may be a factor.

13. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty.** In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances.

14. ———: ———: ———: ———: ———. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances.

15. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.

16. **Criminal Law: Homicide: Mental Illness.** The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility.

17. **Trial: Witnesses: Evidence.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the individual has personal knowledge of that matter.

18. **Criminal Law: Constitutional Law: Homicide: Statutes: Death Penalty.** We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Beatty, Morgan & Vyhnalek and Keith N. Bystrom, 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.

SPENCER, J.

This case is before us for review of a death penalty imposed after a jury conviction on six counts of murder in the first degree.

Defendant essentially alleges four assignments of error: (1) The statute under which the sentence was imposed is unconstitutional; (2) the evidence is insufficient to support the findings of the jury; (3) the court erred in excluding the testimony of defendant's ex-wife; and (4) the sentence imposed is excessive and contrary to law. We affirm.

During the course of the afternoon of October 18, 1975, defendant drank at one of the local bars in Sutherland, Nebraska, with members of his family and friends. At approximately 8 o'clock p.m., defendant asked his sister, Mrs. Boggs, to take him to her residence where he was residing. The residence was located next to the residence of Henry Kellie. After returning defendant to her home, his sister returned to the bar. Defendant visited with his 13-year-old nephew, then went to his brother-in-law's bedroom for a .22-caliber rifle. He obtained some shells and loaded it. He then told the nephew to keep the kids in the house, and left the sister's residence.

Some 45 minutes later defendant returned to the sister's home, unloaded the rifle, put it back in place, and wrote a note at the kitchen table, as follows: "I am sorry to all — it is the best way out — do not crie (sic)." Defendant then told the nephew he had just killed the Kellies, and named them to him. He then

had his nephew call his mother, who resided in Sutherland, and defendant told her about the killings. He then went to the home of his parents and told them he had just killed the Kellies. His father went to the Kellie home, came back to his own home, told his wife what he had found, and she called the authorities.

Defendant left his parents' home, went to two downtown bars, drank some beer at each, and returned to a field at the rear of the Boggs' residence. He remained there until approximately 8 a.m. the morning of October 19, 1975. At that time he tried to get in his sister's house and was refused admission. His sister called the authorities to whom he gave a statement.

For the purposes of this appeal it is sufficient to say that defendant attempted to have sexual relations with Florance Marie Kellie, a 10-year-old girl. During the process he shot her in the forehead with a .22-caliber rifle, which caused her death. He then heard the girl's grandfather, James Henry Kellie, approaching. He went to the bedroom doorway and shot him as he approached. He then dragged the body into the bedroom. Shortly thereafter, Audrey Marie Kellie, the child's grandmother, entered the house. Defendant killed her with a shot in the forehead, and the evidence would indicate some sexual molestation. Shortly thereafter, the Kellie's son, David Leroy Kellie, and his two children came to the house. Defendant then killed David and his two children; Daniel Leroy, who was approximately 5 years of age; and Deanna, who was 7 years of age. The evidence would indicate some sexual molestation of Deanna. All deaths were caused by the gunshot wounds.

We initially consider defendant's contention that sections 29-2519 et seq., R. R. S. 1943, outlining the capital punishment procedures, are in violation of the Eighth and Fourteenth Amendments to the United States Constitution and sections 3 and 9 of the Bill of Rights of the Constitution of the State of Nebraska. Suffice it

to say that since Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), from which defendant quotes substantially, the United States Supreme Court on July 2, 1976, decided the cases of Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); and Jurek v. Texas, 428 U. S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). These cases answered some of the questions raised by Furman and now urged by defendant.

In Gregg, the Supreme Court noted capital punishment was accepted by the framers of the Constitution, and that for nearly 2 centuries the Court has recognized its use for the crime of murder is not invalid per se. The Court also noted legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency. It answered the argument that the Eighth Amendment, forbidding cruel and unusual punishment, should be construed as prohibiting the death penalty by pointing to the fact that in the 4 years since Furman was decided, Congress and at least 35 states have enacted new statutes providing for the death penalty. The Court further noted that retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a Legislature to weigh in determining whether the death penalty should be imposed. Importantly herein, it observed that capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime.

Of particular moment in answering some of the arguments of the defendant is the observation that the concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously, can be met by carefully drafted statutes. These statutes should insure the sentencing authority is given adequate information and guidance. It noted these concerns are best

met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relative to the imposition of sentence and provided with standards to guide its use in that information.

Because Gregg v. Georgia, *supra,* adequately answers the questions raised by the defendant as to the applicability of the death penalty in this case, we concern ourselves with an analysis of the Nebraska statute in the light of that case.

The Nebraska statute, as amended after the United States Supreme Court's decision in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), retains the death penalty for any person deemed guilty of first-degree murder as defined in section 28-401, R. R. S. 1943. The defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury. Whenever the trial is by jury, the jury has nothing whatsoever to do with the sentencing determination. If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any credible evidence presented. The sentencing procedures are essentially the same in both bench and jury trials and are in large part patterned after the Model Penal Code.

Whenever any person is found guilty of first-degree murder, the District Court fixes a date for a hearing on determination of the sentence to be imposed. The sentence determination shall be made by either the judge who presided at the trial or who accepted the guilty plea, or a panel of three judges, including the judge who presided or accepted the plea, or in case of his disqualification for any reason, by a panel of three District Judges named by the Chief Justice of the Supreme Court.

In the proceeding to determine the sentence, evidence may be presented as to any matter that the court deems relevant to the sentence, and shall include matters re-

lating to any of the aggravating or mitigating circumstances. These are set forth in section 29-2523, R. R. S. 1943, and are as follows:

"(1) Aggravating Circumstances:

"(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

"(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

"(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

"(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

"(e) At the time the murder was committed, the offender also committed another murder;

"(f) The offender knowingly created a great risk of death to at least several persons;

"(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

"(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

"(2) Mitigating Circumstances:

"(a) The offender has no significant history of prior criminal activity;

"(b) The offender acted under unusual pressures or influences or under the domination of another person;

"(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

"(d) The age of the defendant at the time of the crime;

"(e) The offender was an accomplice in the crime

committed by another person and his participation was relatively minor;

"(f) The victim was a participant in the defendant's conduct or consented to the act; or

"(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

Additionally, the court may receive any evidence of mitigating factors which it deems to have probative value.

Section 29-2261, R. R. S. 1943, requires the court to order a presentence investigation before a defendant is sentenced. The defendant, his counsel and counsel for the State are permitted to present oral arguments for or against the sentence of death. It should here be noted that the court is required to set forth a general order of procedure at the outset of the sentencing procedure. This was done herein.

Section 29-2522, R. R. S. 1943, requires that the judge or judges presiding at the sentencing procedure shall fix the sentence at either death or life imprisonment but such determination shall be based upon the following considerations:

"(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

"(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination."

Sections 29-2524 through 29-2528, R. R. S. 1943, pro-

vide for an automatic review of all capital punishment cases. The review eliminates the need for a petition of error where the punishment is capital. The clerk of the District Court is required to automatically notify the court reporter to prepare a bill of exceptions and provides that the cost of printing briefs shall be borne by the county. The execution of the sentence is suspended pending the automatic review of the case by the Supreme Court of Nebraska.

Before we consider the procedures further, we turn to defendant's contention that the lack of jury involvement in the sentencing procedure is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution as well as Article I, section 3, of the Bill of Rights, of the Constitution of the State of Nebraska. The United States Supreme Court, in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), has held that jury sentencing in a capital case is not constitutionally required. In that case the Court stated in upholding the Florida procedure: "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This (the United States Supreme) Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U. S. 510, 519 n. 15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Inferentially, Nebraska has met this contention in the application of its habitual criminal law. We have repeatedly sustained the constitutionality of that law. In

Nebraska the increased punishment for a subsequent felony is a court determination and not one for a jury. See State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406 (1969).

As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either the Nebraska or the federal Constitution.

Defendant argues that the Nebraska death penalty procedures are constitutionally invalid because they are silent as to what burden must be met before an aggravating circumstance is proven to exist by the sentencing authority. He argues that aggravating circumstances must be proved to exist beyond a reasonable doubt. That question is not involved in this case because the aggravating circumstances found to exist here were clearly found to exist beyond a reasonable doubt.

In Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), this court said: " 'The doctrine of reasonable doubt has no application to the jury's determination as to the penalty to be imposed.' " That case was decided at a time when the jury determined whether the sentence should be death or life imprisonment in capital cases. The present statute has changed that rule. It may be forcibly argued that there is no reason or logic why a similar rule should not apply to judicial sentencing. However, the law has been substantially changed and the question should be reconsidered in regard to the imposition of the death penalty.

Section 29-2522, R. R. S. 1943, now requires a determination after hearing that sufficient aggravating cir-

cumstances exist to justify the imposition of a death penalty. As the United States Supreme Court noted in Woodson v. North Carolina, 428 U. S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976): "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

We believe the obvious intent of the statute is that the enumerated aggravating circumstances should require strong proof. Aggravating circumstances are now a mandatory element to be considered in capital cases. The sentence depends upon the proof of some aggravating circumstance. We believe it is the intent of the act to require the facts upon which the aggravating circumstances referred to in section 29-2523, R. R. S. 1943, are based be proved beyond a reasonable doubt, and so construe it. We hold that the rule enunciated in Grandsinger v. State, *supra*, is not applicable to our present law.

Defendant maintains the Nebraska capital punishment statute does not remove the substantial risk that the death penalty will be inflicted in an arbitrary or capricious manner. It is pointed out that at various stages in the proceedings discretion may be exercised by the prosecutor, the jury, the sentencing judge, the Nebraska Supreme Court, and the Board of Pardons. Thus, the defendant argues the prosecutor is not required to charge a capital offense in all cases where the facts might support such a charge. He is further empowered to enter into plea bargaining with the defendant. The jury, although not involved in sentencing in Nebraska, may still affect the outcome by convicting the defendant of a lesser included offense not punishable by death. And even after the defendant has been

sentenced to death, his sentence may be commuted at the discretion of the Board of Pardons.

These objections were raised in Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and found to be without merit: "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Language contained in a footnote to the paragraph just quoted suggests a system without such discretion would be unconstitutional: "The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have

to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

"Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in Woodson v. North Carolina, post, p. 280, and Roberts v. Louisiana, post, p. 325. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment."

The argument that the sentencing judge is given too much discretion under the Nebraska scheme has also been foreclosed by the United States Supreme Court decisions. As noted, the Florida statute is very similar to the Nebraska statute in that the sentencing authority is required to weigh statutory aggravating and mitigating circumstances. This system, requiring an examination of the circumstances of each case, was expressly approved in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), as the court stated: "On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course

of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, compare Gregg v. State, ante, p. 40, the sentencing judge must focus on the individual circumstances of each homicide and each defendant."

In Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), it was stated: "As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.' Coley v. State, 231 Ga. 829, 834, 204 S. E. 2d 612, 615." Whether the Nebraska statute provides clear standards will be considered later.

That the sentencing authority must exercise some degree of discretion can further be seen in the two cases which struck down statutory schemes providing for mandatory imposition of the death penalty in all cases of first-degree murder. Woodson v. North Carolina, 428 U. S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); Roberts v. Louisiana, 428 U. S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

The Supreme Court has indicated in its opinions that meaningful appellate review may be required to insure that the death penalty is not applied in an arbitrary or capricious manner. Defendant asserts that the Nebraska system is deficient in this regard because there are no statutory guidelines for the Nebraska Supreme Court such as are provided in Georgia. We answer that this court, in every case under the new statute, will perform its function of death sentence review with a maximum of rationality and consistency. While we do not have the Georgia provision for proportional review, every capital case where there can be the slightest question will be considered in comparison with other capital

cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty has or has not been imposed under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

Defendant urges that the language employed in the Nebraska statute describing aggravating and mitigating circumstances is so vague and overbroad that a substantial likelihood exists that the death penalty will be applied arbitrarily and capriciously. This same claim was urged in Gregg v. Georgia, *supra*, where it is stated: "While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."

The Supreme Court in Gregg determined that, as construed by the state court, the standards provided adequate guidance for sentencing. The trial court herein made written findings reviewing the aggravating and mitigating standards considered in the imposition of the death penalty. In doing so, it specifically reviewed each of the standards in light of the record before it. We now review the trial court's findings in light of our construction of those provisions.

Defendant herein was charged with six separate counts of murder, as follows: Count I, James Henry Kellie; count II, Audrey Marie Kellie; count III, David Leroy Kellie; count IV, Daniel Leroy Kellie; count V, Deanna Lynn Kellie; and count VI, Florance Marie Kellie.

The trial court discussed the standards as they pertained to the separate counts on which the defendant was convicted. We have heretofore set out the standards as they are defined in the statute. We will refer to them here by the letter which enumerates the standard in the statute.

We first refer to the aggravating circumstances. Subsection (a) covers previous murder convictions or crimes involving the use of threat of violence to the person. The last clause obviously describes persons with previous histories of serious assaultive or terrorizing criminal activity. These are words in common usage with meanings well fixed and clearly understandable. The trial court found that (a) was not present and did not apply, and we agree.

Subsection (b) is intended to cover those situations where a murder is committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of that crime. The court found this standard did not apply with regard to the murder of Florance Marie Kellie, or the sixth count. It found that murder was committed in an effort to perpetrate a first-degree sexual assault. The court found after Florance Marie Kellie was murdered the other murders were committed in an apparent attempt to conceal the commission of the crime or the identity of the perpetrator of it. With these findings, we agree.

The court found subsection (c) did not apply to any of the counts. With this we agree. We construe subsection (c) to include those situations where the murder was committed for hire, where the murder was itself committed for a pecuniary gain, or where the defendant hired another to commit a murder for him.

The court found that subsection (d) applied to three of the murders but not to the three others. With regard to the first murder, or count VI, the court found it was done in the perpetration of a first-degree sexual assault. The sexual assault caused pain, and when the

young girl cried out she was killed and there was a further sexual assault upon her after death. The court specifically found the standard applied to the murder of Audrey Marie Kellie, count II, considering the difference in the ages of the defendant and the victim, coupled with the attack on her body after her death. The court also specifically found that the murder perpetrated upon Deanna, the 7-year-old child, coupled with the bruises displayed on the inside of her thighs in the immediate vicinity of her pubic area, were sufficient to bring it within the ambit of the standard.

The court specifically found the murder of Daniel, the 5-year-old boy, might evidence some sign of depravity, but found subsection (d) did not apply. The court further found the section did not apply to the murders of David Leroy Kellie or James Henry Kellie.

In construing subsection (d) it might be argued that all killings are atrocious. Obviously, the Legislature intended something more than the fact that there had been a murder in the use of this phraseology. The Florida Supreme Court in State v. Dixon, 283 So. 2d 1 (1973), defines the terms "heinous, atrocious, or cruel" to be directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. We accept that construction, and to us it is obvious that it was followed by the trial court.

The Florida law does not include the following language found in the Nebraska standard: "* * * or manifested exceptional depravity by ordinary standards of morality and intelligence." In interpreting this portion of the statute, the key word is "exceptional." It might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. We find such depravity was present in the murder of the three females.

Subsection (e) is clear, easily understood, and no

clarification or construction is necessary. The court found that at the time each murder was committed, the offender committed five other murders, and therefore subsection (e) applied to each of the counts.

Subsection (f) refers to those situations where the act of the defendant also endangered the lives of others. The trial court found this standard did not apply in this case and we agree. We interpret it to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations.

Subsection (g) is clear, readily understandable, and needs no construction. The court found that (g) was not applicable herein.

Subsection (h) refers to those crimes intended to disrupt or hinder the lawful exercise of a governmental function or the enforcement of the laws. The trial court found that (h) had no application herein.

We are now concerned with the mitigating circumstances. Defendant had been convicted of contributing to the delinquency of a minor on February 26, 1967. On appeal to the District Court a demurrer was sustained to the charge. It was then appealed to the Supreme Court where the judgment of the District Court for Lincoln County was reversed. See State v. Simants, 182 Neb. 491, 155 N. W. 2d 788 (1968). On remand, the case was never prosecuted further in the District Court. Defendant had several misdemeanor convictions, including one conviction of intoxication and reckless driving. The presentence investigation indicated that defendant apparently had been guilty of statutory rape several years before but the matter was not called to the attention of the authorities and no prosecution resulted.

The trial court did find that the defendant had a significant history of prior criminal activity. While it is

immaterial on the present record, we would consider this to be a very borderline finding. It does, however, involve two instances involving girls under 15. The standard reads: "The offender has no significant history of prior criminal activity." We agree with the District Court. The statute reads "prior criminal activity" and not "prior criminal convictions." We note, however, that the statute says "significant history." We do not find this to be a significant history and give the defendant the benefit of any doubt. As we have previously held, criminal activity must be proved beyond a reasonable doubt. While we concede that criminal activity may be proved, obviously the burden of proof is greater in the absence of prior convictions.

The trial court found subsection (b), "The offender acted under unusual pressures or influences or under the domination of another person" was not applicable. We agree.

The court found the crime was not committed while the offender was under the influence of extreme mental or emotional disturbance, which is subsection (c). While defendant's defense was predicated upon insanity, we agree with the finding of the trial court.

Subsection (d) reads: "The age of the defendant at the time of the crime." At the time of the crime, the defendant was approximately 30 years of age. We agree with the finding of the trial court, the defendant was not of such tender age that this should in any way be considered as a mitigating circumstance. We interpret this language to refer to a child of tender age, a juvenile, or to a person of advanced years, where senility may be involved.

The trial court correctly found subsection (e) was not applicable. This standard refers to those situations where the offender may have been only an aider or an abettor and his role in the murder was negligible.

The trial court properly found that while the record does not reflect the exact course of conduct of any of

the victims, subsection (f) is not applicable herein. As the court noted, Florance Marie Kellie, the 10-year-old child, could not knowingly consent to an act of first degree sexual assault.

Subsection (g) provides as follows: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental illness, mental defect, or intoxication." The trial court found that as the result of the combination of the influence of intoxicating liquors, defendant's low intelligence level, together with any mental deficiency, this standard was a mitigating circumstance to be considered in each of the six counts on which he was convicted. We agree.

In the balancing of the aggravating and mitigating circumstances, we emphasize the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. The death penalty is not to be imposed if sufficient mitigating circumstances exist, which approach or outweigh the weight to be given the aggravating circumstances. In balancing the aggravating and the mitigating circumstances, we agree with the trial court. The presence of aggravating circumstances (b), (d), and (e) in some or all the murders far outweighs any consideration we give to mitigating circumstances (a) and (g). In our review of the record, the defendant at the time of the murders knew the nature and quality of his acts. He knew they were wrong and that he would be punished if caught. In our judgment, this motivated the murders. We determine the imposition of the death penalty was justified and is amply sustained by the record.

We now consider defendant's contention that the evidence is insufficient to support the findings of the jury.

He predicates this assignment on the jury's rejection of the defendant's insanity defense. In defendant's brief and argument, he seems to be arguing for the Durham rule, which has been rejected in Nebraska. In State v. Jacobs, 190 Neb. 4, 205 N. W. 2d 662 (1973), we said: "The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act."

In that same case, we said: "The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility."

A review of the record indicates there was substantial evidence supporting the jury's action in rejecting the defendant's claim of insanity. Defendant's own witness, Doctor Campanella, stated with regard to defendant's behavior on the night of October 18, 1975: "In my opinion he was aware of what he was doing." Another of the defense witnesses, Doctor Jack R. Anderson, admitted that other experts with education similar to his might come to an opposite conclusion than he did based upon the same tests that he used.

The State's medical witnesses testified the defendant knew what he was doing, could distinguish between right and wrong, and knew he deserved punishment at the time of the crime. Doctor Kenny, a physician and psychiatrist, found that defendant had a normal functioning I.Q., which is the measurement of how a man functions in daily life as opposed to how he functions on tests. He testified defendant knew the nature and quality of his acts; he knew they were wrong; he knew he would be punished; and he was able to distinguish at the time of those acts between right and wrong. On the record, the jury could find, as it did, that the defendant was responsible for his criminal activity.

Defendant's last assignment is directed to the exclusion of his former wife's opinion. Mrs. Olson, his ex-

wife, had no contact with him after 1967, or 8 years before the crimes charged. The defendant made an offer of proof to the effect his ex-wife would testify that in his right mind he could not have performed the acts charged. The State objected to the offer of proof for the reason that her opinion would relate to observations made prior to 1967.

The objection was properly sustained because the witness had no contact with the defendant after 1967. It is apparent her observations would be too remote to give an opinion as to his conduct on October 18, 1975. The foundation was insufficient to permit the witness to give her opinion as to the defendant's ability to commit the acts on October 18, 1975. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the individual has personal knowledge of that matter.

We have attempted to answer in detail each of the defendant's assignments, and some of the other questions they raise. A careful review of the record indicates to us that the sentencing judge gave careful consideration to each and every aggravating and mitigating factor pertaining to these offenses. As previously stated, we conclude that he correctly found the aggravating factors considerably outweigh the mitigating factors. We find from our review of the record that the sentence imposed is not improper or excessive under the law.

We further find that the Nebraska statute does not violate any of the provisions of the state or federal Constitutions. We determine that the several provisions of the challenged statutes are clear and unequivocal, and are not vague and indefinite as contended by the defendant. In order to further pin the provisions down beyond any chance for misconception, we incorporate herein the pertinent rules enunciated in State v. Holtan, *ante* p. 544, 250 N. W. 2d 876, State v. Rust, *ante* p. 528, 250 N. W. 2d 867, and State v. Stewart,

ante p. 497, 250 N. W. 2d 849. These four cases have been considered in comparison to each other, and we sustain the death penalty in three of them.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES LEDWITH, A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.
250 N. W. 2d 230

Filed February 9, 1977. No. 40183.

1. **Attorneys at Law: Disciplinary Proceedings: Canons.** An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal.
2. ———: ———: ———. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment.
3. ———: ———: ———. A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct.
4. ———: ———: ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.

Original action. Judgment of disbarment.

Paul L. Douglas, Attorney General, and John P. Regan, for relator.

Lloyd E. Atchley, for respondent.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEW-

TON, CLINTON, and BRODKEY, JJ., and FAHRNBRUCH, District Judge.

PER CURIAM.

This is a disciplinary proceeding brought against Charles Ledwith, a practicing member of the Nebraska State Bar Association. Ledwith acted as both executor and attorney for the estate of his father-in-law, Nels P. Nelson, who died testate December 24, 1971. Letters testamentary were issued January 20, 1972. Decedent's property, with the exception of household goods, jewelry, and tangible personalty, was by will bequeathed in equal shares to his six children or their heirs by right of representation. The inventory listed assets consisting of cash, bank and savings and loan deposits amounting to $23,244.57. Final decree was entered May 15, 1973, and found remaining assets consisted of an account amounting to $19,148.79 which were ordered distributed as follows: To Donald Martin Nelson, a son, Wayne Lawrence Nelson, a son, Bette Bonn Ledwith, a daughter, and Richard L. Nelson, only child of a deceased son, $3,191.46 each; to Sandra Bohlmeyer and John Armstrong, children of a deceased daughter, $1,595.73 each; to Angeline Anne Beck, Robert Eugene Nelson, Jr., Rene Rogers Nelson, Nanette Nelson, and Suzette Nelson, children of a deceased son, each $638.30. An attorney's fee in the sum of $1,100 was allowed and the executor's fee waived.

Both the final report and supplemental report of the executor were false in that a considerable part of the funds said to be on hand had been expended. Bank records show that respondent, as executor, had paid to Bette Bonn Ledwith, his wife, $13,900 and to himself, $1,990. Distribution was not made as directed in the decree of May 15, 1973, and on October 30, 1973, respondent was removed as executor. The order of removal was appealed and stalled for several months. It appears that respondent may have eventually paid all

the distributive shares except those of Rene Rogers Nelson, Nanette Nelson, and Suzette Nelson, who were minors for whom respondent was acting as custodian. No receipts or other evidence of payment of these items appear in the records. It is evident that, as executor, respondent converted a large portion of the estate to the use of his wife and himself. Some of the distributive shares paid were not paid until October 23, 1974, approximately 15 months after entry of the decree of distribution and 1 day before respondent was to appear before the local Committee on Inquiry.

It is evident that respondent has violated several of the canons and disciplinary rules of the Code of Professional Responsibility. He has failed to assist in maintaining the integrity and competence of the legal profession; he has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, conduct prejudicial to the administration of justice, and conduct adversely reflecting on his fitness to practice law. He has neglected legal matters entrusted to him; he has failed to keep separate and properly account for funds entrusted to him; he has failed to promptly pay over and deliver such funds and has converted them, at least in part, to his own uses.

"An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal." State ex rel. Nebraska State Bar Assn. v. Cook, 194 Neb. 364, 232 N. W. 2d 120.

"A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. * * *

"Violation of any of the ethical standards relating to

the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment." State ex rel. Nebraska State Bar Assn. v. Strom, 189 Neb. 146, 201 N. W. 2d 391.

"A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct." State ex rel. Nebraska State Bar Assn. v. Hungerford, 159 Neb. 468, 67 N. W. 2d 759. See, also, State ex rel. Nebraska State Bar Assn. v. Conover, 166 Neb. 132, 88 N. W. 2d 135.

"A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice." State ex rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 105 N. W. 2d 459.

We have consistently held that a conversion by a lawyer of trust funds in his possession requires his disbarment. It is therefore adjudged that respondent be disbarred.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA ET AL., APPELLEES AND CROSS APPELLANTS, V. CITY BETTERMENT CORPORATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE.
250 N. W. 2d 601

Filed February 9, 1977. No. 40619.

1. **Statutes.** A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served.
2. **Statutes: Municipal Corporations: Lotteries: Words and Phrases.** The term "primary activities" in section 28-964.03, R. R. S.

1943, means only activities conducted for charitable and community betterment purposes other than the organization and operation of a lottery.

3. **Statutes: Municipal Corporations: Lotteries.** An organization whose only activities have been the organization and operation of a lottery is not an organization whose primary activities are conducted for charitable or community betterment purposes within the meaning of section 28-964.03, R. R. S. 1943.

4. **Constitutional Law.** The words and terms of a constitutional provision are to be interpreted and understood in their most natural meaning.

5. **Constitutional Law: Statutes: Lotteries: Words and Phrases.** The word "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means net proceeds. Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds.

6. **Constitutional Law: Lotteries.** Under Article III, section 24, Constitution of Nebraska, the word "promoter" of a lottery means only the persons or organizations legally responsible for conducting the lottery.

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

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellant.

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

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

MCCOWN, J.

This is a declaratory judgment action brought by the State of Nebraska and the County of Douglas against City Betterment Corporation to declare a series of lotteries operated by the defendant corporation unlawful, and to permanently enjoin their operation. The District Court decree found the lotteries in violation of law and permanently enjoined the defendant, City Betterment Corporation, from further conducting any lot-

teries in the State of Nebraska. City Betterment Corporation has appealed, and the State and County have cross-appealed.

The facts require some constitutional and statutory background. Until 1968, Article III, section 24, of the Constitution of Nebraska provided: "The Legislature shall not authorize any game of chance, nor any lottery, or gift enterprise where the consideration for a chance to participate involves the payment of money for the purchase of property, services, chance or admission ticket, or requires an expenditure of substantial effort or time; * * *." In 1968, the voters adopted an amendment to that section which reads: "Provided, that it may authorize and regulate other lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises. * * *."

In 1969, acting under the authority of the amendment, the Legislature enacted sections 28-964.01 to 28-964.05, R. R. S. 1943. The first section provides that, except as specifically authorized by those sections, it is unlawful for any person to operate any lottery. Section 28-964.03, R. R. S. 1943, provides: "Any bona fide nonprofit organization whose primary activities are conducted for charitable and community betterment purposes may conduct lotteries, raffles, and gift enterprises when the proceeds of such activities are used solely for charitable or community betterment purposes and the awarding of prizes to participants."

In 1972, a group of Omaha citizens organized the Central Business District Task Force to combat the deterioration of downtown Omaha. That group financed professional studies and considered various ways of revitalizing the downtown area. Having focused on a "super block" proposal and finding that tax funds for the project were insufficient, it was proposed that a

lottery be established for the purpose of providing "seed money" to attract private investment. As an outgrowth of that idea, City Betterment Corporation was incorporated on April 15, 1975, under the Nebraska Nonprofit Corporation Act. The corporation was to be operated "exclusively for charitable and educational purposes, including in particular for the charitable or community betterment purposes of the downtown area of Omaha, Nebraska." The net income of the corporation was to be distributed one-half to the City of Omaha for its community betterment purposes and one-half was to be expended by the corporation for charitable or community betterment purposes within the downtown area of Omaha, Nebraska. The District Court specifically found that the City Betterment Corporation was a bona fide nonprofit organization whose stated purposes were for charitable and city betterment purposes, and that finding is not challenged here.

The board of directors of the Community Betterment Corporation borrowed approximately $200,000 and hired some 15 employees to commence the operation of a lottery. Office space was leased, a public relations firm was hired, and an agreement was entered into with Systems Operations, Inc., to provide computer programs and technical advice and services. Numerous Omaha banks agreed to distribute lottery tickets for 1 percent of the ticket proceeds. Various Omaha businesses also agreed to sell tickets for a 5 percent commission. City Betterment Corporation also incurred other business expenses in connection with the lottery, including printing costs, and telephone and other utilities.

In September 1975, the Big Green lottery commenced operation with the first drawing for winners held on October 2, 1975. The lottery operated for approximately 4 months until its operation was enjoined by the District Court in this action on January 16, 1976. None of the net income or proceeds from the operation

of the lottery had been distributed to charitable and community betterment projects at the time of trial, although committees had been appointed to select projects to receive the proceeds.

The declaratory judgment action here was filed on October 6, 1975, and trial was held in early January 1976. On January 16, 1976, the District Court entered its decree. The court specifically found that City Betterment Corporation was a bona fide nonprofit corporation whose stated purposes are for charitable and city betterment purposes; and that the sole function and activity of the corporation since its existence had been the organization and operation of the lottery. The court also made conclusions of law: (1) That the term "proceeds" used in the constitutional amendment and the implementing statutes means net proceeds and not gross proceeds, and that a bona fide nonprofit qualified organization may therefore incur reasonably necessary expenses incident to the organization and operation of a lottery; (2) that the "promoter" of a lottery within the meaning of the constitutional amendment means only the organization conducting the lottery and does not include the individual employees or agents or independent contractors retained by the organization to provide services; and (3) that an organization whose only activity is the operation of a lottery is not an organization whose primary activities are conducted for charitable and community betterment purposes notwithstanding the intended use of the proceeds is solely for charitable or community betterment purposes. The District Court therefore concluded that City Betterment Corporation was not an organization whose primary activities are conducted for charitable or community betterment purposes and therefore is not an organization that may conduct a lottery pursuant to section 28-964.03, R. R. S. 1943. On those findings of fact and conclusions of law the court decreed the lotteries in violation of law and enjoined the defendant from

further conducting any lottery in the State of Nebraska.

City Betterment Corporation has appealed from that portion of the decree finding that it is not an organization whose primary activities are conducted for charitable or community betterment purposes and therefore not an organization that may conduct a lottery. The State and County have cross-appealed from those portions of the decree finding that the term "proceeds" as used in the constitutional amendment and implementing statutes means net proceeds and not gross proceeds, and from the determination that the "promoter" of a lottery means only the organization conducting the lottery and does not include employees, agents, or independent contractors providing services for profit.

The crucial issue on this appeal turns on an interpretation of the language of section 28-964.03, R. R. S. 1943, "any bona fide nonprofit organization whose primary activities are conducted for charitable and community betterment purposes may conduct a lottery * * *." The meaning of the term "primary activities" is the focal point for determining the intent of the Legislature and that term is found only in the statute and not in the constitutional amendment. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. Nance, *ante* p. 257, 248 N. W. 2d 339.

Traditionally in Nebraska lotteries have been forbidden. The Constitution of Nebraska still forbids any lottery except a lottery specifically authorized by the Legislature within the limitations of Article III, section 24. Under the 1968 amendment, the Legislature cannot authorize any lottery beyond the specific scope of the constitutional permission. The Legislature may refuse to authorize any lottery, or it may impose limits or restrictions, or qualifications upon the operation of a

lottery it authorizes. The legislative history of the 1969 statutes implementing the provisions of the constitutional amendment is not clear. Constitutional and statutory provisions from other states are not of much assistance because of their great variation in language and because of the fact that none are even reasonably comparable to our own. In Nebraska, however, unless a lottery is conducted and operated within the specific limits and terms of a statutory authorization, it is illegal.

In section 28-964.03, R. R. S. 1943, the Legislature has imposed some major requirements which must be met before an organization is authorized to operate a lottery. The first is that it must be a bona fide nonprofit organization. That requirement is admittedly met here. The second is that its "primary activities" are conducted for charitable and community betterment purposes. If an organization meets those two requirements, then, and only then, is it authorized to conduct a lottery, and even then only when the proceeds of the lottery activities are used solely for charitable or community betterment purposes. When the Legislature required that the "primary activities" of a qualified organization are to be conducted for charitable and community betterment purposes before the organization may conduct lotteries, the logical and reasonable conclusion must be that the primary activities referred to are activities other than the operation of a lottery. The Legislature thus limited its authorization to qualified organizations actually conducting activities for charitable and community betterment purposes. It is reasonable to assume that the Legislature intended to require that an organization actually conduct charitable and community betterment activities rather than merely express an intent to conduct them in the future before that organization will be authorized to operate a lottery.

It is argued that because the word "primary" was

used to describe the charitable and community betterment activities which must be conducted by an organization before it may legally operate a lottery, the Legislature intended that the operation of a lottery must be secondary or incidental to the "primary" activity of the organization. The Legislature failed to impose any specific restrictions as to the size or frequency of any lottery, and there is no reasonable or logical way of comparing or measuring the relative size of activities in such diverse and unrelated fields. The issue is not directly presented in this case, and we therefore do not pass on it.

The evidence in this case is undisputed that the sole function and activity of the City Betterment Corporation during its entire existence has been the organization and operation of the lotteries. The District Court specifically determined that an organization whose only activity has been the operation of a lottery is not an organization whose primary activities are conducted for charitable and community betterment purposes, and that the conduct or operation of a lottery may not be included as one of such an organization's primary activities. Those determinations were correct and are determinative of the appeal of City Betterment Corporation.

The State's and County's cross-appeal contends that the word "proceeds" used in both the constitutional amendment and the statute means gross proceeds rather than net proceeds. The constitutional amendment requires that lottery "proceeds" be used solely for charitable or community betterment purposes, and the statute adds the phrase "and the awarding of prizes to participants."

The term "proceeds" has been used in all kinds of contexts and in various situations has been interpreted as net or gross, depending upon the circumstances. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and

obvious meaning. Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593. The use of the word "proceeds" and the accompanying phraseology in both the constitutional amendment and the statute would ordinarily require that it be interpreted in the same fashion in both. The State argues that the word "proceeds" was intended to mean gross proceeds and that the statutory addition of words permitting the awarding of prizes was intended to allow only that deduction from gross proceeds. If "proceeds" means gross proceeds in the Constitution, then the statutory provision for prizes would be unconstitutional, because it goes beyond the constitutional limitation. To interpret the word to mean gross proceeds in the statute is to assume that the Legislature intended to require that except for prizes, all property, goods, services, and other expenses of any lottery must be donated, including advertising and printing of the tickets. There is no indication of any such intent. If the Legislature had wanted to describe or restrict the kinds or types of expenses authorized to be deducted, it could have done so. The Legislature did not make any reference to expenses. The trial court's finding that reasonably necessary expenses may be incurred was clearly correct. The word "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means "net proceeds." Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds.

Finally, the State and County contend that the District Court erred in holding that the term "promoter" in Article III, section 24, Constitution of Nebraska, means only the organization conducting the lottery. The State contends that anyone who advances money, sells tickets, secures financing, helps organize, manages, or in any other way helps to advance a lottery is a promoter of that lottery. It also contends that any person or firm performing any functions for a promoting

organization cannot profit or be paid for such services because of the constitutional prohibition against profit to the promoter. In essence, such a definition would mean that all services would have to be donated, including even the printing of lottery tickets. Any such interpretation would make it difficult, if not impossible, to hold a legal lottery except for a very small local lottery, and it could make dozens, or even hundreds, of helpful but unwary persons subject to criminal responsibility in the event legal boundaries were breeched. Logically and reasonably the term "promoter" refers to the person or organization legally responsible for the operation of the lottery.

Under Article III, section 24, Constitution of Nebraska, the word "promoter" of a lottery means only the persons or organizations legally responsible for conducting the lottery. It does not include individual employees of the organization or agents or independent contractors retained by the organization to provide services in the conduct of the lottery. Where the organization is a nonprofit corporation, the corporation is deemed to include the corporation's officers and directors.

The findings of fact and conclusions of law made by the District Court were correct in all respects. The judgment of the District Court is affirmed.

AFFIRMED.

IN RE COMMITMENT OF WELLS.
STATE OF NEBRASKA, APPELLEE, V. KENNETH CLARK WELLS, APPELLANT.
249 N. W. 2d 904

Filed February 9, 1977. No. 40624.

1. **Statutes: Appeal and Error: Time.** Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month.

2. **Courts: Sexual Sociopaths: Criminal Law.** While the court retains jurisdiction of the petitioner so long as he remains committed, that retention is not for the purpose of reexamination of the original commitment but rather for periodic reviews to determine if petitioner is still a sexual sociopath.
3. **Statutes: Sexual Sociopaths.** While a petitioner's commitment under section 29-2909, R. R. S. 1943, was voluntary in the sense that he initiated the proceedings, when it proceeded to the determination that he was a sexual sociopath, his confinement and release are subject to the other provisions of the act. His only remedy is a determination thereafter that he is no longer a sexual sociopath.
4. **Statutes: Trial.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality.
5. **Sexual Sociopaths: Evidence.** The finding that petitioner was a sexual sociopath continues until such time as evidence is adduced to prove otherwise.
6. **Sexual Sociopaths.** A prior conviction of a sexual offense is not a condition precedent to a voluntary commitment.
7. **Trial: Stipulations: Judgments.** Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
8. **Criminal Law: Attorney and Client: Judgments.** A person convicted of a felony and represented by counsel cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial.

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

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

Ronald D. Lahners and Roger W. Hirsch, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

SPENCER, J.

This is an appeal from a determination on an annual review that petitioner, Kenneth Clark Wells, is still a sexual sociopath. Petitioner asserts seven assignments

of error. They are essentially embraced in the following: (1) Petitioner's commitment was void; (2) petitioner's commitment was a voluntary commitment, terminable by him at will; and (3) the court erred in not permitting petitioner to be personally present in court on the hearing and argument on his motion for a new trial. We affirm.

In July 1973, petitioner-appellant was charged with the felony offenses of sodomy and assault with intent to commit sodomy. Following a preliminary hearing, defendant was bound over to District Court. Petitioner was never brought to trial because on October 9, 1973, Wells filed a petition under section 29-2909, R. R. S. 1943, stating he believed himself to be a sexual sociopath in need of treatment and requesting commitment to the Nebraska Regional Center. On October 11, 1973, the county attorney also filed a motion requesting a hearing on whether defendant was a sexual sociopath. Two psychiatrists were appointed by the Court to examine defendant. Both reported he was a sexual sociopath.

At a hearing on November 21, 1973, petitioner stipulated to a 1953 rape conviction in Lancaster County. The court ordered petitioner temporarily committed to the Lincoln Regional Center for further examination. The examining psychiatrist reported defendant was a sexual sociopath but that he would not benefit from treatment at the Lincoln Regional Center. He recommended defendant be sent to the Nebraska Penal and Correctional Complex.

The report of the psychiatrist contained a history of the defendant. It revealed defendant received a 12-year sentence on the 1953 rape conviction. He was in the Nebraska Penal Complex from 1953 to April 1959. During the time of his incarceration he made one escape. In July of 1959, 2 months after his release, he was charged with molesting a young girl. In September of 1959, he was sent to the Norfolk Regional

Center as a sexual psychopath. He was transferred to the Lincoln Regional Center where he was a patient from November 1959, until April of 1961, when he was returned to the Nebraska Penal Complex. In June of 1965, he was incarcerated at the Penal Complex on a charge of forgery. He was paroled in June of 1970. In December of 1970, and January of 1971, there were several incidents of breaking and entering and rapes in the Kansas area where he lived, and he was then returned to the Nebraska Penal Complex. He was released sometime in 1971, and was incarcerated again in 1972 for an insufficient fund check charge. He was released from the Penal Complex May 1, 1973. The offenses preceding his incarceration as a sexual sociopath occurred 2 months later, in July of 1973.

The first question raised by several of petitioner's assignments of error is whether or not he can attack the original commitment proceedings at this time. Section 29-2906(1), R. R. S. 1943, provides, so far as material herein: "Whenever a defendant has been adjudicated a sexual sociopath and committed for an indefinite period to either the Nebraska Penal and Correctional Complex or a state regional center for treatment of the mentally ill, he may appeal such commitment directly to the Supreme Court." Petitioner's commitment to the Penal Complex was a final order. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Williams, 194 Neb. 483, 233 N. W. 2d 772 (1975).

Petitioner's attempt to attack the original commitment at the annual review hearing was a collateral attack which the District Court properly declined to hear. While the court retains jurisdiction of the petitioner so long as he remains committed, that retention is not for the purpose of reexamination of the original commitment but rather for periodic reviews to determine if petitioner is still a sexual sociopath.

Petitioner's next contention is that as he instituted

the initial proceedings, it was a voluntary commitment and he should have the right to terminate it at will. At the outset, we observe that the commitment was not one for treatment but rather a commitment for being a sexual sociopath. The fact that petitioner initiated the proceedings does not change the nature of the commitment. At the time the proceedings were initiated, Wells was before the District Court on two sex-related felony charges. The county attorney joined in the sexual sociopath proceedings rather than proceeding with the criminal prosecutions.

Nebraska is one of the few states in the Union which provides for a voluntary proceedings. Section 29-2909, R. R. S. 1943, is as follows: "Any person whether or not he is guilty of a sexual offense who believes himself to be a sexual sociopath may initiate proceedings under sections 29-2901 to 29-2910 by filing a petition in the district court of any county alleging that he believes himself to be a sexual sociopath. The judge of such court shall thereupon order such person to be examined by two psychiatrists in the manner provided by section 29-2902 and thereafter proceedings shall be held in the same manner as if such person had committed a sex offense except (a) the petitioner shall be deemed to have waived a jury trial and no jury shall be called to determine whether the petitioner is a sexual sociopath and (b) the proceedings shall be confidential in nature and no publicity shall be permitted concerning the filing of the petition or the proceedings thereunder. The records of such proceeding shall be available to any attorney representing the petitioner but shall not be available to the public."

While the petitioner's commitment under section 29-2909, R. R. S. 1943, was voluntary in the sense that he initiated the proceedings, when it proceeded to the determination that he was a sexual sociopath, his confinement and release are subject to the other provisions

of the act. His only remedy is a determination thereafter that he is no longer a sexual sociopath.

Petitioner essentially is challenging the legality of the proceedings. The California court on a challenge to its sexual psychopath law, presenting almost the identical issue, said in People v. Hymes, 161 Cal. App. 2d 668, 327 P. 2d 219 (1958): "In the second place, it is to be remembered that appellant himself initiated the sexual psychopathy proceedings. Having invoked the beneficent provisions of the law, and having sought the hoped-for benefits of the observation, care and treatment thereby accorded him, appellant cannot be heard to question the constitutionality of the law. (Tracy v. MacIntyre, 29 Cal. App. 2d 145, 150 [84 P. 2d 526]; Foster v. Superior Court, 26 Cal. App. 2d 230, 234 [79 P. 2d 144]; Zeibak v. Nasser, 12 Cal. 2d 1, 18 [82 P. 2d 375].)"

In Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49 (1974), we said: "A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality."

Petitioner argues that the court, by granting a hearing, assumed there was probable cause to believe that he was no longer a sexual sociopath. The hearing was initiated on the petitioner's motion. Defendant's commitment provided that it was subject to annual or other reviews. The finding that petitioner was a sexual sociopath continued until such time as evidence is adduced to prove otherwise. The hearing on petitioner's application started on October 10, 1975. It was continued to November 18 to permit petitioner to secure some psychiatric testimony. In the interim, he was examined by a psychiatrist but did not offer the testimony of that psychiatrist at the subsequent hearing. No testimony was adduced to prove petitioner was no longer a sexual sociopath.

Petitioner's attack was on the legality of the origi-

nal commitment procedures. Actually, the primary issue of the annual hearing, whether or not Wells is still a sexual sociopath, is not presented in this appeal. We determine the petitioner is not entitled to terminate his commitment until such time as it shall be determined that he is no longer a sexual sociopath.

Petitioner was allowed to present evidence concerning the validity of the 1953 rape conviction which he stipulated to in the commitment, and for which he served the sentence imposed. Wells argues there must be a conviction for a sexual offense in order for him to be classified as a sexual sociopath. The definition contained in section 29-2901, R. R. S. 1943, is as follows: "(2) sexual sociopath shall mean any person who has been convicted of a sexual offense and who, by the procedure established in sections 29-2901 to 29-2910, is determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others."

Wells' commitment was instituted under section 29-2909, R. R. S. 1943. This section provides, so far as material herein: "Any person *whether or not he is guilty of a sexual offense* who believes himself to be a sexual sociopath may initiate proceedings under sections 29-2901 to 29-2910 by filing a petition in the district court of any county alleging that he believes himself to be a sexual sociopath." (Italics supplied.)

Wells, at the time he initiated the proceedings under section 29-2909, R. R. S. 1943, was charged with two felony sexual offenses. The record indicates that after a conference between him, his retained attorney, and a deputy county attorney, his cases were disposed of by his voluntarily committing himself as a sexual sociopath.

Construing the two sections of the statute set out above in pari materia, it is apparent the intent of the statute is that a prior conviction of a sexual offense is not a condition precedent to a voluntary commitment.

There is no merit to the petitioner's contention herein.

There is a compelling reason to uphold the 1953 rape conviction, if it were an issue herein, without further argument. Defendant's retained counsel in open court stipulated to that conviction when attention was called to the definition of a sexual sociopath in section 29-2909, R. R. S. 1943. This section provides, so far as ma- voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances. Martin v. Martin, 188 Neb. 393, 197 N. W. 2d 388 (1972). No exceptional circumstances are present herein. See, also, State v. Feagin, 196 Neb. 261, 242 N. W. 2d 124 (1976), in which we stated: "The plea of guilty eliminated the necessity of proof of the prior convictions or that the defendant had been represented by counsel or had knowingly or intelligently waived his right to counsel at the time of those convictions. * * * A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional." A voluntary commitment on the record herein is analogous to a plea of guilty, and the rule should be the same.

The final assignment we consider is that the District Court erred in not permitting petitioner to be personally present in court at the hearing and argument on his motion for new trial. The Nebraska rule has long been that a person convicted of a felony and represented by counsel cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial. Davis v. State, 51 Neb. 301, 70 N. W. 984 (1897).

A more recent formulation of the answer to petitioner's assignment is found in Council v. Clemmer, 177 F. 2d 22, (D.C. Cir., 1949): "Appellant says he was not present when the motion for new trial was argued by his counsel, and that his absence was a violation of his constitutional right to be present. The argument upon

that motion was not a part of the trial; it was an effort to get another trial. It dealt with questions of law and alleged errors in the trial. There was no constitutional requirement that the defendant be present."

A review of the record convinces us that there is no merit in any of the petitioner's assignments. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MARLIN R. MATZEN ET AL., APPELLEES.
250 N. W. 2d 232

Filed February 9, 1977. No. 40679.

Property: Quiet Title: Accretion Land: Evidence. A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.

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

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellant.

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen, and Edson Smith of Swarr, May, Smith & Andersen, for appellees.

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

BOSLAUGH, J.

This case involves a controversy concerning the title to accretion land along the Missouri River in Washington County, Nebraska. The State of Nebraska as plaintiff claimed title on the theory the accretion was to Section 16, Township 17 North, Range 13 East of the

6th P.M., a section of school land granted to the State by the Enabling Act.

There is no issue concerning the title of the individual defendants except as against the State. The parties stipulated that as against all persons other than the State of Nebraska the individual defendants are the owners of the property claimed by them in their answers.

The trial court found as a matter of fact that the land in question did not accrete to Section 16 and quieted title to the land in the individual defendants. The State has appealed.

The land in dispute is a kidney-shaped island known as Matzen Island. It is separated from the land to the west by the Boyer Chute and is bordered on the east by the Missouri River.

An 1857 General Land Office map, exhibit 1, shows the Missouri River was then located east of Section 16 with four narrow lots in Section 15 lying between the west bank of the river and the east line of Section 16. An 1879 map, exhibit 2, which was based on a survey by the United States Corps of Engineers, shows that by 1879 the river had moved to the west with the west bank located near the half-section line at the north line of Section 16 and near the southeast corner of Section 16 at the south line of the section. Thus, by 1879, Section 16 had become riparian land.

The State contends that all the land between the 1857 west bank of the river and the 1879 west bank was obliterated during the westward movement of the river. The effect of such a movement of the river would be to destroy the title to the land obliterated by the movement of the river. See Winkle v. Mitera, 195 Neb. 821, 241 N. W. 2d 329. The State's theory is that as the river moved back to the east, accretion land formed along the west bank of the river.

The 1879 map, exhibit 2, shows an island near the east bank of the river on the Iowa side. In 1879 this

island covered Lots 1 and 2 and a part of Lot 3 in Section 15 and a narrow strip along the east line of the northeast quarter of Section 16. The principal issue in this case is whether the island shown on the 1879 map has been in existence continuously since 1879.

The State had the burden of proof to show by a preponderance of the evidence that the land in question was accretion to Section 16. Mitchell v. Beermann, 175 Neb. 616, 122 N. W. 2d 525. If the land in question was accretion to the island and not to Section 16, then the State can not succeed.

The State contends that the island has not existed continuously since 1879. Russell Smith, a professor of geology who was called as an expert witness by the State, testified it was his opinion that the land in question originated as a point bar which built up slowly by the deposit of silt on the inside of a meandering curve in the river.

Russell Smith testified that a strong factor in his theory was a map from an 1884 Atlas, exhibit 3, which does not show the island. However, the defendants produced another 1884 Atlas, exhibit 46, which shows an island on the Iowa side of the river opposite Section 16. This island appears to correspond generally with the island shown on the 1879 map.

The State also contends that the Boyer Chute formed sometime after the river had begun to move back to the east. Russell Smith testified it was his opinion that the Boyer Chute formed gradually, sometime between 1890 and 1910 by water draining from the land after it had been flooded by the river.

The defendants' theory of the case is that both the island and the Boyer Chute have been in existence since at least 1879. The island appears on all the maps which are in evidence except exhibit 3, the 1884 Atlas map previously discussed, and exhibit 4, an 1893 Missouri River Commission map based on an 1890 survey. The defendants suggest the island was not shown on

exhibit 4 because the map may have depicted a high water stage of the river.

The defendants' theory is also supported by an 1894 survey made by the Washington County surveyor. The notes of this survey indicate the Boyer Chute was in existence at that time and was in approximately its present location.

A comparison of the various maps which are in evidence show that the Boyer Chute has always been located within the banks of the river as shown on the 1879 map. This is a circumstance which strongly suggests the Boyer Chute has been in existence continuously since 1879 and is in fact what now remains of the 1879 channel of the river.

Stewart A. Smith, a surveyor with extensive experience with the Missouri River and as an employee of the United States Corps of Engineers, testified as an expert witness for the defendants. It was his opinion that the Boyer Chute and the island have existed continuously since 1879 and that the land in question was accretion to the island shown on the 1879 map.

The State argues that this case is very similar to Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384. In Worm v. Crowell the question was whether the river had moved to the west and destroyed the appellee's title. This court held the evidence showed the river had moved to the west, the appellants' lands had become riparian lands, and the appellants were the owners of the accretion land formed as the river moved back to the east, except for a part thereof which the appellee had obtained by adverse possession.

The difference between this case and Worm v. Crowell, *supra*, is that the evidence in this case shows that an island has existed east of the 1879 west bank of the river since 1879, and the island has been separated from the land to the west by the Boyer Chute which is what now remains of the 1879 channel of the river. The accretion land which formed east of the is-

land as the river moved to the east was accretion to the island and not Section 16.

The factual situation in this case is somewhat similar to Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57. In that case accretion land which formed to the island was held to be the property of the owner of the island.

As we view the record, the preponderance of the evidence supports the defendants' theory of the case. It is unnecessary to consider any of the other issues raised by the defendants.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH L. MCGOWAN, DECEASED. THOMAS F. MCGOWAN, APPELLEE, V. JOHN M. MCGOWAN ET AL., APPELLANTS.
250 N. W. 2d 234

Filed February 9, 1977. No. 40704.

1. **Wills: Statutes: Undue Influence.** Under Nebraska law a so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943.
2. **Wills: Burden of Proof: Trial.** In a will contest the burden of proof or the risk of nonpersuasion on the issue of undue influence is on the contestant and remains there throughout the trial.

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

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

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

Heard before WHITE, C. J., MCCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

McCOWN, J.

This is an action to contest the admission of a will to probate on the grounds of lack of testamentary capacity and undue influence. The county court of Douglas County admitted the will to probate and the contestants appealed to the District Court. The case was tried to a jury in the District Court and the jury found in favor of the proponent and against the contestants on both grounds. The District Court entered judgment admitting the will to probate and the contestants have appealed.

Joseph L. McGowan died at Omaha, Nebraska, on April 14, 1973, leaving a last will and testament. He was 80 years old and a bachelor. His nearest relatives and only heirs-at-law were two nieces and three nephews, the children of his deceased brother. The proponent, who was the principal beneficiary and executor under the will, was Thomas F. McGowan, a second cousin and a godson of the testator.

The estate consisted exclusively of personal property, principally stocks, bonds, and cash, with a value of approximately $770,000. Approximately $40,000 of that amount was in the stock of Uncle Sam Breakfast Food Company, a closely held family corporation.

The will, after several minor bequests, left all the Uncle Sam Breakfast Food Company stock in equal shares to the five nieces and nephews or the survivors of them. The remainder of the estate was left to the First National Bank of Omaha in trust for the benefit of Thomas F. McGowan during his lifetime. Upon his death, or when the younger of his two named sons became 25 years of age, whichever was later, the trust was to terminate and be distributed to the two sons or their children by right of representation.

The witnesses at the trial generally agreed that the testator's relationships with his nieces and nephews had been cordial and friendly over the years. One of the nephews was the managing officer of the family break-

fast food company and another nephew was also employed there. The nephews and nieces who lived in Omaha visited the testator in varying degrees of regularity and he visited them in similar fashion for many years. One niece, who did not live in Omaha, came there several times a year and visited the testator on almost all those occasions. One niece, Mary Jane Edney, was a favorite of the testator. She and her husband lived close to the testator until just before he moved into a retirement home in 1970. She had the testator in her home for dinner on special holidays and on many Sundays. She had taken special care of the testator's mother in her later years when the testator and his mother were living together. After the death of the testator's mother, the testator often depended upon Mary Jane and she did many things for him.

There was evidence that the testator had had a serious falling out with his brother James which had severed their relationship prior to James' death. The indicated cause of the bitterness between the brothers stemmed from the removal of the testator as president of the breakfast food company many years previously. A friend of the testator who received a $1,000 bequest under the will testified that after the testator's brother died, the testator told him that the nieces and nephews were not going to get any of his money, and that Mary Jane was just one of the clique.

Thomas F. McGowan, the proponent of the will, was a godson of the testator. His father and the testator were first cousins. The testator had always treated Thomas as if he were a much closer relative. From the time Thomas was a child, the testator had been generous with his gifts to Thomas. Beginning in his early teens, Thomas would go to testator's house weekly to wash the car and cut the grass. As he grew older, this developed into a standing appointment to do such errands and chores as the testator might need. The weekly schedule had continued for some 17 years

or more prior to the testator's death. In 1965, the testator gave the keys to his home to Thomas so that Thomas would have access to the house in the event of an emergency. In 1966, the testator placed Thomas' name on his safe deposit box. In 1970, the testator opened a joint checking account with Thomas. At that time the testator was in the hospital for a hernia operation and wanted to have someone able to pay his bills for him. The checking account generally had about $8,000 in it. A much larger checking account was maintained by the testator on which only the testator could sign checks. When the testator became ill and entered the hospital in December of 1972, Thomas wrote checks on the joint bank account for all the testator's bills and continued to do so after the testator was released from the hospital. At the testator's direction, Thomas then began to help the testator update his dividend records on stocks and thereafter Thomas maintained the testator's dividend records, which had previously been kept by the testator.

There is no evidence that the testator had made any will prior to 1973. In September of 1972, the testator asked Thomas to select an attorney to prepare a will for the testator. Thomas inquired about attorneys at two Omaha bank trust departments and selected the attorney who had drafted his own will some 10 years before. He made an appointment for the attorney to see the testator about making a will but later canceled the appointment because the testator was not feeling well. Thomas testified that on December 4, 1972, the testator again brought up the question of a will and asked Thomas if he wanted the stock of the family corporation. When Thomas said "no," the testator stated that he would give it to the nephews and nieces, although he had not previously intended to give them anything. That evening the testator had congestive heart failure and was placed in the hospital in the intensive care unit. The next morning in the hospital,

at the testator's request, Thomas wrote down the bequests recited to him by the testator and then took them to the attorney who had been contacted previously. The attorney drew a will based on Thomas' notes and took it to the hospital on December 6, 1972. The testator was quite ill on that day and did not see the attorney. The attorney returned the next day. The attorney talked to the testator with a nurse present. The attorney informed the testator that Thomas had given him a list but did not tell the testator what that list contained. He then asked the testator what the testator wanted and was told essentially the same things that were on Thomas' list. At this meeting the testator also asked about a trust arrangement for Thomas and his sons and about the powers of an executor. He did not execute the will the attorney had brought along. The nurse who was present noted on the chart that the testator was alert and oriented.

Nothing more was done about the will until January 8, 1973, when Thomas again called the attorney and asked him to go see his uncle. On January 9, 1973, the attorney took two different drafts of wills to the hospital for the testator to consider. He was accompanied by an associate and a secretary to witness the will. He went in alone and talked to the testator about the wills, and explained and discussed the trust provisions in particular. He then called the witnesses in and they conversed with the testator a few minutes before he signed the will. In the presence of these two witnesses the attorney asked if the trust provisions for Thomas and his children were clear to the testator, and the testator said that he understood and that was what he wanted to do. The will was then signed and witnessed.

The testator returned to his retirement residence on January 10, 1973. In March the testator suffered a stroke and was returned to the hospital, and on April 14, 1973, he died.

The testimony of the witnesses was in some conflict as to the testator's mental competence and susceptibility to influence during the period that he was in the hospital prior to the execution of his will. He was visited frequently by the various nephews and nieces and Thomas. The medical testimony was generally that he was intermittently confused but at other times was mentally clear and alert. He recognized his relatives, his nurses, and his doctor by name, and could and did carry on conversations with them and other friends in the hospital. A private duty nurse testified that the testator was susceptible to influence but she also testified that he refused to take medication by shot, and there were times when he refused to let her take him for walks in the hall. There was testimony that the testator was perfectly alert. There was testimony that the testator was pliable and testimony that he was unpredictable. The testator was hard of hearing, had had one cataract operation and needed another, and there was some testimony that he was physically weak. He was able to and did read the newspaper and watched TV.

The jury found in favor of the proponent and against the contestants upon the issues of mental competency and undue influence. The District Court entered judgment affirming the order of the county court admitting the will to probate.

The contentions of the contestants on this appeal rest on the assertion that the instructions to the jury erroneously placed the burden on the contestants to prove undue influence. The argument is grounded on the assumption that the evidence was sufficient to establish a presumption of undue influence, and that under the provisions of section 27-301, R. R. S. 1943, the establishment of the presumption shifted the burden of proof from the contestants to the proponent and the instructions were therefore erroneous. The critical issues involve the effect of section 27-301, R. R. S. 1943, and

whether it applies to a "presumption" of undue influence in the making and execution of a will.

Section 27-301, R. R. S. 1943, is a part of the Nebraska Evidence Rules adopted by the Legislature in 1975, and is effective as to all trials commenced after December 31, 1975. That section provides: "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

Prior to the effective date of section 27-301, R. R. S. 1943, the effect of a presumption in Nebraska was only to shift the burden of going forward with the evidence, and the burden of proof or persuasion did not shift. When evidence was introduced to rebut the presumption, the presumption disappeared. The presumption was not evidence itself but only sustained the burden of proof until evidence rebutting the presumption was introduced. In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; Loomis v. Estate of Davenport, 192 Neb. 461, 222 N. W. 2d 369.

The Nebraska Evidence Rules, including section 27-301, R. R. S. 1943, were essentially the same as the then *proposed* Federal Rules of Evidence, but were adopted by the Nebraska Legislature prior to the final adoption of the federal rules by Congress. When Congress finally adopted the federal rules later in the same year, Rule 301 was completely changed. Instead of the language of section 27-301, R. R. S. 1943, Rule 301 of Public Law 93-595 reads: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." In essence, the new federal rule is the

former Nebraska rule. Although the Nebraska Legislature adopted the proposed version of federal Rule 301, it did not adopt the special section on the procedural effect of that rule. Neither the Nebraska rules nor the federal rules define or prescribe what constitutes a presumption within the meaning of Rule 301.

A presumption is a standardized practice under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts. McCormick on Evidence (2d Ed.), § 342, p. 802. The same authority suggests that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." Reasons for the creation of presumptions are numerous and the treatment of presumptions also differs widely. There are at least eight senses in which the term has been used by courts. The former Nebraska approach to presumptions is ordinarily referred to as the "bursting bubble" theory. Under that approach when evidence was introduced to rebut the presumption, the presumption disappeared and the burden of proof or persuasion did not shift. Under such a rule whether a particular set of basic facts gave rise to the dignity of a presumption was ordinarily not critical in the matter of instructing a jury after trial. What was many times referred to as a "presumption" was often merely a permissible or probable inference, or was a method of indicating that the evidence was sufficient to withstand a motion for a directed verdict or to constitute a prima facie case. In terms of instructions to the jury the new rule poses far greater problems. An additional problem is posed in a case such as this because the presumed fact of undue influence is also the ultimate fact to be determined by the jury.

Ordinarily the basic facts which give rise to a true presumption are specific and definite. They can be readily determined and uniformly applied. That is not the case with the so-called presumption of undue in-

fluence in Nebraska. An analysis of the Nebraska cases demonstrates that the basic facts which have been held to give rise to a presumption of undue influence in the making of a will have not been specific nor definite nor uniform. Instead the basic facts have themselves varied, and have been formulated from the facts and circumstances of each particular case. Almost without exception we have used the term "presumption" in connection with undue influence to mean that the evidence was sufficient to constitute a prima facie case or to withstand a motion for a directed verdict. In most instances the term "presumption" seems to have been intended to mean a permissible or probable inference when used in undue influence cases.

The Report of the Committee on Practice and Procedure in connection with the proposed Nebraska Rules of Evidence confirms the conclusion that this court can place the burden of proof in the first place, or hold that a particular set of basic facts does not rise to the dignity of a presumption under the rule. It is also obvious that situations which have previously been referred to as presumptions when only permissible or probable inference was meant, or those where the term "presumption" was used to indicate that the basic facts were sufficient to constitute a prima facie case or to withstand a motion for directed verdict, are cases which may be excluded from the operation of the rule. See Proposed Nebraska Rules of Evidence, Article III, Presumptions, p. 35 (1973).

We therefore hold that under Nebraska law a so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943.

The policy considerations which support the right of a competent testator to dispose of his property at death by a duly executed will also demand that the burden of proof on the issue of undue influence be placed upon the party contesting the will. We therefore hold that

in a will contest the burden of proof or the risk of nonpersuasion on the issue of undue influence is on the contestant and remains there throughout the trial.

In the case at bar it is clear that the factual issues of undue influence were for the jury, and that the instructions placed the burden of proof on the contestants, and the jury brought in its verdict for the proponent. If the instructions properly placed the burden of proof, the verdict and judgment must be affirmed. In view of the determinations made, the burden of proof was properly placed and the judgment is affirmed.

AFFIRMED.

RUBY COOPERATIVE COMPANY, A CORPORATION, APPELLEE, V. FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

250 N. W. 2d 239

Filed February 9, 1977. No. 40720.

1. **Insurance: Contracts.** A policy of insurance cannot be altered or modified without consent of the insured.
2. **Insurance: Attorney and Client: Fees: Statutes.** In fixing an attorney's fee allowed by statute to an insurance policy beneficiary, factors which may be considered by the court include the amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duty, result of service performed, and professional diligence and skill exhibited. § 44-359, R. R. S. 1943.
3. ———: ———: ———: ———. The reasonable sum allowed as attorney's fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. § 44-359, R. R. S. 1943.

Appeal from the District Court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed as modified.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Blevins, Bartu, Blevins & Jacobs, for appellee.

Heard before SPENCER, MCCOWN, and CLINTON, JJ., and MORAN and KELLY, District Judges.

KELLY, District Judge.

This is an action brought by the plaintiff-appellee, a cooperative grain storage company, against the defendant-appellant, a mutual insurance company, which insured certain buildings owned by the plaintiff. The defendant also insured the plaintiff for contents of the buildings and other forms of insurance used in plaintiff's business, however, these are not particularly important to this action other than as may be stated further in this opinion.

On February 24, 1969, the defendant issued its insurance policy No. 60-854 to the plaintiff herein, insuring thereby certain described buildings and improvements against losses by fire and other perils.

From time to time, the plaintiff erected additional buildings which were included in the contract of insurance by endorsement thereon. The building which is the subject matter of this appeal was a portion of a complex of buildings known as the "Chief Bin" complex which is endorsed on the contract of insurance and coverage was effective April 29, 1970.

The original policy was written for a 5-year term. On December 1, 1973, within the original 5-year term of the policy, a grain storage building in the "Chief Bin" complex was destroyed by fire.

Beginning in the spring of 1973, representatives of the defendant apparently became aware of a condition of the facilities of the plaintiff, and in particular were concerned about the "Chief Bin" complex. They requested that certain changes and procedures be followed to continue the insurance in effect. In a letter of November 2, 1973, the defendant notified the plaintiff that it would cancel the coverage on the six buildings known as the "Chief Bin" complex, effective November 15, 1973. The policy, according to the terms of

the insurance company, was to continue in effect on all other scheduled property.

Upon receipt of the letter of November 2, 1973, the manager of the plaintiff discussed with the board of directors the contents thereof, but no attempt was made by the board of directors of the plaintiff to secure coverage upon the "Chief Bin" complex.

On November 21, 1973, the defendant prepared a change of endorsement for the policy, deleting the coverage on the "Chief Bin" complex, retroactive to November 15, 1973, and indicated on that change of endorsement the amount of the return of the premium which would be paid to the plaintiff. This change of endorsement was received by the manager of the plaintiff, and on November 26, 1973, the defendant issued a check in the sum of $227.25, which represented a return of the premium because of partial cancellation of coverage on the "Chief Bin" complex by the defendant. This check was cashed by the plaintiff on November 29, 1973. The testimony indicated that the check was received in the mail, that there was no letter of transmittal with the check, and there was nothing written on the check indicating why it was issued to the plaintiff.

Because of frequent adjustments between the plaintiff and the defendant it was not unusual, in the course of business, for the plaintiff to pay additional premiums or for the defendant to issue checks for rebate upon insurance coverage based upon the amount of grain in storage.

The trial court ruled that as a matter of law the cancellation of a portion of the contract of insurance, which amounted to a unilateral modification of the contract by the insurance company, was not effective. The matter was submitted upon proper instructions to the jury, and the jury rendered a verdict on the first cause of action in the sum of $8,000. There were two other causes of action included in the loss claimed by

the plaintiff for which judgment was also rendered, however, the defendant has not appealed the verdict on these other causes of action. The trial court overruled the defendant's motion for new trial, and assessed attorney's fees against the defendant, and in favor of the plaintiff, in the sum of one-third of the jury verdict in each cause of action. The defendant appeals the judgment on the first cause of action and the assessment of attorney's fees. We hereby affirm as modified.

The defendant argues, in this court, that the cancellation of the coverage on the "Chief Bin" complex was proper under the provisions of the policy of insurance. The provision relied upon is as follows: "This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

The fallacy of the argument of the defendant is that the defendant did not attempt to cancel the entire policy, but rather attempted to modify by canceling only a portion thereof, to wit, the six buildings known as the "Chief Bin" complex.

The law is set out in the following quotations: "In order that there may be a modification, there must be an agreement therefor, supported by a consideration, and neither party has a right to modify the contract without the consent of the other party." 44 C. J. S., Insurance, § 281, p. 1120.

It has further been held as a general rule of law as follows: "An entire insurance contract is not susceptible of cancellation or rescission in part, at least without the consent of both the insurer and the insured." 43 Am. Jur. 2d, Insurance, § 402, p. 447.

The appellate court of Illinois had this problem before it in the case of Henderson v. Bankers Life & Cas. Co., 323 Ill. App. 59, 54 N. E. 2d 832. When faced with this question the Illinois court held that a policy of insurance can not be altered without the consent of the insured.

The California court had a similar question presented in the case of Bassi v. Springfield Fire & Marine Ins. Co., 57 Cal. App. 707, 208 P. 154. This particular case is similar in many respects to the instant case. In that case, which involved two fire insurance policies, the court held that a rider which had been attached to one of the policies by the agent of the insurance company some six weeks after delivery of the policies to the insured, which rider contained provisions by which the insured covenanted and agreed to keep his books and inventory of stock securely locked in a fireproof safe at night and at all times when the building mentioned in said policy was not actually open for business, was not binding upon the insured by reason of the fact that the insured did not understand the rider or agree thereto, and no new consideration had passed from the insurer to the insured. It likewise held with reference to the rider to the second policy sued on, which rider was sent through the mail with the request that it be attached to the policy, that said rider never became a part of the contract between the insurer and the insured by reason of the fact that the insured never agreed to put the rider on the policy, and no new consideration passed for the acceptance by the insured of the conditions of the rider.

The California court further adhered to this decision in the case of American Building Maintenance Co. v. Indemnity Ins. Co. of North America, 214 Cal. 608, 7 P. 2d 305.

In this case we therefore find that the defendant attempted to unilaterally modify the contract of insurance by canceling a portion thereof, to wit, the cov-

erage of the "Chief Bin" complex. This the defendant could not do and, therefore, the District Court properly ruled that the insurance coverage was in force at the time of the loss sustained by the plaintiff. The jury properly determined the amount of that loss to be in the sum of $8,000, and that judgment is therefore affirmed.

The second assignment of error made by the defendant is that the District Court did not properly assess attorney's fees under section 44-359, R. R. S. 1943. The trial court at a separate hearing attended by counsel for both the plaintiff and defendant, subsequent to the entry of judgment in favor of the plaintiff, heard testimony from the attorneys of record. At the conclusion of the hearing the trial court found that the attorney for the plaintiff had entered into a contingency fee agreement with the plaintiff in the sum of one-third of the amount of the recovery. The trial court found this to be a reasonable attorney's fee and awarded plaintiff's attorney a fee based upon one-third of the amount of recovery.

This court has previously held in the case of Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471: "In Andrews v. Commercial Cas. Ins. Co., 128 Neb. 496, 259 N. W. 653, the court dealt with this issue in the following language: 'The statute authorizes a reasonable sum as an attorney's fee to be taxed as costs in addition to a judgment on a liability insurance policy. Comp. St. 1929, sec. 44-346. While the allowance is reviewable on appeal, the trial court, in view of all the facts and circumstances, determines in the first instance, in the exercise of sound discretion, what is a reasonable sum. An arbitrary percentage of the recovery on the policy is not necessarily the test. Among the factors in the problem, the court may consider the amount involved; the responsibility assumed; the questions of law raised; the time and labor necessarily required in the performance of duties; the

result of service performed; professional diligence and skill. In re Estate of Rhea, 126 Neb. 571. Whatever is shown in these particulars or observed by the trial judge in the course of the proceedings is open to him for consideration. With these factors in mind, there does not seem to have been an abuse of discretion or an excessive allowance, when the entire record is considered.' "

The trial court in the case before us allowed an attorney's fee in the amount of 33 1/3 percent of the judgment. There is evidence in the record that plaintiff's attorney was handling the case on a contingent fee basis, although the percentage of the recovery to be retained as an attorney's fee is not stated. The allowance of a reasonable attorney's fee under section 44-359, R. R. S. 1943, has no relation to the fee contracted for on a contingency basis. The contingent fee involves risks that are not pertinent to a reasonable attorney's fee for services rendered. There is no evidence in the record as to what constitutes a reasonable attorney's fee for the services rendered in the case.

This court recently, in the case of Schmer v. Hawkeye-Security Ins. Co., 194 Neb. 94, 230 N. W. 2d 216 (1975), also discussed the allowance of attorney's fees pursuant to section 44-359, R. R. S. 1943. Therein it is stated: "In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916. The amount of the allowance generally rests in the sound discretion of the court. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133.

"The affidavit attached to the motion of the plaintiff's attorney filed in the trial court alleged in detail the correspondence involved in handling the case. It included an itemized time sheet and a statement of expenses incurred. The amount claimed was $6,349.60 including expenses of $615.66. The trial court allowed the sum of $2,460.51 plus $615.66 expenses. We find no abuse of discretion in regard to the amount of the allowance."

It is therefore the opinion of this court that the taxing of attorney's fees as costs in this matter was done improperly by the District Court for Seward County, and that the cause should be remanded for retaxing of the attorney's fees. The court should hold either a detailed hearing requiring testimony and evidence in accordance with prior opinions, or a detailed affidavit to the same. In all other respects the judgment of the District Court for Seward County is hereby affirmed.

AFFIRMED AS MODIFIED.

MR. U INC., A CORPORATION, ET AL., APPELLEES, V. MOBIL OIL CORPORATION, A CORPORATION, APPELLANT, IMPLEADED WITH NEBRASKA-IOWA CAR WASH, INC., A CORPORATION, ET AL., APPELLEES.

249 N. W. 2d 909

Filed February 9, 1977. No. 40776.

1. **Property: Mortgages: Liens.** As a general rule the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien.
2. **Property: Mortgages: Tender.** A tender is more than a mere offer to pay. It is an offer to perform coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied.
3. **Tender: Words and Phrases.** A tender is the offer of a sum of money in satisfaction of a debt and is made by producing

and showing the amount to the creditor and expressing verbally a willingness to pay it.

4. **Statutes: Mortgages.** A mortgagor has no cause of action under section 76-255, R. R. S. 1943, until there has been full performance of the condition of the mortgage.
5. **Liens: Mortgages.** Where a discharge of the lien results in the discharge of the debt the court may refuse to discharge the lien.

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

Robert D. Mullin and Timothy J. Pugh of Boland, Mullin & Walsh, for appellant.

Robert L. Matthews, Jr., and Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellees Mr. U Inc., et al.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH J.

This is an appeal in an action to quiet title. The plaintiffs are the owners of a triangular shaped tract of land near 78th and Dodge Streets in Omaha, Nebraska. In 1970, the plaintiff corporation, Mr. U Inc., leased a part of the property to John W. Sanders. The lease provided Sanders would construct a car wash and gasoline station on the property.

The lease to Sanders also provided the lessor would execute and deliver a mortgage on the property in the amount of $60,000 to secure a loan from a third party to the lessee in that amount. In accordance with the terms of the lease, Mr. U Inc., executed and delivered a mortgage in the amount of $60,000 to Mobil Oil Corporation to secure a loan of that amount to Sanders.

Sometime in June or July of 1972, Sanders became in default on the lease. On December 1, 1972, Mr. U Inc., Sanders, and Nebraska-Iowa Car Wash, Inc., en-

tered into a modification of lease agreement. The modification agreement provided for an assignment of the Sanders' lease to Nebraska-Iowa and the substitution of the West Omaha National Bank as mortgagee in place of Mobil. Nebraska-Iowa agreed to obtain financing in the amount of $100,000 from the bank and a release of the Mobil mortgage. Mr. U Inc., agreed to execute a mortgage to the bank in the amount of $57,958, the balance due on the Mobil mortgage.

On December 7, 1972, a meeting was held at the bank apparently for closing the transfer from Sanders to Nebraska-Iowa. The meeting was attended by Steve Urosevich, the president of Mr. U Inc.; Sanders; Leonard Stoller and Eldon Hickerson, representing Nebraska-Iowa; Lloyd Kitrell, the executive vice-president of the bank; David S. Hamilton, the district sales manager of Mobil; and Douglas Reno, an attorney representing Urosevich and Mr. U Inc.

When Hamilton arrived at the meeting he was requested to sign on behalf of Mobil an agreement that had been prepared by the bank and executed by Mr. U Inc., Nebraska-Iowa, and the bank. The agreement provided in substance that Mr. U Inc., would execute a new mortgage to the bank, Mobil would release its mortgage, but the bank would not disburse any funds to Mobil until it had received a release from Mobil and it was determined that the bank mortgage was a valid first lien on the property. Hamilton refused to sign the agreement because he did not have authority to sign such an agreement or a release of the mortgage on behalf of Mobil.

Although the bank knew the amount due on the Mobil mortgage as of that day, payment in the form of cash or a check was not offered to Hamilton. Kitrell later testified that payment to Mobil was offered only through the form of the agreement.

At one point during the meeting Hamilton asked Reno what would happen if Mobil was to "drag their feet"

in connection with the release of the mortgage. Reno replied that it might be a slander of title.

On December 8, 1972, Reno wrote to Hamilton stating that the bank held funds sufficient to pay the mortgage and that in exchange for an accounting of the amount due and a release of the mortgage the funds would be disbursed to Mobil. Reno requested that a release be made available within the next 7 days. On the same date Kitrell wrote to Hamilton enclosing a copy of the agreement that Hamilton had refused to sign at the meeting on the day before. The letter stated that the bank had $58,047.49 available to pay the Mobil mortgage and that the agreement indicated "the terms under which payment should be granted to Mobil Oil Corporation." The letter also requested an accounting of past payments and stated the bank would disburse the amount due Mobil at the time a release was available. Hamilton immediately forwarded both letters to the proper officers of Mobil.

Although the record is not entirely clear, apparently Nebraska-Iowa went into possession under the modification of lease agreement and operated the car wash until sometime in 1973 when it ceased operations. Nebraska-Iowa was in default under the lease after July 1973.

In April 1973, Nebraska-Iowa advised the bank to not disburse any funds to pay the Mobil mortgage. Sanders has been adjudicated a bankrupt.

This action was commenced October 16, 1973, to cancel the lien of the Mobil mortgage on the theory that payment had been tendered to Mobil on December 7, 1972, and on several other occasions during the next 5 months. The trial court found that a tender had been made on December 7, 1972, which had been rejected by Mobil because it failed to accept it within a reasonable time and that the lien of the mortgage was extinguished and discharged. The plaintiffs were also awarded a judgment for damages in the amount of $100

against Mobil under section 76-255, R. R. S. 1943. Mobil has appealed.

Mr. U Inc., relies upon the rule that under certain circumstances a tender of the amount due upon a mortgage discharges the lien. It has been said that such relief is most drastic, and, to obtain the same in an equitable action, the right thereto must clearly appear; that the rule is a harsh one, penal in nature, and courts have shown no disposition to extend it; that the principle should not be pressed beyond its strict limits; and in order to discharge the lien, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary, and unaccompanied by any bona fide, although mistaken, claim of right. See Hilmes v. Moon, 168 Wash. 222, 11 P. 2d 253.

The rule was stated in Security State Bank v. Waterloo Lodge, 85 Neb. 255, 122 N. W. 992, as follows: "It is a general rule, to which it is possible there may be exceptions under special circumstances, that the tender of the exact sum due upon a mortgage debt upon the 'law day' in accordance with the terms of the instrument operates to discharge the mortgage lien, and, whether there are any exceptions to this rule or not, we think this case does not afford room for doubt."

In the Security State Bank case, the mortgagor tenddered the amount due in cash at the bank where the mortgage was payable upon an "interest pay day" in accordance with the terms of the note. The tender was repeated later on several occasions, and after the foreclosure action was commenced the mortgagor offered to confess judgment for the amount tendered. On these facts this court held the mortgagee was not entitled to foreclosure; that the mortgagee could not recover more than the amount that had been tendered; and that upon payment of that amount to the clerk by the mortgagor the petition should be dismissed and a release delivered.

The facts in the case at bar are quite different. One

of the principal issues is whether a valid tender was ever made. If there was no tender the plaintiffs cannot succeed on the theory that the lien of the mortgage was extinguished by a tender.

A tender is more than a mere offer to pay. It is an offer to perform coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied. Caha v. Nelson, 195 Neb. 333, 237 N. W. 2d 870. A tender is the offer of a sum of money in satisfaction of a debt and is made by producing and showing the amount to the creditor and expressing verbally a willingness to pay it. Tompkins v. Batie, 11 Neb. 147, 7 N. W. 747. See, also, Linch v. Nebraska Buick Auto. Co., 120 Neb. 819, 235 N. W. 456.

If any tender was made in this case it was made by the bank. Neither Urosevich or Sanders had any funds with which to pay the mortgage. Nebraska-Iowa had arranged for the $100,000 bank loan but the money to be used for payment of the Mobil mortgage was never advanced to Nebraska-Iowa. The bank retained control over this money.

The tender which the bank made was at best conditional and equivocal. The agreement presented to Hamilton at the meeting on December 7, 1972, stated that the bank would disburse no funds to Mobil until it had received a release of the Mobil mortgage and it was determined the bank mortgage was a valid first lien against the property. The letter from Kitrell to Hamilton on December 8, 1972, stated that the agreement indicated the terms under which payment would be made to Mobil by the bank, and that the amount held for payment of the mortgage was $58,047.49, the amount due as of December 7, 1972. This was not a tender which Mobil was required to accept and was not sufficient to extinguish the lien of the mortgage.

Although there was testimony to the effect that the

bank would have produced the funds to pay the mortgage if Mobil could have furnished a release at the meeting on December 7, 1972, we find it not persuasive. Hamilton had no prior notice of the purpose of the meeting, was not requested to bring a release, and was not authorized to sign a release on behalf of Mobil or the agreement which the bank had prepared. More importantly, at that time the bank did not know whether its mortgage would be a valid first lien.

Kitrell's testimony at best was equivocal. Although he testified the funds would have been produced if a release had been available he also testified "the primary concern" was that Mobil would agree to the terms of the agreement which the bank, Mr. U Inc., and Nebraska-Iowa had executed but which Hamilton refused to sign; that the bank did not disburse the $58,047.49 to Nebraska-Iowa because "the bank wanted to maintain control of it until such time as we had Mobil's agreement. Q. You mean a release on the mortgage? A. A release would have been part of it or at least an arrangement for a release."; that the bank did not offer the $58,047.49 to Mobil at the meeting on December 7, 1972, except through the form of the agreement; that the bank did not offer cash or a cashier's check to Mobil; the bank's position was that it would not deliver payment until such time as a release was prepared for exchange; that the agreement enclosed with the letter of December 8, 1972, indicated the terms under which payment would be granted to Mobil; that the bank would not disburse funds to Mobil until a release was received and it was determined that the bank mortgage was a valid first lien; and that at the time of the meeting on December 7, 1972, it had not been determined that the bank mortgage was a valid first lien.

The bank mortgage was not recorded until December 12, 1972, and the abstract was extended some time after that. Although Kitrell testified the abstract when extended showed the bank mortgage to be a second mort-

gage, the bank did not advise Mobil that the bank had determined it's lien was subject only to the Mobil mortgage. Mobil had no duty to furnish a release until the mortgage was paid, and it clearly had no duty to guarantee the bank that there were no intervening liens between the two mortgages.

Mobil had no duty to furnish a release until after the mortgage had been paid. Section 76-255, R. R. S. 1943, provides that if after full performance of the condition of a mortgage, the mortgagee fails to execute or acknowledge a certificate of discharge or release of the mortgage within 7 days after being requested to do so and being tendered his reasonable charges, the mortgagee shall be liable to the mortgagor in the sum of $100 damages and all actual damages occasioned by such neglect or refusal. Under this statute a mortgagee has 7 days after payment of the mortgage and a request for a release to furnish the release.

We have held this statute is highly penal in nature and strict compliance with its terms is required. Bangs v. Gray, 60 Neb. 457, 83 N. W. 680; Gurske v. Kelpin, 61 Neb. 517, 85 N. W. 557. The duty to release the mortgage arises when the debt has been paid. William Deering & Co. v. Miller, 33 Neb. 654, 50 N. W. 1056. The judgment awarded the plaintiffs against Mobil under section 76-255, R. R. S. 1943, was clearly erroneous. A mortgagor has no cause of action under the statute until there has been "full performance of the condition of the mortgage."

The plaintiffs suggest that Karnes v. Barton (Tex. Civ. App.), 272 S. W. 317, is a similar case. In the Karnes case the plaintiff alleged the defendant held a judgment based on a vendor's lien on the plaintiff's land. On several occasions the plaintiff tendered the full amount of the lien to the defendant, but the defendant refused to execute a release unless the plaintiff also paid an additional unsecured indebtedness. The petition sought to cancel the lien and enjoin a sale

of the land. The trial court sustained a demurrer to the petition, which order was reversed on appeal. The appellate court held that the refusal to accept the tender suspended the defendant's right to enforce his lien unless the defendant signified a willingness to do equity and accept the tender and the plaintiff then refused to pay or keep good the tender.

In discussing whether the refusal of a tender discharges the lien, the court said: "* * * the general conclusion of our courts, and of the great weight of authority, seems to be that a refusal to accept tender of a debt secured by a vendor's lien upon land does not as a matter of law cancel and discharge the lien, where no damages or injury result as a consequence of the refusal to accept tender. Tender under such circumstances merely stops interest and costs from the date of tender. Many reasons have been given for this rule. One reason is that to hold tender so cancels the lien would be nothing less than a forfeiture, and our courts do not favor forfeitures. Another reason is that since a refusal of tender does not discharge the debt, it should not discharge the lien securing it, for the lien is only an incident of the debt. Still another reason is that a cancellation of the security for the debt would in many instances destroy the debt. * * * it may be said that as a general rule equity will cancel a lien for wrongful refusal to accept a proper tender of the debt secured, where the refusal is without reasonable cause and results in injury to the tenderer. Equity will not, however, in every instance cancel a lien because the lienholder wrongfully refuses to accept a proper tender of the debt secured, but will inquire into the facts and circumstances of each case and where justice demands it, the enforcement of the lien will be enjoined until the lienholder signifies a willingness to do equity as the situation requires and receives the tender. These rules are salutary and are enforced to save a lien, as well as the debt secured, from forfeiture."

In the case at bar there is no evidence that Mobil ever refused a valid tender or stated that it would not release the mortgage until the unsecured indebtedness of Sanders to Mobil had been paid. There was testimony that Hamilton was concerned about the unsecured indebtedness of Sanders, which was about $20,000, and at the meeting on December 7, 1972, Hamilton asked Reno what would happen if Mobil delayed furnishing a release. However, the evidence is undisputed that Hamilton promptly forwarded both the Reno letter and Kitrell's letter to the proper officers of Mobil with a request that a release be processed. There is no evidence that Mobil ever conditioned a release of the mortgage upon payment of the unsecured indebtedness of Sanders.

The record does not show how the plaintiffs were damaged by the delay in obtaining the release from Mobil. If a release had been furnished the land would now be encumbered by the bank mortgage instead of the Mobil mortgage. However, if the lien of the Mobil mortgage is discharged, the practical effect is to cancel the debt because Sanders is now a bankrupt. Where a discharge of the lien results in the discharge of the debt the court may refuse to discharge the lien. Easton v. Littooy, 91 Wash. 648, 158 P. 531.

Upon consideration of the record as a whole we have concluded that the part of the judgment of the District Court finding that the lien of Mobil Oil Corporation was extinguished, that the plaintiffs' title to the land should be quieted as against Mobil Oil Corporation, and that the plaintiffs should recover damages in the amount of $100 against Mobil Oil Corporation was erroneous and should be reversed; that the judgment in all other respects should be affirmed; and that the cause should be remanded for further proceedings.

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEVEN J. WENDT, APPELLANT, V. CAVALIER INSURANCE CORPORATION, APPELLEE.
250 N. W. 2d 243

Filed February 9, 1977. No. 40790.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course.
2. ———. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
3. ———. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Statutes: Insurance: Tender: Attorney and Client: Fees.** Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the amount offered.

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

A. James McArthur, for appellant.

Richard D. Myers of Thompson, Crounse & Pieper, for appellee.

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

CLINTON, J.

The issue on this appeal is whether the plaintiff, an insured under a motor vehicle liability policy, is entitled to recover, under the provisions of section 44-359, R. R. S. 1943, a fee for the services of his attorney in his action against the insurer for breach of its duty to defend a claim against the defendant.

There is no bill of exceptions in this case. The issue was decided in the court below upon the pleadings and there is presented to us only a question of law.

In his petition plaintiff pled a cause of action for

wrongful refusal of the defendant-insurer to perform its duties under the liability policy in that, among other things, it wrongfully denied liability coverage upon an insured motor vehicle and refused to handle a liability claim against the insured; and that, as a consequence, he was required to, and did, negotiate a settlement of the claim and did pay $905.40 in settlement of the claim. In this action plaintiff prayed for damages in the amount of $905.40, together with attorney's fees and costs of the action.

The transcript shows that the defendant first filed a general denial and after certain discovery proceedings were pursued by the plaintiff the defendant on March 22, 1976, made a written tender of $905.40 and all court costs to date. Four days later defendant amended its tender in writing and offered the sum of $905.40 plus interest of $85.14 and all court costs to date. Before the tender was filed the plaintiff had filed a motion for attorney's fees. A journal entry made after the amended tender was filed shows that the parties appeared by counsel and "Plaintiff accepts tender without prejudice to plaintiff's claim for attorney's fees." On the same day the court entered an order finding that the amended tender was for the full amount prayed for with interest and costs, "leaving only the matter of determination of the propriety and amount, if any, of attorney fees to be allowed to plaintiff." It ordered that the tender be accepted and disbursed by the clerk "without prejudice to plaintiff's motion for attorney's fees . . . ." Thereafter the court denied the motion for attorney's fees because plaintiff had failed to obtain a judgment for more than was offered by the defendant.

Section 44-359, R. R. S. 1943, provides, and for a long time has provided, that in all cases where any person entitled thereto brings an action on an insurance policy, the court, upon rendering judgment against the insurer, shall allow the plaintiff a reasonable attorney's

fee as part of the costs. The statute also provides for attorney's fee on appeal. In 1971, section 44-359, R. R. S. 1943, was amended and, with other changes not necessary to note here, the following proviso was added: "Provided, that if the plaintiff shall fail to obtain judgment for more than may have been offered by such company, person or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section." Section 25-901, R. R. S. 1943, mentioned in the proviso, pertains to offer of a judgment before trial and provides that in an action for money judgment the defendant may at any time before trial offer in writing to allow judgment to be taken for a specified amount and if accepted "the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly." It also provides that if the plaintiff fails to obtain judgment for more than the amount offered, he shall pay defendant's costs from the time of the offer.

The plaintiff asks this court to interpret section 44-359, R. R. S. 1943, so as to provide that reasonable attorney's fees incurred by plaintiff prior to the tender be charged as part of the costs in any event. He argues that the legislative history of the 1971 amendment indicates that at that time the Legislature intended to enlarge the circumstances under which attorney's fees were to be paid.

The difficulty with the plaintiff's position is that the statute is unambiguous. "A statute is not be be read as if open to construction as a matter of course. . . . Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. . . . It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74. The

proviso clearly incorporates the offer or tender provision of section 25-901, R. R. S. 1943. It clearly provides that if the offer is made and judgment is not obtained for more than the amount offered, the plaintiff shall not recover the attorney's fees provided for in the preceding part of section 44-359, R. R. S. 1943.

The transcript establishes that the plaintiff did not recover judgment for more than the offer. The District Court properly denied the motion. We note in passing that the attorney's fee here sought is not an attorney's fee incurred in the course of defending a claim which would properly become part of the damages recoverable in an action such as this, 14 Couch on Insurance (2d Ed.), §§ 51:57, 51:51, 51:153, but is the fee incurred in an action on the policy.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RHUDOLPH OVERSTREET, APPELLANT.
250 N. W. 2d 246

Filed February 9, 1977. No. 40843.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

Healey, Healey, Brown & Wieland, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

SPENCER, J.

Defendant, Rhudolph Overstreet, appeals his sentence

of 1 to 5 years in the Nebraska Penal and Correctional Complex on the claim that the sentence imposed on him is excessive. We affirm.

Defendant pled guilty to a charge of shooting with intent to kill, wound, or maim his ex-wife. The court accepted the plea and referred him to the Penal Complex for psychological testing and evaluation. His psychological report recommended a structured probation. The probation officer recommended against probation. The trial judge in sentencing the defendant stated that he had given consideration to probation, but considering the seriousness of the case was imposing what he considered to be a minimal type sentence.

The facts in this case reveal no abuse of discretion on the part of the trial court. The defendant went to his ex-wife's residence with a loaded gun. Without provocation, when she insisted she needed child support, he aimed the gun at her head and shot twice. He missed once but hit the side of her head the second time. While the evaluation team recommended a highly structured probation, the judge is not bound to follow such recommendation.

Defendant could have been sentenced to a term of not less than 1 year nor more than 50 years in the Nebraska Penal and Correctional Complex. We agree with the trial judge. The sentence imposed was a minimal one. Defendant was given credit on the sentence for the time spent undergoing psychological testing.

Our law is well settled. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. McFall, 197 Neb. 136, 247 N. W. 2d 60 (1976). There is no abuse of discretion herein. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CURTIS D. MORROW, APPELLANT.
250 N. W. 2d 247

Filed February 9, 1977. No. 40921.

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

Curtis D. Morrow, pro se.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

McCOWN, J.

This is a post conviction action. The defendant filed a motion to vacate and set aside a 3 to 5 year sentence for robbery. After a full evidentiary hearing, the District Court denied post conviction relief.

In 1974, the defendant was initially charged with one count of robbery and one count of use of a firearm in the commission of a felony. Pursuant to a plea bargain he pleaded guilty to the robbery charge and the firearm count was dismissed. He was represented by appointed counsel. The conviction and sentence on that guilty plea was affirmed by this court in State v. Morrow, 194 Neb. 591, 234 N. W. 2d 211.

Defendant essentially contends that he was denied effective assistance of counsel because his counsel was aware of a potential defense but failed to investigate it. The evidence establishes that the robbery of the service station for which the defendant was convicted was actually carried out by some of defendant's companions who used the defendant's car while the defendant was in the back seat under a blanket. The defendant permitted his car to be used, knew the robbery was planned, and was physically present when it occurred. He knew one of his companions had a gun,

and after the robbery was committed, he accepted a portion of the proceeds.

Defendant apparently believes that because he objected to the planned robbery before its occurrence and took no active part in the robbery, he had a valid defense and the failure of his counsel to investigate and confirm those facts constituted ineffective assistance of counsel. He is wrong on both counts.

Section 28-201, R. R. S. 1943, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." The conceded facts here are more than sufficient to constitute aiding and abetting. The evidence fails to establish any ineffective assistance of counsel.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELMER A. CHAPMAN, APPELLANT.
250 N. W. 2d 248

Filed February 9, 1977. No. 40926.

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

D. E. Rissler, 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.

NEWTON, J.

Defendant was charged with a third offense of driving while intoxicated. A plea of guilty was entered

and the defendant thereupon sentenced to a term of 18 months to 3 years. The sole issue presented on appeal is the charge that the sentence is excessive. The sentence is modified to comply with the requirements of section 83-1,105, R. S. Supp., 1976, and State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793.

Section 39-669.07, R. R. S. 1943, provides a penalty of 1 to 3 years for the offense of which defendant was convicted. The minimum sentence of 18 months imposed exceeds one-third of the statutory maximum and the sentence will be reduced to 1 to 3 years. The defendant has a lengthy record of misdemeanor and felony convictions and the sentence does not otherwise present an abuse of discretion.

The judgment of the District Court will be affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOE MARIO RIVERA, APPELLANT.
249 N. W. 2d 914

Filed February 9, 1977. No. 40929.

Criminal Law: Sentences: Post Conviction. Where a sentence is imposed within prescribed statutory limits, the validity of the sentence is not a matter of post conviction relief.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

John R. Hall of McDermott & Hall, 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.

SPENCER, J.

Defendant, Joe Mario Rivera, appeals from the over-

ruling of his motion for post conviction relief after an evidentiary hearing. The issue presented was whether the indeterminate sentence imposed on defendant was erroneous. We affirm.

On December 10, 1970, defendant was sentenced to a term of 15 to 25 years in the Nebraska Penal and Correctional Complex. He had been convicted of second-degree murder after a jury trial. Defendant waived his right to appeal and was committed to the Penal Complex.

On April 26, 1976, defendant filed a motion for post conviction relief, urging the invalidity of the sentence imposed upon him. An evidentiary hearing was held May 26, 1976, and the motion was overruled by the court.

The indeterminate sentence statute in effect December 10, 1970, when defendant was sentenced, section 83-1,105, R. S. Supp., 1969, read in part as follows: "Except where a term of life is required by law, every person convicted of a criminal offense may, in the court's discretion, be given an indeterminate sentence. In imposing an indeterminate sentence upon the offender, the court may:

"(1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law and the maximum limit shall not be greater than the maximum provided by law; * * *."

Under section 28-402, R. R. S. 1943, the penalty for second-degree murder is imprisonment for "not less than ten years, or during life." The plain language of section 83-1,105, R. S. Supp., 1969, indicates an indeterminate sentence could properly be imposed on December 10, 1970, since a term of life imprisonment was not required by law upon conviction for second-degree murder.

Prior to the enactment of section 83-1,105 in 1969, the indeterminate sentence statute excepted crimes of

violence from its provisions. After defendant was sentenced, section 83-1,105 was again amended. The 1972 amendment provided that the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law. We have held the 1972 amendment of section 83-1,105 made it inapplicable in cases of second-degree murder. See State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793 (1973).

It was not until the 1972 amendment that the problem arose of how to determine one-third of a life sentence. In 1973, in Suggett, we held second-degree murder convictions were not subject to indeterminate sentencing. Here, however, the indeterminate sentence was imposed under the applicable statute in force at that time, December 10, 1970. The statute then required a minimum of 10 years, with a maximum of life. As we interpret that statute, it was possible to give an indeterminate sentence. The sentence imposed herein was 15 to 25 years. We hold the defendant was properly sentenced under the statute in force at the time of the sentence.

Where a sentence is imposed within prescribed statutory limits, the validity of the sentence is not a matter of post conviction relief. State v. DeLoa, 194 Neb. 270, 231 N. W. 2d 357 (1975).

Post conviction relief is not available to the defendant herein on the issue raised. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD F. GOODLOE, APPELLANT.
250 N. W. 2d 606

Filed February 16, 1977. No. 40643.

1. **Criminal Law: Constitutional Law: Double Jeopardy.** A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act.
2. **Criminal Law: Constitutional Law.** Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses.
3. **Courts: Motions, Rules, and Orders: Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
4. **Statutes: Criminal Law: Constitutional Law: Double Jeopardy: Habitual Criminals.** The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy.
5. **Statutes: Legislature: Criminal Law: Habitual Criminals.** The habitual criminal statute represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than ordinarily would be considered.
6. **Statutes: Sentences: Appeal and Error: Criminal Law.** Under section 29-2308, R. R. S. 1943, this court may reduce a sentence when in its opinion that sentence is excessive.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed as modified.

James A. Nanfito and Charles A. Nanfito, 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 defendant was charged in two separate felony actions. The first information charged the defendant, in count I, with willful reckless driving, third offense, in violation of section 39-669.06, R. R. S. 1943; and in count II, with being a habitual criminal. The second information charged the defendant, in count I, with operating a motor vehicle to avoid arrest in violation of section 60-430.07, R. R. S. 1943; and in count II, with being a habitual criminal.

A jury trial was held on the issues of whether the defendant was guilty of willful reckless driving and operating a motor vehicle to avoid arrest. The jury found the defendant guilty of both offenses. The issues of whether the defendant was guilty of a third offense of willful reckless driving and whether he was a habitual criminal was tried to the court. The court found that this was the defendant's third offense of willful reckless driving and that he was a habitual criminal. The court sentenced the defendant to a term of 10 to 15 years' imprisonment in the Nebraska Penal and Correctional Complex on each information, the two sentences to run concurrently. The defendant appeals both convictions. We affirm the judgment, and modify the sentence of the District Court.

The defendant makes numerous assignments of error. His first assignment of error is that the District Court committed error when it refused to dismiss the information charging him with a violation of section 60-430.07, R. R. S. 1943, on the ground of former jeopardy. The defendant's argument is that his acquittal from a charge of driving while under suspension or revocation of his driver's license prohibits the State from further prosecution arising out of the same series of events, or transactions, out of which the charge of driv-

ing while under suspension or revocation of his driver's license arose. There is no merit to this contention.

This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611 (1951). In that case we stated: "Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses."

The defendant was charged with three separate and distinct statutory offenses: Driving while under suspension or revocation of driver's license, willful reckless driving, third and subsequent offenses, and operation of a motor vehicle to avoid arrest. His acquittal on the charge of driving while under suspension or revocation of driver's license did not forbid the other prosecutions arising out of the same incident. The District Court correctly refused to dismiss the information charging defendant with a violation of section 60-430.07, R. R. S. 1943.

The defendant's second assignment of error is that the District Court committed reversible error when it denied his motion for a continuance. "A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." Korte v. Betzer, 193 Neb. 15, 225 N. W. 2d 30 (1975). See, also, State v. Newton, 193 Neb. 129, 225 N. W. 2d 562 (1975). The record shows that the defendant was charged on May 8, 1975.

From that time onward, he was continuously represented by counsel. New counsel was retained on November 10, 1975, and the trial set for November 18, 1975. The motion for continuance was made on November 13, 1975. Based upon our review of the record, we find no prejudice to the defendant, and no error by the District Court in refusing to grant a continuance.

The defendant's third assignment of error is that the District Court committed reversible error when it overruled his motion to suppress the testimony of Susan Paine, on the ground that the State had not complied with his motion for discovery in good faith.

The defendant filed a motion for discovery on November 13, 1975. At a hearing on November 14, 1975, the State indicated that it had no knowledge of the whereabouts of Susan Paine. A subpoena had been issued on October 10, 1975, for her to testify on November 18, 1975. At this hearing, the prosecuting attorney informed the parties present of Susan Paine's last-known address. Susan Paine returned to the jurisdiction on November 17, 1975, and was served with a subpoena at that time. The State's counsel immediately notified the defendant's counsel of this fact. On the morning of the trial, the defendant's counsel was given 15 minutes to interview Susan Paine.

Susan Paine testified that she was sent out of the jurisdiction by her father and mother, and that they also made the decision for her to return. Susan Paine's mother testified that she was aware that the prosecution wanted Susan to testify. She stated that she and her husband made the decision for Susan to return, and that the decision to send her away was based in part on their deep concern for her safety. Both Susan and her mother denied that there was any agreement with law enforcement officials or anyone else concerning her testimony. We find no evidence to support the defendant's charge that the State did not in good faith comply with his motion for discovery. The District

Court correctly overruled the motion to suppress the testimony of Susan Paine.

The defendant next alleges that the District Court committed reversible error when it denied the defendant's motion to suppress the in-court identification by Officer Cupido of the defendant as the driver of the motor vehicle he pursued on May 7, 1975, on the ground that this identification was based upon impermissible pretrial identification procedure. There is no merit to this contention. It is clear from the record that Officer Cupido's in-court identification of the defendant was based upon his observation of the defendant during the episode giving rise to these proceedings. The District Court correctly denied the defendant's motion to suppress this testimony.

The defendant next contends that there was insufficient evidence to find him guilty of willful reckless driving and operating a motor vehicle to avoid arrest. This contention is without merit. Officer Cupido testified that he followed the defendant's vehicle during the incident, which occurred around midnight. At times, he stated, his speed reached over 100 miles per hour. The defendant was going at least 40 or 50 miles per hour in a 25-mile per hour residential zone at one point. The defendant's vehicle was accelerating as it traveled through a residential area. While driving in town, the defendant failed to stop at a stop sign. Officer Cupido testified that during the incident he observed the defendant cross over the median of the highway. Part of the chase took place on a state highway. The defendant had a passenger in his vehicle during this episode. Officer Cupido's lights were flashing and his siren was on as he pursued the defendant. There is sufficient evidence in the record to support the jury's finding that the defendant was guilty of willful reckless driving and operation of a motor vehicle to avoid arrest.

The defendant next argues that section 60-430.07, R.

R. S. 1943, is vague, ambiguous, and overbroad, violating constitutional guarantees of due process of law. Section 60-430.07, R. R. S. 1943, was held constitutional, after a similar attack in State v. Etchison, 190 Neb. 629, 211 N. W. 2d 405 (1973), cert. den. 416 U. S. 943 (1974).

The defendant next contends that the District Court erred in giving instruction No. 5 over the defendant's objection. That instruction required the jury to find, in order to convict the defendant of violating section 60-430.07, R. R. S. 1943, that the defendant was operating a motor vehicle upon a public highway or road of the State; that he had violated a law of the State; and that he was willfully fleeing in such vehicle in an effort to avoid arrest for violating the law. This was a correct statement of the law. There was no error in giving the instruction.

The defendant also contends that it was error for the District Court to refuse to give two instructions tendered by him. We have examined these instructions. It was proper to refuse them.

Lastly, the defendant contends that sentencing him as a habitual criminal violated his constitutional rights to be free from cruel and unusual punishment and to be free from double jeopardy. We have previously held that the habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment. State v. Martin, 190 Neb. 212, 206 N. W. 2d 856 (1973). Sentencing the defendant under the habitual criminal statute does not subject the defendant to double jeopardy. The defendant is not being punished again for past offenses. He was sentenced for a different offense. The previous convictions, however, under the habitual criminal act, operated to increase the penalty for the last offense. The habitual criminal act represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than

ordinarily would be considered. See, State v. Tyndall 187 Neb. 48, 187 N. W. 2d 298 (1971); Davis v. 'O'Grady, 137 Neb. 708, 291 N. W. 82 (1940). There is no merit to this contention.

Under section 29-2308, R. R. S. 1943, this court may reduce a sentence when in its opinion that sentence is excessive. The District Court sentenced the defendant to a term of 10 to 15 years imprisonment in the Nebraska Penal and Correctional Complex on both informations, the two sentences to run concurrently. We have reviewed the record and believe that a more appropriate sentence in this case would be 10 years on each information, the two sentences to run concurrently.

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

AFFIRMED AS MODIFIED.

CHARLES I. SCUDDER, APPELLEE, V. LYDIA H. HAUG, APPELLANT.
250 N. W. 2d 611

Filed February 16, 1977. No. 40696.

Courts: Trial: Dismissal and Nonsuit. A court of general jurisdiction has inherent power to protect itself, litigants, and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form.

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

Lydia H. Haug, pro se.

Michael P. Cavel of Emil F. Sodoro Law Offices, for appellee.

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

PER CURIAM.

On June 11, 1975, the plaintiff brought suit against the defendant, seeking to recover a money judgment for the value of legal services rendered to her. The defendant filed her answer on July 14, 1975, along with a "Cross Petition Malpractice." On August 19, 1975, the plaintiff filed a motion to have portions of the cross-petition stricken and to have other portions thereof made more definite and certain.

A hearing on the plaintiff's motion was held on September 23, 1975. The District Court granted the plaintiff's motion in 20 of its 22 particulars. The defendant was given until October 24, 1975, to comply. The defendant appeared pro se at the hearing on September 23, 1975. It is clear from the record that the defendant was aware of the court's order, and was aware that she had until October 24, 1975, to amend her cross-petition.

The defendant failed to make any amendments to her cross-petition by October 24, 1975, and on October 27, 1975, the plaintiff moved for dismissal of the defendant's cross-petition for failure to comply with the court's order of September 23, 1975. A hearing on the plaintiff's motion to dismiss was held on November 17, 1975. The defendant was granted an additional 2 weeks to comply with the court's order, and was specifically warned that her failure to comply would result in a dismissal of her cross-petition with prejudice. The defendant was present pro se at this hearing, and the record shows that she was clearly informed by the District Court of the consequences of her failure to comply with the earlier court order.

The 2 weeks transpired and the defendant made no amendments to her cross-petition. On December 5, 1975, the District Court dismissed the defendant's cross-

petition with prejudice. The defendant filed a motion for a new trial but failed to appear at the scheduled hearing on her motion. The motion for a new trial was overruled. The defendant appeals. We affirm the judgment of the District Court.

In Ferson v. Armour & Co., 109 Neb. 648, 192 N. W. 125 (1923), this court held: "A court of general jurisdiction has inherent power to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form."

In Pressey v. State, 173 Neb. 652, 114 N. W. 2d 518 (1962), we stated: "* * * it has almost universally been held or recognized that courts have the inherent power to dismiss an action for disobedience of a court order. It is obvious that this is one of the more coercive measures to compel obedience of an order. It should be equally evident that it is necessary on occasions for courts to resort to such action in the interest of the orderly administration of justice. * * *

" 'When a plaintiff invokes the jurisdiction of a court and seeks to avail himself of it he does so with the understanding that he must abide by all lawful statutes, rules and orders applicable to him, and the court has inherent power to impose the sanction of dismissal, for its coercive effect.' We say that the right of a court to enforce its lawful orders is inherent in the power of the court. Without this right, a court could not control its dockets; business before it would become congested; its functions would be impaired; and speedy justice to litigants would largely be denied." See, also, Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453 (1937).

The defendant was given repeated opportunities to comply with the court's order of September 23, 1975, and to bring her pleadings into proper form, yet she

failed to do so. She was present at these proceedings. She was given adequate time in which to comply. She was specifically advised of the consequences of her failure to comply with the court's order.

The dismissal of the defendant's cross-petition with prejudice by the District Court is correct and is affirmed.

AFFIRMED.

PATRICIA ANN BOROFF, APPELLEE, V. EUGENE ALLAN BOROFF, APPELLANT.
250 N. W. 2d 613

Filed February 16, 1977. No. 40705.

1. **Parent and Child: Infants: Divorce: Custody.** A mother and father have an equal and joint right to the custody of their children, and custody shall be determined on the basis of the best interests of the child.
2. ———: ———: ———: ———. Although the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling in regard to custody.
3. ———: ———: ———: ———. Although it is generally sound public policy to keep the children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is dissolved.
4. **Parent and Child: Infants: Divorce: Custody: Statutes.** A court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976.
5. **Courts: Parent and Child: Infants: Divorce: Custody: Appeal and Error.** This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal.
6. **Divorce: Alimony: Property.** The questions of alimony and division of property may be considered together when a marriage is dissolved; and in considering these questions the court shall have regard for such factors as the circumstances of the parties, the duration of the marriage, the history of the con-

tributions to the marriage by each party, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed as modified.

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

John R. O'Hanlon of O'Hanlon & O'Hanlon, for appellee.

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

BRODKEY, J.

This is an appeal from a District Court decree dissolving the marriage of the parties; granting custody of a daughter to the mother, and of a son to the father; and awarding alimony and child support to the wife. The husband has appealed, contesting the custody, alimony, and child support awards.

On November 18, 1975, Patricia Ann Boroff, the appellee herein, petitioned the District Court for Washington County to dissolve her marriage, alleging that the marriage was irretrievably broken. In her petition, she did not specifically request alimony, custody of her two childen, child support, or a division of property, but prayed for other equitable relief. Respondent Eugene Allan Boroff, the appellant herein, answered the petition on November 19, 1975, admitting the allegations thereof, and prayed that the marriage be dissolved, that the custody of the children be awarded to him, and also for other equitable relief.

Hearing was had on February 12, 1976, at which time both parties and their children testified. Both parties acknowledged that their marriage was irretrievably broken, and that issue is not contested in this appeal. The Boroff's have two children, Vickie, a 12-year-old daughter who attends elementary school in Herman, Nebraska; and Robert, a 14-year-old son who

attends Tekamah-Herman High School. The parties were married in 1961. Patricia is 36 years old, and Eugene is 34 years old.

Patricia is currently employed at a cafe in Herman, Nebraska, and earns $60 in net income each week. She works from 5:30 a.m. until 1 p.m. 3 days a week, and from 5:30 a.m. until 2 p.m. 2 days a week. She has a high school education, and has previously worked for Western Electric, wiring PBX machines.

Patricia testified at trial that she was asking for custody of the children and an award of child support that would enable her to meet household expenses. She itemized monthly household expenses, totalling $511. Patricia stated that if she were to receive custody of the children, she was asking that she receive the parties' home as part of the property division. She acknowledged that she and her husband had agreed that the party who received custody of the children would remain in the home with the children until they were grown, and that the equity in the house would then be equally divided.

Patricia also asked that she receive a 1965 Buick automobile which the Boroffs owned, and that she receive necessary household furnishings. She stated that Eugene should receive the 1969 Chevrolet pickup they owned, and that he was entitled to the bonds that they jointly owned because he had paid for them. Patricia did not specifically request alimony either in her petition or at trial. In view of her prayer for equitable relief, this was not necessary. Browers v. Browers, 195 Neb. 743, 240 N. W. 2d 585 (1976).

Finally, Patricia stated that Eugene had been a good father to the children, and that he was a fit person to have custody of the children. She did state, however, that she did not think that Eugene could do the wash, fix the children's meals, and keep the house clean; and she believed that she could provide a better home for the children than Eugene could provide.

Eugene stated that he is the postmaster at Herman, Nebraska, and that he earns $14,489 per year. With his deductions, he receives a monthly take-home pay of approximately $790. The house which the Boroffs own is worth approximately $12,000, and they owe a loan company $3,900.20 on the house, which is paid off at the rate of $61 per month, including real estate taxes and insurance.

Other assets of the Boroffs as testified to at the time of the divorce total $3,144.06. Eugene listed current debts such as oil bills, hospital bills, service station bills, mastercharge, etc., as being in the amount of approximately $600.

Eugene stated that he could do the household duties and take care of the children. He testified that the children got average grades in school, and that their grades had gone down due to domestic tensions over the divorce. Otherwise the children have no problems, and get along well in their community. Eugene agreed with Patricia that the person who is awarded custody of the children should be awarded the possession of the house until the children are grown, and that the equity in the house should then be divided equally between them.

The children testified outside the presence of each other and their parents. Robert stated that he wished to live with his father because his father could care for him better, and could understand his problems better. Robert had not discussed the matter of custody with his mother, but had talked with his father about who he wished to live with. Robert testified that he got along well with his sister, and wished to be together with her. Robert stated that he did not wish to live with his mother because "she goes places and leaves us at home sometimes." Robert stated that his mother had been doing this for 4 or 5 weeks, and that she would be away in the evening from 7 to 11. Robert is involved in scouting, and his father is scoutmaster.

Vickie also testified that she wished to live with her father, as she did not "like the friends my Mom hangs around with," and did not like her mother going to the bar. Vickie stated that her mother went to the bar on Wednesdays, when she went bowling. Vickie stated that she could talk to her father better than she could to her mother, and that she wanted to stay with her brother. Vickie had not talked with her mother about custody, but had talked with her father about it.

On redirect examination, Patricia stated that when she filed for divorce, she thought that the children should decide who they wanted to live with. She now thinks that the children would be better off with her, and particularly that Vickie needs a mother because she is entering her maturity. Patricia acknowledged that she bowls on Wednesday nights, and that she has a beer or two on such occasions. Ordinarily Patricia is home in the evenings with the children. Patricia admitted that Eugene had spent quite a bit of time with the children in recent years, and that he has been a good father.

In a decree dated February 12, 1976, the District Court dissolved the marriage, and made the following awards, which we summarize as follows:

(1) The parties shall receive the house and real estate as tenants in common, subject to the right of Patricia to live in the house rent free until Vickie becomes of legal age or fully self-supporting; Patricia shall pay the utilities and expenses of ordinary wear and tear on the house while she is in possession;

(2) Patricia shall receive the household goods subject to the indebtedness thereon, which she is to pay;

(3) Patricia is to receive the 1965 Buick;

(4) Patricia is to receive her checking account ($2.29), her credit union account ($24.39), and the savings account ($10.82);

(5) Eugene is to receive the pickup truck;

(6) Eugene is to receive his checking account ($203.86), his credit union account ($3.02), and the savings bonds ($380);

(7) Both parties are to equally pay the loan on the house (balance of $3,900.20) in $61 monthly installments;

(8) Eugene is to pay outstanding bills totaling approximately $600;

(9) Eugene is to pay Patricia alimony in the amount of $5,000 at the rate of $1,000 per year;

(10) Patricia shall have the custody of Vickie until she becomes of legal age, subject to reasonable visitation by Eugene;

(11) Patricia shall receive $300 child support per month until Vickie becomes of legal age or fully self-supporting;

(12) Eugene shall have custody of Robert until he becomes of legal age, subject to reasonable visitation by Patricia; and

(13) Eugene shall pay fees of $350 for Patricia's attorney and court costs of $26.

Eugene has appealed from the decree of the District Court, contending that the court erred: (1) In granting custody of Vickie to Patricia, thereby splitting the children contrary to their expressed wishes; (2) in awarding Patricia alimony when no alimony was asked for by Patricia and no evidence was adduced in support of an alimony award; (3) in awarding excessive alimony; (4) in awarding Patricia possession of the family dwelling; and (5) in awarding Patricia an excessive amount of child support.

The first issue to be addressed is whether the District Court erred in granting custody of Vickie to Patricia, thereby splitting the children contrary to their expressed wishes. Section 42-364, R. S. Supp., 1976, provides in part: "(1) In determining with which of the parents the children, or any of them, shall remain,

the court shall consider the best interests of the children, which shall include, but not be limited to:

"(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing;

"(b) The desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and

"(c) The general health, welfare, and social behavior of the children.

"(2) In determining with which of the parents the children, or any of them, shall remain, *the court shall not give preference to either parent based on the sex* of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other." (Emphasis supplied.)

The Nebraska cases are clear in holding that the mother and father have an equal and joint right to the custody of their children, and that custody shall be determined on the basis of the best interests of the child. Young v. Young, 195 Neb. 163, 237 N. W. 2d 135 (1976).

In this case, both children expressed the wish to live with their father rather than their mother. The children were clearly of an age of comprehension, as required by section 42-364, R. S. Supp., 1976, and their wishes appear to have been based on sound reasoning. Both believed that social activities their mother engaged in were either improper or unnecessary. The wishes of the children, however, are not dispositive of the issue. " 'While the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling.' " Miller v. Miller, 196 Neb. 146, 241 N. W. 2d 666 (1976). See, also, Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445 (1966). Thus, although the wishes of the children in this case should have been considered by the trial court,

they are not dispositive of what constitutes the best interests of the children.

In reference to the other factors listed in section 42-364 (1), R. S. Supp., 1976, the evidence indicates that the relationship of the children to each parent prior to the commencement of the action was good, although the children expressed their disapproval of their mother's social activities. There was no evidence of any serious conflict between the children and either parent. Both children stated that they felt they could talk to their father more easily than they could talk to their mother. The general health, welfare, and social behavior of the children appeared to be normal, although the boy's grades at school were, at best, average.

In Young v. Young, *supra*, the court listed several other factors which are relevant in determining the best interests of a child: Moral fitness of each parent; the environment offered to the child by the parent; the emotional relationship of the children and each parent; the age, sex, and health of the child; the attitudes of each parent toward the child; each parent's capacity to furnish care to the child; and whether the child's social relationships would be disrupted by one parent having custody rather than the other parent. In this case, applying these factors does not result in a clear conclusion that one parent, rather than the other, should have custody of the children.

A final factor to consider is that the children will be split between the parents as the decree now stands. Although this court has acknowledged that it is sound public policy to keep children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of the children when a marriage is dissolved; rather, the ultimate standard is the best interests of the children. Braeman v. Braeman, 192 Neb. 510, 222 N. W. 2d 811 (1974); Humann v. Humann, 180 Neb. 719, 144 N. W. 2d 723 (1966).

The trial court, in splitting custody of the children,

stated: "I hate to do this, but I'm going to split these children. I think the boy has definitely indicated that he wanted to be with his father. He's over 14, I think, that his counsel's indication here about, thought he could pick his own guardian. * * * as far as the girl is concerned, I think it's paramount that she be with her mother until she gets through maturity. I have some personal experience with that. I've been guardian, but have had to exercise guardianship rights of both boys and girls and I think that's that's very necessary that this girl get up to her maturity with the mother. They're both fit, and get up to age 16."

We call attention to section 42-364(2), R. S. Supp., 1976, which provides that "the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other." The trial court gave no reason why the wishes of the children should be ignored, and why the custody of the children should be split, other than his belief that Vickie should be with her mother until she reached maturity. The trial court did not find that Vickie's wish to be with her father was not based on sound reasons, or that Vickie was not of an age of comprehension.

On balance, we believe that the court should have placed custody of both children in the father. If this were done, the wishes of the children would have been followed, the children would not have been split, and the father, who was admittedly a good father and fit parent, and who financially is probably in a better position to support the children, would have custody. This court clearly has the power to modify awards granting custody of children to a parent, as marriage dissolution actions are tried de novo by this court on appeal. Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617 (1974). In this case the trial court's determination did not really turn on its accepting one version of the facts rather than another. The facts in this case

are largely undisputed, and simply present a question of law as to who is entitled to custody of the children. In this case we conclude that Eugene should be given the custody of both children.

Since we determine that Eugene should be awarded the custody of Vickie, it is obvious that the award of child support to Patricia must be vacated; and pursuant to the agreement of the parties, Eugene should be awarded possession of the house until the children reach their majority. The parties clearly agreed that whoever received custody of the children should receive possession of the house until the children are of legal age or self-supporting, at which time the equity in the house would be divided equally between them. The question then arises as to whether the award of alimony should remain the same, and whether the household goods should be awarded to Eugene rather than to Patricia.

The ultimate criteria in determining alimony is one of reasonableness. Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212 (1975). The questions of alimony and division of property may be considered together when a marriage is dissolved. Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126 (1975). In considering these questions, the court shall have regard for such factors as the circumstances of the parties, the duration of the marriage, the history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. § 42-365, R. S. Supp., 1976; Gregg v. Gregg, 193 Neb. 811, 229 N. W. 2d 546 (1975).

We believe that the issues of alimony and property settlement in this case can best be resolved by granting Eugene the house and household goods outright, and by ordering a property settlement which gives Patricia one-half of the equity in those items. Under this arrangement, Patricia is entitled to $6,000 on the house and to $550 on the household goods, the value

of these items having been established by evidence at the trial. The payment of the property settlement, as in the case of alimony payments, shall be made over a 5-year period in the same manner as set forth for alimony payments by the District Court. Payment in this manner allows the husband the means to pay the wife without selling property, an approach approved in prior cases. See Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618 (1975). We also reduce the award of alimony to $2,500, payable over 5 years in the manner set forth by the District Court. The sum total of the alimony and property settlement will then be $9,050, which will require Eugene to pay Patricia approximately $150 per month for the next 5 years. We find this to be a reasonable and fair amount, taking into account the circumstances of the parties and the history of their marriage. We note that under this arrangement Patricia will receive one-half the value of the house, although Eugene will have the burden of paying the outstanding $3,900 balance due on the house.

In awarding custody of Vickie to Eugene, we also grant reasonable visitation rights to Patricia as to both the minor children. We do not modify the provisions of the divorce decree relative to payment of attorney's fees and costs, nor the provisions relative to division of property of the parties other than the house and household goods.

We affirm the decree of the District Court as modified above.

AFFIRMED AS MODIFIED.

RICHARD SHEPOKA ET AL., APPELLEES, V. ED KNOPIK ET AL., APPELLANTS.
250 N. W. 2d 619

Filed February 16, 1977. No. 40730.

1. **Declaratory Judgments: Parties.** When declaratory relief is

sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.

2. ———: ———. In declaratory judgment actions, the presence of necessary parties is a jurisdictional matter, and one which the parties cannot waive.
3. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
4. **Municipal Corporations: Actions: Parties.** In an action involving the disbursement of county funds, the county has a great, if not an exclusive, interest, and is a necessary party.

Appeal from the District Court for Nance County: C. THOMAS WHITE, Judge. Reversed and remanded.

Philip T. Morgan of Morgan & Morgan, for appellants.

Norman Krivosha of Ginsburg, Rosenberg, Ginsburg & Krivosha and Douglas L. Curry, for appellees.

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

BRODKEY, J.

This is an appeal from a summary judgment entered by the District Court for Nance County in an action brought under the Nebraska Uniform Declaratory Judgments Act, sections 25-21,149 to 25-21,164, R. R. S. 1943. The sheriff and other officials of Nance County brought the action against the members of the Nance County board of supervisors, individually and in their official capacity as the county board of supervisors of Nance County, to obtain a declaration of their rights against that board and its members for its failure to pay to the plaintiffs a certain cost of living increase allegedly due them under a resolution of the board adopted on December 11, 1973, and later modified as to the effective date of such increase by a resolution adopted on December 17, 1974.

So far as disclosed by the record before us, only the defendants filed a motion for summary judgment; but after hearing, the court awarded summary judgment to the plaintiffs. No bill of exceptions has been filed in this case, and, according to an affidavit of the court reporter, no evidence was taken in the District Court. The parties entered into a stipulation of facts, which appears in the transcript, but there is nothing in the record before us to indicate that the stipulation of facts was offered and received in evidence at the hearing. The rule is well established that in order that a stipulation of facts may be considered on appeal, such stipulation must be identified and offered in evidence on the trial of the case and preserved in a bill of exceptions. Higgins v. Postal Life & Cas. Ins. Co., 161 Neb. 278, 73 N. W. 2d 175 (1955).

Nevertheless, we conclude that the disposition of this appeal involves a question of law, rather than questions of fact. It is obvious from the face of the petition that Nance County was not made a party defendant in this action for declaratory judgment. Defendants contend on appeal, as they did in their answer and also in their motion for a new trial, that the County of Nance is a necessary party in this case. We agree, and reverse and remand. This court has held that an action against the board of supervisors of the county does not make the action one against the county. Jameson v. Plischke, 184 Neb. 97, 165 N. W. 2d 373 (1969). To make Nance County a proper party defendant in this action it would be necessary to comply with the requirements of section 23-101, R. R. S. 1943, which provides: "Each county, established in this state according to the laws thereof, shall be a body politic and corporate, by the name and style of The county of ————————, and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or equity, or

other place where justice shall be administered." It is clear that Nance County was not joined as a party defendant in this case.

We now consider whether Nance County was a necessary party to the action involved herein. Section 25-21,159, R. R. S. 1943, provides that when "declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." Nebraska cases are clear in holding that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceedings. Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801 (1949); Berigan Bros. v. Growers Cattle Credit Corp. of Omaha, 182 Neb. 656, 156 N. W. 2d 794 (1968); Marsh v. Marsh, 173 Neb. 282, 113 N. W. 2d 323 (1962); Haynes v. Anderson, 163 Neb. 50, 77 N. W. 2d 674 (1956). In Redick, the court found that a party to a contract which was to be interpreted in the declaratory judgment action was a necessary party to the action, and must be impleaded before the action could proceed. The court noted that the presence of necessary parties is a jurisdictional matter, stating: "* * * we have held that the presence of necessary parties was jurisdictional in this class of cases, and that is a matter which the parties cannot waive." In Redick the court followed prior cases in stating that declaratory judgment actions are designed to terminate a controversy so far as it relates to the parties, and courts should, under most circumstances, dismiss such an action without prejudice whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, had not been impleaded. 151 Neb. at 448.

In City of Omaha v. Danner, 186 Neb. 701, 185 N. W. 2d 869 (1971), the court stated: "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have

an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience." Also, in Ohmart v. Dennis, 188 Neb. 260, 196 N. W. 2d 181 (1972), we held that indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render a final decree without affecting their interests.

Under the foregoing rules, the County of Nance is undoubtedly an indispensable party in this case. The question is whether the County of Nance not only has an interest in the subject matter of this case, but also has an interest of such a nature that a final decree cannot be made without affecting its rights, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. City of Omaha v. Danner, *supra*. The County of Nance would certainly appear to have an interest in the result of this case, for it, ultimately, pays the salaries of its officials, and the outcome of this case will determine whether salaries for 1975 shall include or exclude a cost of living increase. Thus the relief granted in this case by the District Court, which included ordering the defendants to pay the cost of living increase in 1975 pursuant to the first resolution, affects the amount of money the County of Nance must pay to its officials in salary. The obvious result of plaintiffs' success in this action is the requirement that they be paid by the County of Nance, through the board, the salaries to which they are entitled.

The case of Hall v. United States Nat. Bank, 128 Neb. 254, 258 N. W. 403 (1935), is enlightening. That case involved an action by the State Treasurer against certain banks which, because of the treasurer's failure to give a new official bond on his second term, refused to honor his checks. The treasurer prayed for a declaration that he was a de jure officer. The action was dis-

missed, because the court considered that both the state and the surety should be bound by the judgment and yet had not been made parties.

Also persuasive on the question before us is the case of Kilroy v. O'Connor, 324 Mass. 238, 85 N. E. 2d 441 (1949), which involved the refusal of a county treasurer to pay the salary of a defendant county commissioner, except on orders drawn on him and signed by the remaining county commissioners, because the treasurer doubted the validity of defendant's appointment. The county treasurer brought an action for a declaratory decree adjudicating the defendant's right to hold the office of county commissioner. In its opinion the court stated: "The county of Bristol is not a party. The due and proper administration of the business of the county by the board of county commissioners and the disbursement of county funds in accordance with law are matters in which the county has a great, if not an exclusive, interest. The suit directly concerns the management of the affairs of the county and the payment of its funds. It is plain that the county should have been made a party. Bauer v. Mitchell, 247 Mass. 522, 525, 526. Martin v. Smith, 280 Mass. 101, 106. Home Development Co. v. Dupre, 323 Mass. 98, 99-100." In discussing the Massachusetts declaratory judgment law, which is similar to the Nebraska act, the court also stated: "One of the principal purposes of the declaratory judgment law, G.L. (Ter. Ed.) c. 231A, is to settle completely the controversy submitted for decision. To that end, it is provided in § 8 that 'When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.' This purpose of the declaratory procedure is further emphasized by § 3, which provides that 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 proceedings or for other sufficient reasons.' It was said in Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Association of Greater New York, Inc., 289 N. Y. 82, 88, that a declaratory action serves a legitimate purpose where all the parties in interest are before the court but 'As to persons who are not parties a declaratory judgment would be a mere academic pronouncement without juridical consequence, but which might be embarrassing if attempt is made thereafter to enforce these rights in legal proceedings to which they are parties. A court may, and ordinarily must, refuse to render a declaratory judgment in such case.' The absence of the real parties in interest prevents the court from entering a decree which will be adequate and effective in finally settling the question as to the right of the defendant to occupy the office of county commissioner."

In this regard it should also be noted that section 25-323, R. R. S. 1943, provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." To the same effect, see, Midwest Laundry Equipment Corp. v. Berg, 174 Neb. 747, 119 N. W. 2d 509 (1963); Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533 (1944).

Our conclusion is, therefore, that the County of Nance was a necessary and indispensable party to the declaratory judgment action filed by plaintiffs, and that under the authorities cited above, the county should have been impleaded, or the District Court should have ordered it to be made a party to the action.

We reverse the judgment and remand the cause for the purpose of affording an opportunity to add the County of Nance as a party defendant, if it is desired

that this be done. In the event of a trial thereafter on the merits, a proper bill of exceptions could be prepared and included in the record in the event of a subsequent appeal to this court.

In view of our disposition of this appeal we need not reach the other issues raised by the defendants.

REVERSED AND REMANDED.

HARRY R. ALWARD, APPELLEE AND CROSS-APPELLANT, V. UNITED MINERAL PRODUCTS COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH MADISON SOYA PRODUCTS, INC., A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.

250 N. W. 2d 623

Filed February 16, 1977. No. 40749.

1. **Contracts: Time.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
2. ———: ———. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
3. **Contracts: Intent.** No implied contract may be found unless the evidence shows mutuality of intent.
4. **Contracts: Accounting: Burden of Proof.** The party seeking an accounting has the burden of establishing both the contract upon which accounting is sought and his right to credit for disputed items.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions to dismiss.

C. Gregory H. Eden of Kutak Rock Cohen Campbell Garfinkle & Woodward, for appellant.

Joseph R. Moore, for appellee Alward.

Heard before SPENCER, NEWTON, and BRODKEY, JJ., and

HASTINGS, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an action for accounting brought by Harry R. Alward, the appellee, against United Mineral Products Company, the appellant, Central States Phosphate, Inc., and Madison Soya Products, Inc., codefendants. The District Court for Douglas County, Nebraska, rendered judgment for $2,644.44 in favor of the appellee and against the appellant and dismissed the action as to the remaining two codefendants. United Mineral Products Company has appealed, assigning as error the finding of any liability against it. Appellee has cross-appealed claiming that the judgment should have been for a larger amount. We reverse the judgment and dismiss the cross-appeal.

The action arises from an oral contract by which the appellant employed the appellee to act as its plant manager during the period from March 20, 1972, until appellee resigned on January 22, 1975. Appellee, who had training and experience as an industrial engineer, was responsible for the rate of production, quality of the product, and total plant responsibility for the operation of appellant's business of mining, processing, and selling phosphate products. When the contract was made, appellee was to receive a salary starting at $18,000 per annum, to be increased to the rate of $19,000 per annum after 6 months; this amount was subsequently increased to the amount of $20,000 per annum. All amounts of salary were paid and there is no issue concerning salary and the payment thereof. The appellant also promised to pay an incentive bonus of 10 percent of any reduction achieved in plant production costs, payable quarterly, the first quarter to commence 6 months later; this bonus was to be calculated from a formula to be determined by Harold Myers, vice-president of the appellant, and agreed to by the appellee.

No formula was ever proposed or established by agreement of the parties; this failure was due in part to the inability of the parties to determine or agree upon the production costs incurred in the area of appellee's responsibility. After the end of the first bonus quarter and up to the quarter commencing April 1, 1974, appellee and appellant's officers had meetings to establish the amount of such bonus; on each occasion, this amount was fixed at the sum of $1,000, except for one period of two quarters when appellee requested and received a total of $2,500. Appellee testified he was told that such amounts were paid subject to the application of the formula when established and that if a later calculation showed he was entitled to a greater amount, he would receive an additional payment. Appellant's officers testified that such payments were an indication of their satisfaction with appellee's efforts at performance even though no cost reduction was in fact accomplished. When appellee resigned, he demanded the payment of a bonus for the final three quarters of 1974 and the period from January 1, 1975, to the date of his resignation on January 22, 1975, still complaining about the failure of appellant to prepare and submit the formula. Appellant offered the sum of $1,000 but appellee refused the tendered check.

Appellee's amended petition alleged a contract of employment and fraud in the concealment of the amounts due to him on account of such incentive bonus. The prayer was for an accounting of the sums due him and judgment for the amount thereof. Appellant's answer denied such allegations generally.

In the memorandum of the trial court, after reciting the evidence relating to the determination and payment of the bonus to appellee, the trial court made the following finding: "From the foregoing and in particular from the fact that the amount of quarterly payments at $1,000.00 (with one small deviation) bore absolutely no relationship to costs of plant production or

any other criteria to determine the amount, it is the finding of the court that the parties by their actions abandoned reduction in plant production costs as the basis for determining an incentive bonus for the plaintiff and substituted in its stead a $1,000.00 quarterly incentive bonus." The appellant contends that the evidence does not support this finding and the appellee contends that the court should substitute a method for determining comparative production costs according to their relationship to profits realized by appellant.

There is no evidence in the record of any agreement between the parties to substitute a bonus of $1,000 quarterly for the original cost reduction percentage. On the contrary, during the entire period of appellee's employment and even during the trial of this action, efforts were being made to ascertain the cost of production to which the percentage should be applied. Each side appears to have made some proposals for the determination of this amount, but there was never an agreement between them. Without such agreement, no formula could ever become effective. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. 17 C. J. S., Contracts, § 49, pp. 702, 703. There can, therefore, be no express contract between the parties here. If the finding of the trial court is taken as a finding of an implied contract, it likewise is not supported by the evidence. There is no evidence of a mutual intent, without which no implied contract may be found. Acton v. Schoenauer, 121 Neb. 62, 236 N. W. 140.

The foregoing is likewise applicable to the contention made by the appellee on his cross-appeal. His claim of a larger amount of bonus arises from his calculation

of the proportion of cost to profit, without regard for any actual reduction in production costs. The lack of any mutual agreement to this method is a complete bar to its use to calculate an amount of recovery. The cross-appeal is dismissed.

The appellee has failed to carry his burden of establishing the contract upon which he seeks the accounting and his right to credit for disputed items. Barthuly v. Barthuly, 192 Neb. 610, 223 N. W. 2d 429. For this reason, his action must fail and it should be dismissed.

The judgment of the trial court is reversed and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM RALPH WEBB, APPELLANT.
250 N. W. 2d 625

Filed February 16, 1977. No. 40761.

Criminal Law: Evidence: Verdicts: Courts. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, 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.

CLINTON, J.

The defendant was found guilty by a jury of the crime of grand larceny, which, by statutory definition, is the theft of property of the value of $300 or upwards. § 28-506, R. R. S. 1943. Defendant was sentenced to a term of 18 months to 6 years in the Nebraska Penal and Correctional Complex. On appeal to this court he asserts the evidence is insufficient to sustain the jury finding. We affirm.

The specific argument is that the evidence is insufficient to have permitted the jury to find that the value of the property stolen was upwards of $300.

A brief summary of the pertinent evidence is as follows. On the day of the crime the defendant and four companions drove to the Crossroads Shopping Center in the car of one Berry with the intention of "ripping off" a store. While Berry parked the car and waited, the defendant and two of the others got out of the car and in a few minutes returned to the car with an armload of leather and vinyl coats.

A clerk in Natelson's, Inc., heard someone say, " 'There they go,' " and turned to observe two men, arms loaded with coats, departing just a few steps outside the door of the store. She also noted that a rack of coats near the door had been partially emptied. Coats on the rack were of two general types, leather and vinyl.

On the night before the theft the manager of the store had loaded the rack in the course of rearranging merchandise. He testified that about ½ to 1 hour before the theft he observed that the rack was full of coats. Immediately after the theft there was an empty 2-foot space on the rack at the end nearest the door. He estimated that about a dozen coats were missing. He testified, although not positively, that the missing coats were leather. The value of the leather coats was $59.90 each and the vinyl coats $30 to $35 each. The clerk testified that the price tag on the vinyl coats was

$29.90. On cross-examination the manager testified that sometimes customers try on coats and do not return them to the proper place and that if this had occurred his estimate of the number of missing coats might be wrong.

Berry, the owner of the car, testified for the State. He was present when the loot was divided and he stated that 14 or 15 coats were taken, some leather and some vinyl. He received four or five coats, one of which was leather. The remaining coats were divided among three other participants.

The jury was instructed on the elements of the crime, including the element of value in excess of $300, and that such elements must be proved beyond a reasonable doubt. The jury returned a finding of value substantially in excess of $300.

It is apparent that the witness who was in the best position to testify on the number of coats was the accomplice Berry. Even if all the coats had been vinyl, the evidence was sufficient to support a finding of a value in excess of $300. It was for the jury to determine whether or not they believed Berry's testimony. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Turner, 190 Neb. 261, 207 N. W. 2d 382.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER L. WESTERLUND, APPELLANT.
250 N. W. 2d 627

Filed February 16, 1977. No. 40767.

1. **Courts: Criminal Law: Sentences: Judges.** While this court has

recognized that all participants in one crime, or series of related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances.

2. **Criminal Law: Sentences: Appeal and Error.** 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.

Douglas McArthur, 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 the defendant's sentence is excessive.

The charge against the defendant arose out of a break-in at the Reddish Brothers Elevator at Rokeby, Nebraska, on September 26, 1975. Involved in this incident, other than the defendant, who was then 18 years old, was another 18-year-old, and two brothers aged 14 and 15, who were processed through the Separate Juvenile Court.

The defendant was charged with two counts of burglary. On February 12, 1976, the defendant entered a plea of guilty to one count of burglary. Pursuant to a plea bargain, the second count was dismissed. On March 17, 1976, the District Court sentenced the defendant to a term of 3 to 5 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the District Court.

The defendant contends that his sentence is excessive because one of his coactors, the other 18-year-old, received a sentence of 2 years' probation from a different judge. While this court has recognized that all partici-

pants in one crime, or series of related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances. State v. Burkhardt, 194 Neb. 265, 231 N. W. 2d 354 (1975).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). Our review of the record reveals no abuse of discretion by the District Judge in sentencing the defendant as he did, even though a different District Judge had given the defendant's coactor a sentence of 2 years' probation.

The presentence report shows that the defendant admitted to having committed approximately 40 burglaries and 20 larcenies. The amount of merchandise taken in these thefts was estimated by police at $25,000. The defendant, along with others, engaged in theft on a regular and systematic basis. Both residences and business establishments were robbed. The sole motivation for this thievery was to obtain money and property for the personal benefit of the group's members. The defendant was not a mere passive follower in this group, but described himself as the leader, or "president" of the group. The presentence report also shows that the defendant has a previous record of shoplifting, fighting, and possession of marijuana. The presensentence report shows that the defendant possesses a negative attitude and shuns all efforts aimed at his improvement.

The presentence report for the other 18-year-old involved in this crime indicates that he had never been in trouble prior to meeting the defendant. He had no prior record. He was not a leader in the defendant's group, but only occasionally involved. Because of strong support from his parents, family, and friends, his chances for rehabilitation without confinement appear to be excellent.

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

AFFIRMED.

RUSSEL GOLGERT, GUARDIAN, APPELLANT, V. HOWARD W. SMIDT ET AL., APPELLEES.
250 N. W. 2d 628

Filed February 16, 1977. No. 40805.

1. **Deeds: Property: Undue Influence: Burden of Proof: In an** action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence to overcome a presumption of undue influence shifts to the defendants.
2. **Deeds: Property: Undue Influence: Evidence.** To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor.
3. **Deeds: Property: Undue Influence.** The mere existence of a confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her.
4. **Deeds: Statutes: Undue Influence.** A presumption of undue influence is not a presumption contemplated by section 27-301, R. R. S. 1943, and the burden of proof on the issue of undue influence remains on the plaintiff.

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

Conway & Connolly and Stephen G. Lowe, for appellant.

Dunmire & Blessing, for appellees.

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

NEWTON, J.

This is an action to set aside two deeds each conveying a 160-acre tract of land to the defendants. Walter Golgert died March 31, 1967. Walter and his wife Alice held all their property in joint tenancy. Except for some accumulation during the marriage, it had all been derived from Alice' side of the family. Alice conveyed two tracts of land to the defendants Marjorie and Howard Smidt who were, and had been for several years, farm tenants of the Golgerts. Plaintiff charges that these conveyances were the result of undue influence. The District Court entered judgment for the defendants. We affirm that judgment.

Alice Golgert had no blood relatives living except the Korgans who appear to be second cousins. There were some nephews and nieces by marriage including Russel Golgert who brings this action as her guardian.

The evidence indicates that Alice was grief stricken after her husband's death; she spoke of him as though he were still living and would get lost when driving. In February or March 1969, she had a stroke, spent some time in a hospital and a rest home, but eventually she returned to her own home for about 3 years. In February 1973, she had deteriorated physically and mentally to the point where she was placed in a state hospital and a guardian appointed for her. At this time she had about $67,000 in bonds and certificates of deposit, $20,000 in a checking account, her home, and 240 acres of farmland. She had previously conveyed 320 acres to the defendants and 80 acres to Claire Halloran, a friend.

About 60 days after her husband's death Alice consulted Joseph Helmann, a lawyer, about making a will. In all, she executed four wills which will be referred to by number in the sequence in which they were exe-

cuted. Will No. 1, executed about June 1, 1967, left $5,000 to a cemetery association; 80 acres to Claire Halloran; 80 acres each to Raymond Korgan, Carolyn Korgan, and Glen Korgan; directed the sale of her remaining real estate and the distribution of the proceeds to 10 of the Golgerts, to Van Derhoff, and to Harold Korgan in equal shares. The residue was left one-half to the defendants and one-half to Raymond, Carolyn, and Glen Korgan. On June 16, 1967, she executed will No. 2. This will was practically identical with the first except that she left 320 acres, the land in question, to the defendants and named the 10 Golgerts as residuary legatees. Howard Smidt took her to see Helmann on every occasion and in this instance Helmann talked to Alice privately. Alice told Helmann she was completely dependent on the Smidts, had to do something for them, and that "this is the way we want to get it done." Helmann testified that she had testamentary capacity but thought she was easily influenced and that Smidt had exercised such influence as to will No. 2. On July 25, 1967, Alice made an appointment with Helmann and will No. 3 was executed. She did not seem to understand the meaning of a codicil and one was not made. This will was practically the same as No. 2 except she gave one-half of her household furniture and personal effects to Howard Smidt and one-half to Russel Golgert.

Mr. Helmann further stated that following her husband's death Alice had about $68,000 in bonds, $29,000 in certificates of deposit, and a checking account of $9,195.71 in addition to the real estate heretofore mentioned. Under will No. 1 defendants were to receive about $49,000 in cash, under will No. 2, real estate valued at $138,600, and under will No. 3, the real estate referred to plus the one-half of the furniture and personal effects. Alice had testamentary capacity when all three wills were made; she knew what was going on; and the wills were as she wanted them.

In the fall of 1967 Alice consulted attorney William G. Cambridge. She said she was dissatisfied with her will, wanted a new one prepared, and did not want to go back to Helmann because he had been named executor in the three previous wills and she wanted that changed. She also said she had heard of wills being broken and wanted to be sure the Smidts got the land devised to them. Cambridge explained all requirements to break a will, including undue influence, and she denied she was subject to undue influence. She stated she had no blood relatives closer than cousins; she explained her relationship to the Korgans and Golgerts, that Hallorans were not related; she said the property came from her side of the family; and she went through will No. 3 with Cambridge item by item and explained the changes she desired. She was also concerned about estate taxes. Cambridge explained the tax consequences of a will, a trust, a gift of the land to defendants, and a gift with a provision for an annuity. She wanted something from the property while she lived and decided to give the 320 acres to defendants by deed and take an annuity in return, one deed to be executed in 1967 and the other in 1968 to increase the gift-tax exemption from $6,000 to $12,000.

Alice listed all her property consisting of 640 acres of land, $36,000 in bonds, $28,000 in certificates of deposit, and her home. She had been receiving about $5,000 in annual rent from the land to be given the Smidts and decided that should be the amount to be paid during her lifetime under the annuity agreement. Mortgages were to be taken to secure the annuity. After several conferences will No. 4, the deeds, mortgages, and annuity agreement were prepared and executed. Will No. 4 left all personal and household effects, including jewelry, clothing, automobiles, furniture, furnishings, silver, books, and pictures to Erna Golgert and Marjorie A. Smidt in equal shares. She reduced the cemetery association bequest to $3,500, continued the devises

to Claire Halloran and Raymond, Carolyn, and Glen Korgan, devised 160 acres to defendants (the other 160 acres had then been deeded), and devised the residuary estate in equal shares to Russel Golgert, Lois Golgert Van Derhoff, Claire Halloran, Marjorie Smidt, and Harold, Raymond, Carolyn, and Glen Korgan, and directed payment of inheritance and estate taxes out of the residuary estate. Howard Smidt was named executor. Each of the four wills also provided for devises and bequests over in the event any of the named beneficiaries predeceased the testator.

The record also indicates that at times Alice made cash gifts to Howard Smidt and had a joint account with him from which he was to pay her share of farm expenses. He had been a tenant of Alice and her husband since 1945 and she gave him a 10-year-crop-share lease. There are numerous letters in the record written by Alice to the Smidts through 1970 and 1971 which clearly show her close relationship to the Smidts, occasional calls on them for assistance, and her love and respect for them. The letters show a realization that her husband was deceased and do not indicate an uncertain or bewildered mind.

A friend who frequently drove Alice out to the farm stated that on one occasion he commented that one 80-acre tract laid nice and she said that was to go to Claire Holloran and if he would take her downtown, she would have the deed fixed up. They went to the office of Jerry Whelan, a lawyer, and the deed was prepared and delivered. Thus Claire Halloran obtained the land devised to her in each of the four wills.

Attorney Cambridge testified he had never done any work for defendants but that Howard Smidt was present when the annuity agreement was discussed as it affected him. Cambridge sized up Alice Golgert as a strong-willed woman who knew her property and to whom she wanted to give it. She was not the sort of person to be pushed around but had a strong personality

and who fully understood his various explanations regarding taxes and the various methods he outlined for the disposition of her property.

It is apparent that the evidence is somewhat conflicting, but it is noted that the defendants are not the only ones to whom Alice deeded land and her choice of beneficiaries was quite stable except for some variance in the size and nature of the bequests. Also, she was fully aware of her relationship to the Korgans, the Golgerts, Claire Halloran, and the defendants. The defendants appear to have been closer to her, and more helpful, than any of the others. Her actions and her reasoning do not appear to have been abnormal or unusual. Is it unreasonable for one without any close kin to wish to reward a faithful tenant of 22 years standing?

Plaintiff charges that a confidential relationship existed between Alice Golgert and the defendants. Assuming this to be correct, it would mean that plaintiff established a prima facie case and although the burden of proof did not shift, the burden of going forward with the evidence to overcome a presumption of undue influence shifted to the defendants. See, Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645; Guill v. Wolpert, 191 Neb. 805, 218 N. W. 2d 224. To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor. See Guill v. Wolpert, *supra*. The mere existence of a confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relation-

ship influenced her. See Gaeth v. Newman, 188 Neb. 756, 199 N. W. 2d 396. A presumption of undue influence is not a presumption contemplated by section 27-301, R. R. S. 1943, and the burden of proof on the issue of undue influence remains on the contestant. See McGowan v. McGowan, *ante* p. 596, 250 N. W. 2d 234.

An action based on undue influence is an action in equity and is to be tried de novo on appeal. On a thorough review of the record we conclude that plaintiff has failed to sustain his burden of proof and that, on the contrary, the preponderance of the evidence favors the defendants. Alice had the able advise of two different attorneys. Both concede that she had testamentary capacity, knew what was going on, was cautioned in regard to undue influence, and that the wills were as she wanted them. Similar testimony was given by attorney Cambridge in regard to the deeds.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH SINSEL, APPELLANT.
250 N. W. 2d 632

Filed February 16, 1977. No. 40818.

Criminal Law: Sentences: Appeal and Error. 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: SAMUEL VAN PELT, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, 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.

WHITE, C. J.

The defendant was originally charged with burglary and receiving stolen property. The defendant entered a plea of no contest to the burglary charge. Pursuant to a plea bargain, the charge of receiving stolen property was dismissed. On January 26, 1976, the District Court ordered the defendant committed to the Nebraska Penal and Correctional Complex for a 90-day evaluation. On April 16, 1976, the District Court sentenced the defendant to a term of 2 to 4 years, and was given credit for 80 days served in custody prior to sentencing, in the Nebraska Penal and Correctional Complex.

The defendant argues on appeal that under the facts his sentence is excessive. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Holloman, *ante* p. 139, 248 N. W. 2d 15 (1976). The defendant contends that the District Court abused its discretion when it failed to follow the recommendation of the Nebraska Penal and Correctional Complex evaluation team that the defendant be placed on a highly structured program of probation, and instead sentenced him to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex.

The District Court also heard a report from an officer of the adult probation office recommending against probation in this case. The record shows that the defendant was arrested, detained, or fined for: Receiving stolen property in May 1971; burglary in June 1971, for which he was placed on 2 years' probation; larceny in November 1971; petit larceny in December 1971, for which he was fined $50 and costs; burglary in 1972, which was amended to petit larceny, for which he was sentenced to 30 days in the county jail; and petit larceny in June 1974, for which he was fined $65.

It is clear from the record that the District Court carefully considered, weighed, and analyzed all the relevant evidence before making its determination that incarceration was preferable over probation in this case.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CINEMA 16, INC., APPELLANT.
250 N. W. 2d 633

Filed February 16, 1977. No. 40848.

1. **Criminal Law: Appeal and Error.** Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal.
2. **Criminal Law: Appeal and Error: Instructions.** An assignment of error with regard to failure to give an unrequested instruction may not be sustained unless it is shown that the instructions given were such as to cause a miscarriage of justice.
3. **Criminal Law: Appeal and Error: New Trial.** Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Walter J. Matejka, for appellant.

Paul L. Douglas, Attorney General, Herbert M. Fitle, and Gary P. Buchhino, for appellee.

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

McCOWN, J.

Cinema 16, Inc., was charged in the municipal court of Omaha on three counts of distribution of obscene

materials in violation of section 28-926.17(1), R. R. S. 1943. Defendant was found guilty by a jury on all three counts and fined $1,000 on each count. An appeal was taken to the District Court in accordance with section 29-611 et seq., R. R. S. 1943. The District Court affirmed the convictions but noted in the judgment that the instructions used by the municipal court could not be found and had not been presented to the District Court for review because of their unavailability. The defendant has appealed to this court contending that the absence of the municipal court instructions at the time the District Court entered its judgment on appeal necessitates the reversal of the convictions. We disagree.

The record shows that in the municipal court the defendant submitted two requested instructions which were in the alternative, and that the court and parties agreed that one of those instructions would be given. The record fails to show that any objections were made to the instructions given in the municipal court, or that there was any objection to the failure to give any requested instruction. Neither was any issue involving the giving of instructions ever raised in the District Court. The instructions actually given by the municipal court were later located. They were filed in the District Court on May 26, 1976, some 6 weeks after the judgment on appeal had been entered. Those instructions are now a part of the record in this court. No objections have yet been made to any of those instructions. Neither has the defendant attempted to establish any prejudice which may have resulted.

Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. O'Kelly, 193 Neb. 390, 227 N.W. 2d 415. A review of the instructions given fails to establish that they were erroneous in any respect. An assignment of error with regard to failure to give an unrequested instruction may not be sus-

tained unless it is shown that the instructions given were such as to cause a miscarriage of justice. State v. Fischer, 194 Neb. 578, 234 N. W. 2d 205.

Even if there were any validity to defendant's claim of error, there was no motion for a new trial in the District Court. Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed by this court. State v. Svoboda, 194 Neb. 663, 234 N. W. 2d 901.

The judgment is affirmed.

AFFIRMED.

SHELDON I. BARNETT ET AL., APPELLEES, IMPLEADED WITH DARLENE J. CLARK, APPELLANT, V. MIKE BOYLE, ELECTION COMMISSIONER OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.
250 N. W. 2d 635

Filed February 16, 1977. No. 40851.

1. **Legislature: Political Subdivisions: Apportionment.** The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function.
2. **Public Officers and Employees: Due Process: Constitutional Law.** Procedural due process is required only when the officer to whom the power has been delegated is required to decide adjudicative facts.
3. **Legislature: Political Subdivisions: Apportionment.** The formation of representative districts in state government is normally a legislative function.
4. **Constitutional Law: Legislature: Due Process.** There is no constitutional due process requirement of notice and hearing applicable to legislative matters.
5. **Constitutional Law: Legislature: Schools and School Districts.** In changing from an election-at-large to an election by district system, the Legislature may provide for staggered terms and allow incumbent members of a board of education to serve until their terms expire. Such legislation does not create an invidious discrimination between classifications of voters and does not

deny the equal protection of the laws to electors in odd-numbered districts who will be represented by hold-over members of the board of education during the transition period.

6. **Statutes: Constitutional Law.** The 1975 amendments to section 79-1003, R. R. S. 1943, are constitutional.

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

Verne Moore, Jr., Dwight J. Moore, and Paul F. Peters of Moore, Moore & Peters, for appellant.

Donald L. Knowles, John Q. Powers, and Kenneth B. Holm, for appellees Boyle et al.

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

BOSLAUGH, J.

Prior to 1975, the members of the board of education of the Omaha School District were elected at large by the electors residing in the district. In 1975 the Legislature amended section 79-1003, R. R. S. 1943, effective January 1, 1976, to provide that the members of the board of education in a Class V district should be elected by districts. This action was brought to obtain a judgment declaring unconstitutional the 1975 amendment and the plan for the division of the Omaha School District into districts. The trial court sustained the motion for summary judgment filed by the defendant Mike Boyle, the Election Commissioner of Douglas County, Nebraska, and dismissed the action. The plaintiffs appeal.

L. B. 423, the 1975 amendments to section 79-1003, R. R. S. 1943, provided the school district should be divided into twelve numbered districts "of compact and contiguous territory and of as nearly equal population as may be practical" by the election commissioner of the county in which the greater part of such district was situated. The defendant Boyle divided the district in accordance with the requirements of the statute

and numbered the districts in accordance with the system used to number the wards in Douglas County.

The plaintiffs contend that the absence of any provision in the statute for notice and hearing prior to the division of the school district into districts for the election of board members made L. B. 423 invalid. The division of the school district into districts for the election of board members was essentially a ministerial act and was legislative in nature rather than quasi-judicial.

The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. Procedural due process is required only when the officer to whom the power has been delegated is required to decide adjudicative facts. School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301.

The formation of representative districts in state government is normally a legislative function. Sincock v. Duffy, 215 F. Supp. 169, 183, affirmed sub nom. Roman v. Sincock, 377 U. S. 695, 84 S. Ct. 1449, 12 L. Ed. 2d 620. Districting is usually performed by the legislative branch of government but in local matters the duty is frequently delegated to local boards and commissions or officials. There is no constitutional due process requirement of notice and hearing applicable to legislative matters. Superior Oil Co. v. Federal Power Commission, 322 F. 2d 601.

L. B. 423 further provided that incumbent members of the board of education would serve until the expiration of their terms. In 1976 and each 4 years thereafter, one member would be elected from each of the even-numbered districts. In 1978, and each 4 years thereafter, one member would be elected from each of the odd-numbered districts.

Section 79-1003, prior to the 1975 amendment, provided for 4-year terms with six members to be elected

at each general election. Thus, during 1977 and 1978, the board of education will consist of six members who were elected at large in 1974 and six members elected from even-numbered districts in 1976. After 1978 all members will have been elected from the districts established under section 79-1003, R. S. Supp., 1976.

The plaintiffs Sheldon I. Barnett and Thelma H. Barnett reside in District 1. The plaintiff Darlene J. Clark resides in District 5. Since the plaintiffs reside in odd-numbered districts they did not vote for any member of the board of education in 1976. Because of the residence of the members who were elected in 1974, during 1977 and 1978 there will be no members residing in Districts 1, 5, and 7; two members will be residents of District 4; three members will be residents of District 10; and one member will be a resident in each of the other 7 districts.

The plaintiffs contend that they were disfranchised by L. B. 423 and will be deprived of the same quality of representation and voice in school district affairs as residents in other districts; that L. B. 423 serves no compelling state interest; and that they have been denied equal protection of the laws. The plaintiffs rely primarily upon Kramer v. Union Free School Dist., 395 U. S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583.

The Kramer case involved a New York statute which limited the electors in certain school district elections to the owners or lessors of taxable real estate or the parents or custodians of children enrolled in the local public schools. The United States Supreme Court held that this statute denied the equal protection of the law to electors who would otherwise be qualified to vote in the school elections and the statute was not required to satisfy a compelling state interest.

Unlike the statute involved in the Kramer case, L. B. 423 does not disfranchise the plaintiffs. They will be eligible to vote for members from their districts in 1978,

and in the meantime they will be represented by members who were elected at large in 1974. The fact that L. B. 423 provides for staggered terms with one-half of the members to be elected at each general election does not establish a classification which results in invidious discrimination.

In Pate v. El Paso County, Texas, 324 F. Supp. 935, affirmed, 400 U. S. 806, 91 S. Ct. 55, 27 L. Ed. 2d 38, a redistricting plan was held valid although voters who would have been entitled to vote at the next election were transferred to districts in which they would not be entitled to vote until the second following election. In rejecting a contention that these voters had been denied the equal protection of the laws, the court noted the provision for staggered terms insured there would be some continuity and experience in the membership of the county board thereby providing for more efficient and effective county government.

In Legislature of the State of California v. Reinecke, 110 Cal. Rptr. 718, 516 P. 2d 6, a similar case involving the reapportionment of the California Legislature, the California Supreme Court upheld a plan providing for an election in only the even-numbered new senatorial districts in 1974. The court stated: "These inequalities among groups of electors are the inevitable byproduct of reapportioning a legislative body whose members are elected for staggered four-year terms. Since these inequalities flow directly from provisions of the California Constitution, we are not free to obviate them unless they constitute invidious discriminations violative of the equal protection clause of the fourteenth amendment to the Constitution of the United States. * * * The state may rationally consider stability and continuity in the Senate as a desirable goal which is reasonably promoted by providing for four-year staggered terms. The resulting inequality among electors is limited to the two-year period following reapportionment and results in even less temporary disenfranchise-

ment than the up to four-year disenfranchisement that may be imposed on residents who move into a senate district or who become of voting age shortly after an election has taken place. To obviate the inequality would substantially interfere with the orderly operation of the four-year staggered terms system after every reapportionment. We conclude that adherence to staggered terms following reapportionment involved no invidious discriminations." See, also, Visnich v. Sacramento County Board of Education, 37 Cal. App. 3d 684, 112 Cal. Rptr. 469.

In Ferrell v. State of Oklahoma ex rel. Hall, 339 F. Supp. 73, an action involving the reapportionment of the Oklahoma State Senate, the court said: "Plaintiffs claim that it is invidiously discriminatory for the State Legislature to provide that citizens living in certain geographic areas of the State of Oklahoma, who last voted for a Senator in 1968, and who will next vote for a Senator in 1974, is untenable. During the two year transitional period in changing from the court-ordered apportionment plan of 1964 to the constitutional apportionment plan of 1972, such situations are unavoidable if four year overlapping terms are to be provided as required by the State Constitution — and to do so does not offend the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Stout v. Bottorf, 249 F. Supp. 488 (D. C. Ind. 1965); Reynolds v. State Election Board, 233 F. Supp. 323 (W. D. Okl. 1964)."

While it is not necessary to find a compelling state interest, because L. B. 423 makes no invidious discrimination between classes of electors, there is a legitimate purpose in providing for continuity in the membership of the Omaha School Board. The transition period involved in changing from an election-at-large to a district system is only a 2-year period. During the transition period the voters in the odd-numbered districts

will be represented by the members who were elected at large at the general election in 1974.

We conclude that section 79-1003, R. S. Supp., 1976, and the plan for the division of the Omaha School District into voting districts, are not unconstitutional. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSIE L. STAHL, APPELLANT.
250 N. W. 2d 639

Filed February 16, 1977. No. 40859.

1. **Criminal Law: Sentences: Probation and Parole: Appeal and Error.** This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.
2. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Robert W. Smith, 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.

WHITE, C. J.

The defendant was charged with assault with intent to kill, wound, or maim, assault with intent to inflict bodily injury, and assaulting or resisting a law enforcement officer. The defendant entered a plea of nolo contendere to the charge of assault with intent to inflict great bodily injury and was found guilty by the District Court. Pursuant to a plea bargain, the other

two charges were dismissed. The District Court sentenced the defendant to a term of 2 to 5 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the District Court.

The sole issue on appeal is whether or not the defendant's sentence is excessive. The defendant contends that he should have received probation. "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. Swails, 195 Neb. 406, 238 N. W. 2d 246 (1976).

The record shows that the defendant has a lengthy record. He had been placed on probation several times previously, yet continued his criminal course of conduct. The District Court specifically concluded that there was a substantial risk that the defendant would engage in criminal conduct if placed on probation. The felony offenses which the defendant was charged with were crimes involving violence. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Holloman, *ante* p. 139, 248 N. W. 2d 15 (1976).

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

AFFIRMED.

DELLA J. MCCREADY, AS THE ADMINISTRATRIX OF THE ESTATE OF DONALD C. MCCREADY, DECEASED, APPELLANT AND CROSS-APPELLEE, V. AL EIGHMY DODGE, A PARTNERSHIP, APPELLEE AND CROSS-APPELLANT.

250 N. W. 2d 640

Filed February 23, 1977. No. 40604.

Attorneys at Law: Instructions: Courts: Trial: Appeal and Error. Noncompliance by counsel with the requirement that he object

to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice.

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

James E. Schneider and James R. Nisley, for appellant.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

CANIGLIA, District Judge.

This is an action for the wrongful death of Donald C. McCready. The plaintiff, Della J. McCready, his widow, brings this action as administratrix of his estate, charging the defendant, Al Eighmy Dodge, a partnership, with negligence in the death of her decedent husband in a truck-tree collision on November 10, 1966.

The plaintiff alleges that the defendant negligently repaired the brakes of the truck operated by her decedent, and, after said repair, the defendant should have discovered or known that the truck was using unreasonably large amounts of brake fluid, failed to warn said decedent that the inordinate loss of brake fluid was dangerous, and that the proximate cause of the accident and resulting damage was the negligence of defendant. Defendant generally denied liability and alleged that the plaintiff's decedent was guilty of contributory negligence, and assumed the risk.

A trial to a six-man jury resulted in a verdict for the plaintiff in the sum of $35,992, and judgment was entered on the verdict by the court. Thereafter, the defendant-appellee, filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. The court overruled the motion for judgment notwithstanding the verdict and sustained the defendant's motion for a new trial on the "basis that in-

struction No. 2 given by the court at the trial of this action is very erroneous."

The plaintiff has appealed from the granting of the defendant's motion for a new trial, assigning as error, among other things, that the court erred in finding that instruction No. 2 was erroneous, in failing to rule that the defendant had waived any error in said instruction No. 2 by reason of its approval of said instruction, and in failing to object to said instruction at the conference on instructions held by the court prior to the time the jury was instructed.

The defendant has cross-appealed, assigning as error the trial court's failure to sustain the defendant's motion to dismiss the action or for a directed verdict in favor of the defendant.

We will discuss the merits of plaintiff's appeal first.

The plaintiff correctly asserts that when a party to a trial has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts at issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Roush v. Nebraska P. P. Dist., 189 Neb. 785, 205 N. W. 2d 519.

The error, if any, in this proceeding is in the giving of instruction No. 2, which was given as follows: "If the plaintiff has failed to establish any one or more of the foregoing numbered propositions by a preponderance of the evidence, your verdict will be for the defendant.

"On the other hand, if the plaintiff has established by a preponderance of the evidence all of the above numbered propositions, then you must consider the defendant's defense.

"In defense to the plaintiff's claim, the defendant alleges that the plaintiff's decedent was negligent himself in one or more of the particulars above enumerated by the defendant, and the plaintiff's decedent assumed the risk of his own injury.

"In connection with the assertion of the plaintiff's

decedent's negligence, the burden is on the defendant to prove by a preponderance of the evidence one or more of its claims of negligence on the part of the plaintiff's decedent.

"In connection with defendant's claim of assumption of risk by plaintiff's decedent, see Instruction No. 4.

"If the defendant has failed to establish *both* (italics added) propositions by the preponderance of the evidence, and the plaintiff has established by a preponderance of the evidence that the defendant was negligent in one or more of the particulars claimed against him by the plaintiff, and that such negligence was . . . ."

The trial court, in sustaining the defendant's motion for a new trial on the basis of the above instruction, referred to that part of the instruction commencing with, "If the defendant has failed to establish *both* (italics added) propositions by the preponderance of the evidence, ..." As if to emphasize that part of the instruction, the court penned a line through the word "said" and wrote in longhand the word "both." Then the court added the letter "s" in longhand to the word "proposition," thus changing the reading from "said proposition" to "both propositions." By doing so, the court, in effect, told the jury that the burden was on the defendant to prove *both* (italics added) defenses of contributory negligence and assumption of risk. This amounts to an improper instruction with respect to said affirmative defenses.

We agree with plaintiff's proposition of law that ordinarily the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. Haumont v. Alexander, 190 Neb. 637, 211 N. W. 2d 119; Barta v. Betzer, 190 Neb. 752, 212 N. W. 2d 352; Beveridge v. State, 183 Neb. 406, 160 N. W. 2d 229; Cone v. Beneficial Standard Life Ins. Co., 388 F. 2d 456.

However, noncompliance by counsel with the require-

ment that he object to a proposed jury instruction when it is submitted to him does not bar the court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. See, Barta v. Betzer, *supra;* Rule 8 a 2(3), Revised Rules of the Supreme Court, 1974. Cf 5A Moore's Federal Practice (2d Ed.), par. 51.04, pp. 2507 to 2528 (1975); 9 Wright & Miller, Federal Practice and Procedure, § 2558, pp. 671 to 675 (1971). In Barta v. Betzer, *supra,* it appeared that the plain error in the instruction was present at the time of its submission by the court to counsel for review; in spite of which this court held that noncompliance by counsel with the requirement that objection be made in such a case does not bar this court from opting to consider the plain error, and even if the instruction had been changed at the time it was submitted to counsel for review, still it was within the power and the discretion of the trial court to grant a new trial on the basis of said plain error and the court is not barred from opting to consider said plain error and to grant a new trial to prevent a miscarriage of justice.

We hold, therefore, that the trial court in this case had the power and the authority to correct its errors which it properly did by sustaining the motion for a new trial, and the judgment of the trial court in sustaining the motion for a new trial is affirmed.

The defendant has cross-appealed assigning as error the trial court's refusal to dismiss the action and direct a verdict in defendant's favor or in the alternative, for judgment notwithstanding the verdict for the reason that the plaintiff's evidence was insufficient, as a matter of law, to authorize the court to submit any issue to the jury.

The defendant correctly asserts that it is the duty of the trial court to direct a verdict where the evidence is undisputed or where the evidence, although conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. Michelson v. Upton, 175 Neb.

743, 123 N. W. 2d 850; Williams v. Watson Bros. Transp. Co., 145 Neb. 466, 16 N. W. 2d 199; Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476; Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571; Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408; Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470; Ward v. Aetna Life Ins. Co., 91 Neb. 52, 135 N. W. 220.

An examination of the evidence in this case, however, reveals that the evidence is not undisputed, and is not so conclusive that it is insufficient to sustain a verdict and judgment.

The evidence in this case shows that the decedent, on the day of the accident, was operating the truck when it went off the road and was in collision with a tree. It is plaintiff's theory that the brakes had been improperly repaired and, as a result, the decedent was unable to control the truck or stop in time to make a turn, resulting in the accident and death of decedent.

At the trial the defendant adduced evidence that there was no brake failure at the time of the accident, that there was nothing wrong with the master cylinder of the brakes, and that the defendant had repaired the brakes of the truck in accordance with good shop practices common throughout the industry. On cross-examination, plaintiff adduced evidence from one Lonnie Morosic, a mechanic, who testified for defendant as an expert. Morosic testified that at the time he tested the brakes, it was his opinion that they were low on brake fluid. He further testified that in a Dodge truck when you only have an inch clearance from the floor, the braking system is not operating as designed; that it was possible if weather changes were so substantial in the period of about 3 weeks the braking system could disintegrate to a point it involved a leak solely because of the weather; and that the difference in the shading of the brake marks indicated that the brakes were either released or failed.

The plaintiff also adduced evidence from the chief of

police, one Glenn Soss, who checked the brakes at the scene by stepping on the brake pedal and that it went to the floor.

Kenneth R. Feder testified on behalf of the plaintiff that he is the owner and manager of Auto Rescue Service, which provides service to the general public, fleet accounts, and car dealers in the Denver area for any type of road failure. The company runs about 15,000 calls a year. He is a graduate of General Motors School of Technology in Flint, with a Bachelor of Science degree from the University of Utah in Automotive Technology and Industrial Engineering. He worked as a line mechanic. He worked as an assistant service manager prior to starting Auto Rescue Service.

On December 3, 1966, he examined the Dodge truck. The vehicle had 125,400 miles on it.

The truck had hydraulic brakes with vacuum boosters. The loss of hydraulic fluid in this type of system results in the brakes not working. It will not function if it is out of brake fluid.

He noticed on the exterior right wheel fresh hydraulic fluid leakage on the backing plate of the wheel and a long-time build up of fluid, dust, and road dirt. He depressed the brake pedal and observed it went all the way to the floorboard. He checked the master cylinder and there was no fluid in it. The right front brake linings were totally soaked with hydraulic fluid. The drum was badly soaked. There were no broken or loose parts and he checked the wheel cylinder for leakage and found it leaking badly. There was no leakage or breakage in the lines of the entire system including all the wheels.

He removed the wheel cylinder and found a high amount of residue inside the wheel cylinder. He checked the left front wheel and found it okay. There was no leakage in the wheel cylinder. There was a difference in cups on the left side versus the right side and the cups on the left were relatively new and the

cups on the right were not, and were the original cups from the manufacturer.

He added brake fluid to the master cylinder, but couldn't get a buildup of pressure. He blocked off the right side by plugging the line and was able to get full application of brakes. There was nothing wrong with the master cylinder.

The left front wheel cylinder had been reconditioned. Feder stated if you have to recondition one wheel cylinder, experience has shown that once you have created a tight seal on the reconditioned cylinder, if you don't have a comparable tight seal on the other wheel cylinder, the brake fluid will, under pressure, take the path of least resistance and cause the wheel cylinder which has not been serviced or inspected to rupture and you run out of brake fluid. He testified that the usual and customary shop practice in the industry is to check the corresponding wheel cylinder on the same axle. It was his opinion that the practice of repairing one wheel cylinder on the left side without servicing or repairing the wheel cylinder on the opposite side is contrary to good shop practice.

Obviously, a jury could believe from the testimony adduced by the plaintiff that the method of repair of the truck by the defendant was contrary to good shop practice and was negligent. The conflict in the evidence was reconciled by the jury in favor of the plaintiff. The motions to dismiss or for a directed verdict, or for a judgment notwithstanding the verdict, were all properly overruled by the trial court, and the trial court was correct in submitting the case to the jury. The order of the trial court granting the motion for a new trial is affirmed, and the defendant's cross-appeal is dismissed.

AFFIRMED.

W. WRIGHT, INC., APPELLEE, V. KORSHOJ CORPORATION, APPELLANT.

250 N. W. 2d 894

Filed February 23, 1977. No. 40628.

1. **Contracts: Contractors: Damages.** A contractor is entitled to recover damages resulting from delay caused by a breach of contract by the other party.
2. ———: ———: ———. Absent a contractual commitment to the contrary, a general contractor is not liable to its subcontractor for damages flowing from delays incurred by the subcontractor unless the delays were caused by the general contractor or some agency or circumstance under his direction or control.
3. **Contracts: Contractors.** A subcontractor does not obtain any rights against a prime contractor simply because the prime contractor is entitled to certain rights under the prime contract, even though the prime contract is incorporated into the subcontract.
4. **Contracts: Parol Agreements.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
5. **Contracts.** If a party to an existing contract proposes a modification thereto, the mere silence of the other party leaves the contract as before, without modification.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas F. Dowd, for appellant.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

BRODKEY, J.

This is an appeal from the verdict of a jury, and judgment entered thereon, by the District Court for Douglas County, upholding the claim of a subcon-

tractor for damages against the prime contractor for additional expenses incurred by the subcontractor as a result of suspension of work on a contract between the U.S. Government and the prime contractor. We affirm in part, and in part reverse and remand with directions.

In May 1972, the United States Government, through the Corps of Engineers, awarded a general contract to Korshoj Corporation ("Korshoj"), the defendant and appellant herein, for the construction of cooling towers and miscellaneous items at Offutt Air Force Base. W. Wright, Inc. ("Wright"), the plaintiff and appellee herein, submitted a bid as a subcontractor to Korshoj. This bid was accepted and a subcontract was executed on May 24, 1972. Under this subcontract, Wright agreed to be bound by all terms and conditions of the general contract, which was incorporated by reference into the subcontract. Wright agreed to do the mechanical work on the project, and the subcontract obligated Wright "to furnish materials and perform all of the work to be done by him hereunder promptly and in due time when required and as directed by the Contractor * * *." The subcontract also provided that Wright "shall be bound by any changes, alterations or amendments as is the Contractor made by the Owner concerning the subject matter of this contract." The subcontract contained no provision regarding remedies for Wright should the project be delayed, causing additional expenses to Wright. The subcontract price was $228,500, and it provided that "the Subcontractor shall not be entitled to nor receive any compensation for extra work or additional work unless such extra work or additional work is approved in writing by the Contractor through its office at Omaha, Nebraska."

The general contract provided that the project was to be completed within 180 days after the time the Corps of Engineers gave Korshoj notice to proceed. The general contract provided that Korshoj was en-

titled to an equitable adjustment on the contract price if changed site conditions caused an increase in its cost of, or time required for, performance of any part of the work. It also permitted the Corps of Engineers to suspend, delay, or interrupt the work, but Korshoj was entitled to an adjustment in contract price in the event that such suspension, delay, or interruption caused an increase in its cost of performance.

Korshoj received notice to proceed on May 15, 1972, and began work within 10 days, in accordance with the terms of the general contract. A rain washout created difficulty with the proposed project site, however, and as a result work was delayed until July 6, 1972, at which time the Corps of Engineers agreed to certain modifications regarding the changed site, and again advised Korshoj to proceed.

Although Wright did minor work on the project in July, it was unable to do its primary job because completion of the concrete shells in the cooling towers, work to be done by Korshoj, was required before Wright could begin its mechanical work of installing "internals" in the towers. Both parties understood that Wright's primary job would take 90 to 120 days after the completion of the concrete shells in the towers by Korshoj.

Subsequently Korshoj entered into negotiations with the Corps of Engineers to obtain time extensions on the general contract due to the delays caused by the changed site conditions. Ultimately three modifications were signed by Korshoj and the Corps of Engineers, extending the completion date on the project from November 12, 1972, to March 12, 1973. Pursuant to these modifications, Korshoj received adjustments on the contract price, including extra compensation for additional supervisory and overhead expenses caused by the delays.

When Wright learned that Korshoj was seeking extensions on the general contract, it advised Korshoj, first orally and then in writing, that it wished to be

compensated for additional costs it was incurring due to the delays on the project. Korshoj did not immediately respond to Wright's request, but continued to negotiate for extensions of time with the Corps of Engineers, and eventually signed the general contract modifications which granted the extensions of time without advising Wright of that fact. Korshoj then notified Wright that the completion date for the project had been extended to March 12, 1973. A week after so advising Wright, Korshoj wrote Wright and stated that "[i]f you intend to be paid for any additional work or compensations your documented statements should also be presented to this office for submittal to proper authority promptly." Wright then submitted to Korshoj a claim of $4,400 as its increased costs due to the delays, costs which consisted of additional supervisory and overhead expenses.

Korshoj forwarded Wright's claim to the Corps of Engineers. The Corps rejected the claim, stating that it could not address the matter because all modifications between it and Korshoj had been negotiated for price and time extensions in good faith, and that they were complete and beyond further requirements by the Corps. Korshoj advised Wright of the Corps' rejection of Wright's claim, and Wright then informed Korshoj that it was looking to Korshoj for payment. Korshoj replied, stating that it would deny Wright's claim because Korshoj was not responsible for any of the delays on the project.

Wright did complete its work on the project, working in the completed towers from January 1973, to April 1973. It was unable to begin its work in the towers until January 1973, because Korshoj had not completed the towers until that time. It is undisputed that Wright did work on the job continuously from November 1972, to April 1973, but that it did so with a reduced work force because the delays prevented it from doing the work in 90 to 120 days with a full-work force. It is

clear that Wright incurred additional supervisory and overhead expenses due to having to complete the work over an extended period of time.

Wright subsequently brought an action against Korshoj on January 23, 1974, alleging that during "the course of the work under Plaintiff's subcontract certain changes in and additions thereto were directed by the Corps of Engineers and Defendant for which Plaintiff was and is entitled to additional compensation under the terms of the contract documents." This allegation was subsequently amended to delete the words "under the terms of the contract documents." The petition listed among the changes "additional supervisory and overhead expense incurred as a result of the suspension of the work, during the course thereof, by the owner and Defendant," said expense being $4,400. The petition also alleged that Korshoj owed Wright a total of $1,593.45 for other work that Wright had performed, but the parties stipulated during trial that Wright was entitled to this claim, and this part of the petition is not at issue in this appeal. Korshoj denied the allegations of the petition, although it admitted "that during the course of the work under Plaintiff's subcontract certain changes in and additions to the work were directed by the Corps of Engineers * * *." Korshoj also counter-claimed, alleging that Wright owed it $5,274.30 for work that Korshoj had completed on Wright's behalf.

Thus the only issues tried to the jury were (1) whether Wright was entitled to recover $4,400 of additional supervisory and overhead expenses due to the delays in the work; and (2) whether Korshoj was entitled to recover $5,274.30 for work it performed for Wright. The jury returned a verdict in favor of Wright on its claim for the $4,400; and awarded Korshoj $454.50 on its counter-claim. The jury also awarded Wright $1,593.45, for which the parties stipulated that Korshoj was liable, bringing Wright's total award to

$5,993.45. This appeal does not involve the award to Korshoj of $454.50, and the only issue presented for consideration is whether Wright was entitled to recover $4,400 for additional supervisory and overhead expenses incurred as a result of the delays on the project.

Korshoj's assignments of error are as follows: (1) The District Court erred in refusing to grant Korshoj's motion for a directed verdict and judgment notwithstanding the verdict because the evidence was insufficient as a matter of law and the verdict was contrary to law; and (2) the District Court erred in instructing the jury. Korshoj contends that it cannot be held liable for Wright's claim because it did not cause the project to be delayed or suspended; and because it did not breach any term of its subcontract with Wright, as the subcontract does not contain any provisions making Korshoj liable to Wright for additional expenses incurred as a result of delay on the project. Korshoj also argues that instructions Nos. 7 and 17 were erroneous because they either referred to agreements of which there was no evidence in the record, or because they injected into the case an oral contract which was neither plead nor proved. The thrust of these instructions, as we interpret them, is that the jury was instructed that it could return a verdict in favor of Wright if it found that Korshoj had breached the subcontract, or an oral amendment thereto, by not paying Wright for additional supervisory and overhead expenses incurred due to the time extensions on the general contract.

Wright contends on appeal that it is entitled to its claim under the subcontract; or alternatively, that the parties had effectively modified their original agreement so as to provide that Korshoj would pay Wright for the latter's additional expenses incurred due to the delays on the project.

The law in Nebraska is clear that a contractor is entitled to recover damages resulting from delay caused by a breach of contract by the other party. Roberts

Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767 (1961); Siefford v. Housing Authority of the City of Humboldt, 192 Neb. 643, 223 N. W. 2d 816 (1974); Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 221 (1966). The Nebraska rule is in accord with the law in other jurisdictions. See Annotation, 16 A. L. R. 3d 1252.

The first question in this case, therefore, is whether the evidence supports a view that Korshoj breached its contract with Wright so that Wright was delayed. We find that it does not. First, there is no dispute that the changed site conditions were the cause of the delay, and Wright admitted at trial that it knew of no acts on the part of Korshoj which caused the delay.

Secondly, Korshoj did not agree in the subcontract to provide Wright with access to the site by a particular date. The only time provision in the subcontract was that the job was to be completed within 180 days after Korshoj received notice to proceed, and this term was in the subcontract by virtue of the fact that the general contract was incorporated into the subcontract by reference. The subcontract, however, also incorporated the other provisions of the general contract, which provided for changes and time extensions on the general contract, and Wright acknowledged at trial that it was bound by such provisions. The subcontract itself provided that Wright "shall be bound by any changes, alterations or amendments as is the contractor by the owner concerning the subject matter of this contract." Thus it cannot be said that Wright and Korshoj had a fixed agreement that the project would be completed within 180 days, since both knew that the Corps of Engineers could suspend work or extend the time of performance; and it cannot be said that Korshoj agreed to complete its work so that Wright would have adequate time to do its job before 180 days expired, regardless of whether the Corps of Engineers ordered changes which caused delay. Indeed, Wright agreed in the subcon-

tract to "perform all of the work to be done by him hereunder promptly and in due time when required and as directed by the Contractor * * *." These facts indicate that Korshoj did not breach its contract with Wright so as to cause Wright delay; nor did Korshoj breach any term in the subcontract in reference to time of performance or to providing Wright access to the site on a given date. No evidence in the record supports the view that Korshoj breached the subcontract, causing the delay, and therefore Korshoj cannot be held liable to Wright under the doctrine of Roberts Constr. Co. v. State, *supra.*

Korshoj's liability, if any, must rest on some contractual commitment by it to reimburse Wright if delay occurred, regardless of the cause of the delay. As stated in Doyle & Russell, Inc. v. Welch Pile Driving Corp., 213 Va. 698, 194 S. E. 2d 719 (1973), "[a]bsent a contractual commitment contra, a general contractor is not liable to its subcontractor for damages flowing from delays incurred by the subcontractor unless the delays were caused by the general contractor or some agency or circumstance under his direction or control." 194 S. E. 2d at 721. See, also, McGrath v. Electrical Constr. Co., 230 Ore. 295, 364 P. 2d 604 (1961), rehearing denied, 230 Ore. 309, 370 P. 2d 231; and generally, Annotation, 16 A. L. R. 3d 1252. The questions which will resolve the issue in this case, then, are (1) whether the evidence supports a view that the subcontract, when signed, obligated Korshoj to reimburse Wright for additional expenses incurred due to a delay, regardless of who or what caused the delay; and (2) if not, whether the parties subsequently modified their contract such that Korshoj agreed to reimburse Wright for such additional expenses. These questions will be discussed in the order presented.

The subcontract by itself does not expressly provide that Korshoj shall be liable to Wright for additional expenses incurred due to delay. The only term in the

subcontract that is even possibly relevant is as follows: "The Subcontractor shall not be entitled to nor receive any compensation for extra work or additional work unless such extra work or additional work is approved in writing by the Contractor through its office at Omaha, Nebraska." Although both parties refer to this clause in their briefs, and Wright argues that it does not bar it from its claim, we do not believe that it is relevant to Wright's claim, which is for *expenses* caused by delay, not for reimbursement for *extra or additional work.* The clause quoted above refers to extra or additional work preformed by Wright, work which Wright was not obligated to do under the subcontract when signed. Wright's claim in this appeal is not for reimbursement for extra or additional work, but for additional expenses incurred while doing the very work it was obligated to do under the subcontract when it was signed. We conclude that this clause in the subcontract does not resolve the issue in the case. See, Annotation 2 A. L. R. 3d 620, Effect of Stipulation, In Private Building or Construction Contract, That Alterations Or Extras Must be Ordered in Writing, § 7-15; 13 Am. Jur. 2d, Building and Construction Contracts, § 22, pp. 24, 25.

Since the subcontract itself does not provide that Korshoj shall be liable to Wright for additional expenses caused by delay, Wright must rely on the fact that the subcontract incorporated by reference the general contract, which provided that Korshoj was entitled to equitable adjustments from the Corps of Engineers in the event of delays. It is undisputed that under the general contract Korshoj was entitled to, and did, recover additional expenses it incurred due to the delays. Essentially, Wright's contention is that it is entitled to recover delay expenses from Korshoj because Korshoj was entitled to recover delay expenses from the Corps of Engineers.

In refuting Wright's contentions, Korshoj argues

that two Supreme Court cases mandate reversal of this case. In United States v. Rice, 317 U. S. 61, 63 S. Ct. 120, 87 L. Ed. 53 (1942), and United States v. Foley, 329 U.S. 64, 67 S. Ct. 154, 91 L. Ed. 44 (1946), the Supreme Court held that an extension of time provision in a government construction contract was the sole remedy for the contractor when unforeseen delays occurred; and that the contractor could not receive damages for the delay because the government had not obligated itself to pay damages to the contractor solely because of delay. Standard government construction contracts were subsequently changed to avoid the harsh result of Rice, and now provide that equitable adjustments in contract price shall be made when delay occurs. See Burgess Constr. Co. v. M. Morrin & Son Co., Inc., 526 F. 2d 108, 114, n. 3 (10th Cir., 1975). Thus Rice and Foley are not particularly helpful in our case since different government contracts were construed in those cases.

However, another case relied on by Korshoj is definitely relevant. Southern Fireproofing Co. v. R. F. Ball Constr. Co., Inc., 334 F. 2d 122 (8th Cir., 1964), was a diversity case in which a subcontractor sued a general contractor for delay damages caused by unanticipated subsurface conditions at the project site. The delay was not the fault of the general contractor.

The court found that the subcontractor was not entitled to damages caused by the delay, despite the fact that the general contractor was entitled, under the general contract, to receive adjustments on the general contract due to the unanticipated difficulty with the subsurface conditions. The court found that the general contractor's right to obtain an adjustment from the project owner did not confer on the subcontractor the derivative protection of being able to receive additional compensation from the general contractor. The court stated that had the parties intended that the general contractor be liable to the subcontractor for

delay damages, they would have said so in their subcontract. We find the Southern Fireproofing decision persuasive, and believe that it was correct in its holding that a subcontractor does not obtain any rights against a prime contractor simply because the prime contractor is entitled to certain rights under the general contract, even though the general contract is incorporated into the subcontract.

Wright relies on United States v. Piracci Constr. Co., Inc., 405 F. Supp. 908 (D.D.C., 1975), in support of its position, and also a companion case, United States v. Piracci Constr. Co., Inc., 405 F. Supp. 904 (D.D.C., 1975). In those cases an action was brought by a subcontractor against a general contractor and his surety under the Miller Act, 40 U. S. C., § 270b (1970), which provides that persons who provide materials and labor on projects involving the construction of public buildings shall have the right to sue on the government contractor's bond to recover any costs to which they are rightfully entitled. In both cases the court found that a subcontractor, under the Miller Act, was entitled to recover from the prime contractor and his surety increased costs incurred due to delay to the extent that such delay was not attributable to the subcontractor, even though the prime contractor did not cause the delay.

Although these two cases generally support the position Wright takes in its brief, it should be noted that they arise under the Miller Act. The court stated that the "* * * key to recovery under the Miller Act is not the theory upon which liability is predicated, but the actual investment by a subcontractor of time and materials in a federal project." 405 F. Supp. at p. 909. "* * * plaintiff's cause of action is not defeated by such technical exercises as analyzing whether the claim arose within or without the contract or by determining if the added costs were indispensible to satisfactory contractual performance." 405 F. Supp. at 907. Thus the

holding of the Piracci cases is relevant to cases arising under the Miller Act, which provides a statutory cause of action, but does not resolve the issue in this case, which is one based solely upon the subcontract between Korshoj and Wright. Since this is the situation, we believe that the result in this case depends on whether Korshoj is liable to Wright under the subcontract, and that question must be resolved by referring to the law of contracts, not to cases interpreting the Miller Act.

The contract documents in this case do not impose on Korshoj the obligation to reimburse Wright for additional expenses Wright incurred due to the delays. The contract documents are in no sense ambiguous so as to raise an issue of fact with regard to the intent of the parties, and therefore interpretation of the contract was a matter of law for the court. Grantham v. General Telephone Co. of the Midwest, 191 Neb. 21, 213 N. W. 2d 439 (1973). Both parties were experienced contractors, and had the intent of the parties been that Korshoj should be liable to Wright for delay expenses, a provision to that effect should have easily been inserted into the subcontract. This court is not permitted to speculate or to supply terms to a contract that the parties have not seen fit to set forth. Yelkin v. Yelkin, 193 Neb. 789, 229 N.W. 2d 59 (1975). The fact that Korshoj was entitled to delay expenses from the project owner under the general contract does not confer upon Wright the right to collect delay expenses from Korshoj, and to so hold would contradict the plain language of the contracts. Finally, the subcontract itself provided that Wright would "perform all of the work to be done by him hereunder promptly and in due time when required and as directed by the Contractor" and established a fixed contract price. We find that the subcontract, as signed, did not obligate Korshoj to reimburse Wright for delay expenses, and therefore Korshoj cannot be held liable for failing to do so.

We note that Wright emphasizes in its brief the fact that Korshoj failed to submit Wright's claims to the Corps of Engineers when the modifications to the general contract were executed. Wright's claim, however, was not made on the theory that Korshoj was obligated to make a timely submission of Wright's claims to the Corps of Engineers, and that Korshoj was liable to Wright for failing to do so. Wright did not rely on such a theory in either its pleadings or at the trial, and therefore the jury verdict cannot be sustained on that basis. The subcontract did not obligate Korshoj to submit Wright's claims to the Corps of Engineers, and therefore Korshoj incurred no liability for failing to do so.

The final issue is whether the parties effectively modified their contract by oral agreement to the effect that Korshoj agreed to compensate Wright for expenses incurred due to the delays. The law in Nebraska is clear that a written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and that the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924 (1967); Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792 (1976). Wright contends that Korshoj's request for data regarding Wright's increased costs and Korshoj's forwarding Wright's claim to the Corps of Engineers show that the parties had modified their contract so that Wright would be compensated for his additional expenses. Wright points to no evidence, however, and the record discloses none, that Korshoj actually made an oral agreement, subsequent to the signing of the subcontract, to compensate Wright for Wright's additional expenses. What the evidence shows is that Wright told Korshoj of its claim, that Korshoj told Wright to prepare data on its claim so that it could be forwarded to

the proper authority, and that Korshoj did forward Wright's claim to the Corps of Engineers. Such evidence does not establish that Wright and Korshoj modidfied their subcontract to provide that Korshoj would compensate Wright for its additional costs. It is the law that if a party to an existing contract proposes a modification thereof, the mere silence of the other party leaves the contract as before without modification. The Elgin Mills, Inc. v. Melcher, 181 Neb. 17, 146 N. W. 2d 573 (1966).

We hold, therefore, that as a matter of law Korshoj was entitled to a directed verdict in its favor. The contract documents in this case are clear that Korshoj had no obligation to reimburse Wright for expenses Wright incurred due to the delays, and there was no sufficient evidence that the parties modified their agreement to impose such an obligation upon Korshoj.

We reverse the judgment and remand the cause with directions to vacate that part of the judgment in the amount of $4,400 in favor of Wright, and to dismiss that part of the petition which claimed damages for additional supervisory and overhead expenses incurred by Wright. The additional judgment of $1,593.45 in favor of Wright, and the judgment of $454.50 in favor of Korshoj, which neither party has contested on appeal, are affirmed.

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

GEORGE T. JANSSEN, APPELLANT, V. MICHAEL J. HAMBLET ET AL., APPELLEES.
250 N. W. 2d 902

Filed February 23, 1977. No. 40701.

1. **Summary Judgments.** Motion for summary judgment can be granted only where there is no genuine issue as to any material fact in the case and where, under the facts, movant is

entitled to judgment as a matter of law.

2. **Contracts: Intent.** In construing a contract, it is the expressed intention of the parties, which they manifest by their words and acts, which is controlling.

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

Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, for appellant.

Quigley, Dill & Quigley and Herrick, McNeill, McElroy & Peregrine, for appellees.

Heard before SPENCER, McCOWN, and CLINTON, JJ., and MORAN and KELLY, District Judges.

KELLY, District Judge.

This is an action for specific performance filed in the District Court for Cherry County, Nebraska.

The plaintiff saw a display ad in the Gordon Journal, in February or March of 1975, which ad was in the following tenor:

FOR SALE
The Edw. TICE Ranch
1,120 acres
Bids in before March 15th
For more information contact
Jean Tice 282-1671

As spelled out in the above advertisement, the ranch consisted of 1,120 acres of ground located in Cherry County, Nebraska. Plaintiff, in response to the advertisement, contacted Jean Tice, who was known to him. The ground was actually owned by the Edward Tice Trust No. 1. The defendants in this action are G. Patrick Tice, Jean Tice, Helen Hamblet, Mary Schweitzer, the Trustees and Beneficiaries of the Edward Tice Trust No. 1, and the Estate of Edward Tice, deceased.

One of the trustees of the Tice Trust was Michael J. Hamblet, who was the son of Helen Hamblet, and was a practicing attorney in Chicago, Illinois.

After the initial contact with Jean Tice by the plaintiff, the plaintiff consulted with his attorney in Gordon, Nebraska, Mr. Michael V. Smith, and Mr. Smith contacted Mr. Hamblet in Chicago.

The plaintiff discussed making a bid of $140 per acre with Jean Tice after Mr. Smith contacted Mr. Hamblet. Mr. Hamblet wanted to be assured that the plaintiff would have sufficient financing to consummate the purchase of the ranch. The plaintiff then contacted the Federal Land Bank in Valentine, Nebraska, and the First National Bank of Gordon. As a result of contacting these two financial institutions, he was given written assurance of sufficient money to purchase the ranch at the bid of $140 per acre.

On March 3, 1975, Mr. Smith contacted Mr. Hamblet by telephone. Mr. Smith relayed the plaintiff's bid of $140 per acre, and the attorneys discussed terms of the sale. It was also agreed that a copy of an offer to purchase, the form of which had been prepared by Mr. Hamblet for use in entertaining bids on the purchase of the ranch, would be forwarded to Mr. Smith. A copy of this offer to purchase was mailed to Mr. Smith on March 4, 1975.

The form of the offer to purchase made no mention of the sale of personalty on the ranch. Also included in the Tice Trust, the personalty was to pass to the benefit of Jean Tice. It was contemplated between the parties that a separate contract would be entered into for the sale of this personal property, but that the sales would be made at the same time.

After Mr. Smith received a copy of the draft of the offer to purchase form, he redrafted the same, inserting the name of the plaintiff, changed the terms insofar as the payment of the taxes on the real estate was concerned, extended the closing date from the 15th of April to the 15th of May 1975, and inserted an execution date of March 7, 1975. This version of the agreement was apparently signed by Mr. Janssen on March

7, 1975. The offer was never signed by any trustee or agent of the trust.

In a telephone conversation on March 8, 1975, the attorneys, Mr. Hamblet and Mr. Smith, discussed changes made by Mr. Smith in the offer executed on March 7, 1975, and apparently they agreed as to a change in form. Mr. Smith agreed, orally, for his client, to restore the original provisions relating to the closing date, and Mr. Hamblet agreed to reduce the reservation of oil and mineral rights, from 100 percent to 50 percent. There had been, apparently, a misunderstanding between the two attorneys as to the language which excepted the 1974 real estate taxes and, also, relating to the matter of personalty to be sold by Jean Tice. Mr. Smith retyped the first two pages of his revised offer to purchase so as to reflect the correct understanding. These two pages were then substituted in the March 7 offer made by the plaintiff. This was then placed in the file of Mr. Smith where it remained until March 15, 1975.

On March 8, 1975, the plaintiff and Jean Tice reached an agreement for a separate contract to sell certain personal property, located on the ranch, to the plaintiff. On the same date there was a further conversation between Mr. Smith and Mr. Hamblet regarding certain changes that were to be made in the original offer. As a result of this conversation, Mr. Hamblet drafted a new agreement reflecting the change in the sale of the mineral rights and, also, including the name of the plaintiff as purchaser. This agreement excluded specific reference to the 1974 real estate taxes, and excluded the mention of the separate personal property of Jean Tice. This agreement was circulated by Mr. Hamblet among the trustees and two nontrustee beneficiaries of the Tice Trust. This agreement was received by Jean Tice on March 14, 1975, and on the morning of March 15, 1975, was executed by Patrick Tice and Jean Tice. Jean Tice then notified Mr.

Janssen and they agreed to meet in Mr. Smith's office in Gordon, Nebraska.

Mr. Michael Smith was not present in the State of Nebraska on March 15, 1975, and the meeting in his office was attended by his associate, Mr. Dennis King. When Jean Tice arrived at the attorney's office, Mr. King notified her that Mr. Hamblet had called from Chicago, and he wanted Jean Tice to contact him before Mr. Janssen signed the contract, or before any further proceedings took place. Jean Tice then called Mr. Hamblet in Chicago, who notified her that the offer of Mr. Janssen, which was still unsigned by him, would not be accepted by the trustees for the reason that a substantially higher offer had been received for the sale of the land involved.

The plaintiff arrived at the attorney's office and was notified that his offer would not be accepted. The plaintiff and his attorney, Mr. King, attempted to give a $1,000 money order to Jean Tice, which she refused to accept. Jean Tice was also informed that the plaintiff had unilaterally placed the sum of $14,800 in an escrow account in the First National Bank of Gordon, Nebraska. This fact had not been previously communicated to either Jean Tice or her attorney, Mr. Hamblet, and no escrow agreement had been entered into by them.

At the March 15, 1975, meeting there was also further conversation between Jean Tice and the plaintiff and his attorney, Mr. King, relating to the items to be included in the contract for the sale of the personal property. When Jean Tice left the attorney's office she took with her both agreements, the contract for the sale of the personal property, and the offer to purchase offered by the plaintiff. Neither of these documents had been signed by the plaintiff, although the offer to purchase had been signed by the trustees and nontrustee beneficiaries of the Tice Trust.

This action for specific performance was subsequently commenced by the plaintiff. Depositions of all

the principal parties involved in this transaction were taken. Both plaintiff and defendants filed motions for summary judgment, and the matter was submitted to the District Court for Cherry County, Nebraska, on the pleadings, depositions, and written documents pertaining to it. On February 11, 1976, after due consideration of all the evidence and testimony offered, the District Court for Cherry County, Nebraska, overruled the plaintiff's motion for summary judgment and sustained the defendants' motion for summary judgment, ordered that the petition of the plaintiff be dismissed with prejudice, and taxed the costs of the action to the plaintiff. Plaintiff has appealed.

The first question that must be resolved is whether or not it was proper for the District Court to sustain a motion for summary judgment in this case. This court was faced with a similar question in the case of Randall v. Erdman, 194 Neb. 390, 231 N. W. 2d 689. That was an action wherein both parties had filed a motion for summary judgment and the motion was sustained by the trial court for one of the parties. Our court in considering the question stated as follows: "A motion for summary judgment can be granted only where there is 'no general issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.' Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152. See, also, Friedrich v. Anderson, 191 Neb. 724, 217 N. W. 2d 831; Grantham v. General Tel. Co. of Midwest, 191 Neb. 21, 213 N. W. 2d 439. The party moving for a summary judgment has the burden of showing that no issue of fact exists, and the court should consider all the evidence in the light most favorable to the party opposing the motion. See, Fay Smith & Associates, Inc. v. Consumers Public Power Dist., 172 Neb. 681, 111 N. W. 2d 451 (1961); Youngs v. Wagner, 172 Neb. 735, 111 N. W. 2d 629 (1961); Green v. Village of Terrytown, supra."

The trial court held "that there is no real dispute as

to the facts in this case, and the only discrepancies that appear, from the depositions, is, perhaps, some minor disagreement on the order of sequence of events that occurred, particularly on that morning in the law office of Smith and King, but generally, the parties are in agreement as to what occurred." It was therefore proper for the trial court to entertain motions for summary judgment.

The next problem that must be dealt with is whether or not the court was correct in sustaining the defendants' motion for summary judgment.

The plaintiff relies on the case of Fairchild v. Fairchild, 176 Neb. 95, 125 N. W. 2d 191, which held that delivery was not necessary for acceptance of an offer to purchase. This statement is correct insofar as the Fairchild case is concerned because in that case, after the defendant had executed an agreement, the defendant had delivered the same to the plaintiff's attorney.

The trial court in this case stated: "* * * the Court finds that the instrument, which is marked Exhibit 3, is the instrument that these parties intended to satisfy the Statute of Frauds in this transaction, and that instrument only was intended to satisfy the Statute of Frauds; and the next point which must be determined is whether there was a meeting of the minds to install that instrument as the agreement of the parties. It having been prior to the meeting in Smith and King's office, been fully executed and sufficient to satisfy the Statute of Frauds, and the Court finds that there was no meeting of the minds. Jean Tice came with the instruments prepared to conclude the transaction, but she was representing the minds of her fellow trustees and the fellow owners of the property, and before any indication by her the deal was settled, she received word from one of the co-trustees that a better bid had been received, and she exercised her control over the instruments, preventing their delivery and refused to take any payments which might well have satisfied the ab-

sence of Mr. Janssen's signature on the instruments, and it is, of course, a fact that he did not execute the instruments identified by Exhibit 3, and I think that his reaction in regard to, I believe it is, Exhibit 4, the personal property contract, indicates that he accepted the fact that she had forestalled an agreement at that time, in that he said in, briefly, these words, there is no sense in me signing the personal property agreement when I don't have the land, and he acknowledged, at the time she took her instruments and went away, that he didn't have a contract. These contracts were not dependent one upon the other. They are divisible, but he didn't want that personal property unless he had the land, and when she left, that was the status of the situation, that there had not yet been a meeting of the minds, and it would have to occur later, and from the evidence, it did not occur later. She gave them the hopes that before midnight she might, but there never occurred a meeting of the minds on this contract, and therefore, the Defendants are entitled to a Summary Judgment ordering that the petition of the Plaintiff be dismissed, with prejudice * * *."

We find that the trial court was correct in determining that there was no dispute of material fact and in sustaining the defendants' motion for summary judgment. The judgment of the trial court is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF PHILIP H. UNITT, DECEASED.
DEAN H. GADE, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF PHILIP H. UNITT, DECEASED, ET AL., APPELLANTS, V. DESCENDANTS OF PHILIP H. UNITT, II, DECEASED, GRANDSON OF PHILIP H. UNITT, TESTATOR, APPELLEES.

250 N. W. 2d 644

Filed February 23, 1977. No. 40779.

1. **Wills: Perpetuities: Time.** No future interest or estate is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.
2. ———: ———: ———. Future interests created by will are measured by lives in being at the testator's death, rather than at the time the will was executed.
3. **Wills: Future Interests: Perpetuities.** Contingent future interests are subject to the rule against perpetuities but vested interests are not.
4. **Wills: Estates: Remainders.** Where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman if a life estate were to terminate the remainder is contingent.
5. ———: ———: ———. A devise of the remainder over after a life estate to children as a class vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate from the moment of their birth.
6. ———: ———: ———. Such words as "at his death" or "at their death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant.

Appeal from the District Court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed.

Blevens, Bartu, Blevens & Jacobs and Russell A. Souchek, for appellants.

Byron J. Norval, for appellees.

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

McCOWN, J.

This is a proceeding to construe the will of Philip H. Unitt, deceased, to determine title to the real estate described in Item Five of the will. The issue is whether the devise of real estate under Item Five violated the rule against perpetuities. The District Court determined that Item Five was valid and effective, and directed the entry of a decree of distribution accordingly. This appeal followed.

The case was submitted on stipulated facts. Philip H. Unitt, a farmer and stockman, died in Seward County, Nebraska, on May 27, 1923. He left five surviving children: Charles, age 52; Arthur, age 50; Vincent, age 41; William, age 40; and Martha, age 36. Items Two, Three, and Four of the will provided legacies to the decedent's three older sons. Item Five then provided in relevant part: "Item Five: To my Fourth son William G. Unitt, of Seward Nebraska, * * * I hereby give, devise and bequeath the following real estate towit: (legal description) containing One Hundred (160) Sixty acres more or less, for life, remainder to the children of him the said William G. Unitt share and share alike: Should the said William G. Unitt die without issue, I direct that said land shall go to the children of my daughter Martha E. Eisenberger share and share alike for life, and at their death to my grandson Philip H. Unitt, his heirs and assigns forever." Item Six left the remainder of the estate, real and personal, to testator's daughter, Martha E. Eisenberger. The quoted portion of Item Five is the only matter involved here.

At the time of the testator's death in 1923, his son, William G. Unitt, was married but had no children; testator's daughter, Martha E. Eisenberger, was living and had one child, Victoria, then age 15; and testator's grandson, Philip H. Unitt, II, was age 27.

On the testator's death, his son, William G. Unitt, took possession of the farm described in Item Five and

remained in possession until his death at age 90 on September 26, 1973. William G. Unitt never had any children. Martha E. Eisenberger died June 5, 1947, and her only child, Victoria, died September 27, 1971. Testator's grandson, Philip H. Unitt, II, died February 28, 1966, leaving a wife, a son, and two grandsons living.

In November 1973, one of the heirs of William G. Unitt commenced this proceeding to reopen the estate of the testator, Philip H. Unitt, and construe the will. The issue in dispute was whether the quoted provisions of Item Five violated the rule against perpetuities. The court determined that three separate groups of heirs were affected by the proceedings, and appointed counsel for each of them. The first group of heirs consists of the persons named as residuary beneficiaries in the will of William G. Unitt, deceased. These persons assert that Item Five violates the rule against perpetuities, invalidates the remainder interest, and vests the title in the life tenant, William G. Unitt, and passes under his will. The second group consists of the heirs of the testator, Philip H. Unitt. These persons also contend that Item Five violates the rule against perpetuities, voids the attempted remainder disposition, and that title passes to them as intestate property. The third group consists of the heirs of the testator's grandson, Philip H. Unitt, II. These persons contend that the provisions of Item Five do not violate the rule against perpetuities, and that the remainder interest in the property vested in Philip H. Unitt, II, upon the death of the testator or, at the latest, upon the death of William G. Unitt.

The District Court found and decreed that the provisions of Item Five did not violate the rule against perpetuities, and that upon the death of the testator the remainder interest in the property vested in testator's grandson, Philip H. Unitt, II, subject to life estates which are terminated.

The rule against perpetuities prohibits only the cre-

ation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. Hauschild v. Hauschild, 176 Neb. 319, 126 N. W. 2d 192; 5 Bowe-Parker: Page on Wills, § 42.8, p. 281.

The basic authority states the rule as: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, The Rule Against Perpetuities (4th Ed.), § 201, p. 191.

Since a will takes effect only upon the testator's death, future interests created by will are measured by lives in being at the testator's death, rather than at the time the will was executed. 5 Bowe-Parker: Page on Wills, § 42.9, p. 287.

The language of Item Five created an immediate life estate in William G. Unitt with the remainder interest to go to his children. If William died without issue, the remainder interest was to go to Philip H. Unitt, II, subject to a life estate in the children of Martha E. Eisenberger. If these interests were vested, or must vest, if at all, within the life or lives of a person or persons in being at the testator's death, plus 21 years, then the rule against perpetuities does not apply.

Whether a remainder is vested or contingent depends upon the language employed. Gray, The Rule Against Perpetuities (4th Ed.), § 108, p. 95; Simes, Law of Future Interests (2d Ed.), § 91, p. 188. In general, a future interest is vested when there is no condition precedent to its taking effect in possession other than the termination of prior estates, however and whenever that may occur; but if there is such a condition precedent, then the interest is contingent. Simes, Law of Future Interests (2d Ed.), § 90, p. 186.

The difficulties involved in terminology and meaning between vested and contingent remainders have been the subject of extensive legal writing and discus-

sion. See Simes & Smith, Law of Future Interests (2d Ed.), Ch. 5, §§ 131 to 166, pp. 110 to 208. The important fact here is that contingent future interests are subject to the rule against perpetuities but vested interests are not. Simes, Law of Future Interests (2d Ed.), § 90, p. 188; Lowry v. Murren, 195 Neb. 42, 236 N. W. 2d 627.

A vested interest is one in which there is a present fixed right either of present or of future enjoyment. The remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. The fact that his enjoyment is postponed, and on such an event as his death, may never take place at all, does not make the remainder contingent. But where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the life estate were to terminate, the remainder is contingent. Drury v. Hickinbotham, 129 Neb. 499, 262 N. W. 37; Moynihan, Introduction to the Law of Real Property, § 16, p. 116.

The devise of the remainder interest to the children of William G. Unitt as a class was a contingent remainder since William G. Unitt had no children at the date of death of the testator. Had a child of William G. Unitt been born thereafter, title to the remainder interest would have vested in the child from the moment of birth. See Rudy v. Wagner, 188 Neb. 508, 198 N. W. 2d 75. The contingent remainder interest of any possible child of William G. Unitt must of necessity vest or disappear not later than the date of death of William G. Unitt. At that moment any alternative remainder interest became finally vested, whether it had previously vested subject to divesting, or had been only contingent.

The language of Item Five made an alternative disposition of the remainder interest in the property. The remainder interest was to go either to the children of William G. Unitt, or, in the alternative, to Philip H.

Unitt, II, and the event which was to determine the effective alternative was whether or not William G. Unitt had a child.

The provisions of Item Five which made the alternative remainder interest of Philip H. Unitt, II, subject to a life estate in the children of Martha E. Eisenberger did not postpone the vesting of the remainder estate in Philip H. Unitt, II. Such words as "at his death" or "at their death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. Rudy v. Wagner, *supra*.

The quoted language of Item Five of the will of Philip H. Unitt, deceased, does not violate the rule against perpetuities. The trial court made that determination and found that the remainder interest in the real estate vested in the testator's grandson, Philip H. Unit, II, subject to life estates which are now terminated. The remainder interest clearly vested not later than the death of William G. Unitt, who was living at the time of the testator's death. The trial court found that the remainder interest vested upon the death of the testator. While there are ample reasons supporting such a finding of early vesting favored by the law, it is not necessary for us to reach that issue here for the result is the same in either case.

The judgment of the District Court is affirmed.

AFFIRMED.

HOWARD P. NEAL, APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT, IMPLEADED WITH STEVEN P. KONFRST ET AL., APPELLEES.

250 N. W. 2d 648

Filed February 23, 1977. No. 40801.

1. **Insurance: Contracts.** An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract.

2. ———: ———. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.

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

Michael P. Cavel of Emil F. Sodoro Law Offices, for appellant.

Harold W. Kauffman and William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day for appellee Neal.

John Timmermeier, Larry R. Welch of McGroarty, Welch & Langdon, and Thomas J. Monaghan, for appellees Konfrst et al.

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

BOSLAUGH, J.

This was an action for a declaratory judgment to determine whether an insurance policy issued by the defendant St. Paul Fire & Marine Insurance Company afforded coverage to the plaintiff, Howard P. Neal, at the time he was involved in an accident in Omaha, Nebraska. At the time of the accident the plaintiff was operating a 1972 Kenworth tractor that had been leased to Little Audrey's Transportation Co., Inc., hereinafter referred to as the carrier.

The trial court found that the policy in question provided coverage to the plaintiff at the time of the accident. The defendant insurer has appealed.

The tractor was owned by Clarence Munns. The plaintiff had entered into a contract with Munns to buy the tractor and a 1972 Tempte trailer. The plaintiff had also entered into an "Independent Contractor Standard Agreement" with the carrier which provided generally that the plaintiff would furnish the tractor

and trailer with drivers to convey commodities as directed by the carrier.

The accident happened on May 17, 1973. The plaintiff had arrived in Omaha that day with a load of fruit. After that cargo had been unloaded he took the trailer to Glenwood, Iowa, so that it could be loaded with meat for a return trip to California. He left the trailer at Glenwood and was returning to Omaha in the tractor so that it could be serviced at a truck stop near Omaha. It was his responsibility to see that the tractor was serviced and the maintenance was to be done at his expense. He was carrying no freight of any kind at the time the accident happened.

The named insured in the policy issued by the defendant insurer was "Various Long Term Lease Owner/Operators of Little Audrey's Transportation Co. Inc." The tractor and trailer which the plaintiff was purchasing from Munns was listed on a schedule attached to the policy. Other endorsements attached to the policy provided the policy covered vehicles leased to the carrier.

The defendant insurer does not dispute the fact that the policy had been issued, was in force, and provided public liability coverage generally for the plaintiff's tractor while it was being operated for "non-trucking use." The defendant insurer claims coverage at the time of the accident was excluded by an endorsement attached to the policy which provided the insurance afforded by the policy did not apply while the tractor was being "used to carry property in any business" or was being "used in the business of any person or organization to whom the automobile is rented."

The defendant argues that the plaintiff was an employee of the carrier at the time of the accident, or should be treated as an employee for the purpose of the liability of the carrier to third persons for his negligence, and the exclusion applies if the plaintiff was acting within the scope of his employment at the time of

the accident. The difficulty with that argument is that the liability status of the carrier to third persons is not controlling as between the parties. See Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U. S. 28, 96 S. Ct. 229, 46 L. Ed. 2d 169. It is not determinative of the liability of the defendant insurer so far as coverage under its policy is concerned.

The record shows the carrier is self-insured so far as equipment under load is concerned. Insurance, known as "bobtail and deadhead insurance" was purchased by the carrier to cover the equipment when it was not under load, was being serviced, or was being used for some other nonrevenue purpose. The policy involved in this case was purchased for the purpose of obtaining bobtail insurance on equipment leased by the carrier such as the plaintiff's tractor.

It is a well-established rule that an insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and in case of doubt the policy will be liberally construed in favor of the insured. Shipley v. American Standard Ins. Co., 183 Neb. 109, 158 N. W. 2d 238; Kent v. Dairyland Mut. Ins. Co., 177 Neb. 709, 131 N. W. 2d 146.

The question in this case is whether the plaintiff's tractor was being "used to carry property in any business" or was being "used in the business" of the carrier at the time of the accident. If not, the exclusion relied upon by the defendant insurer was not applicable.

It is clear from the record that the tractor was not being used to carry property at the time the accident occurred. While the carrier derived some benefit from the fact that the plaintiff attended to the maintenance of the tractor between trips, since that was essential to the continued use of the tractor in hauling commodities, the servicing and maintenance of the tractor was the responsibility of the plaintiff. The mainte-

nance of the tractor was the "business" of the plaintiff, not that of the carrier. We conclude the exclusion was not applicable here.

The judgment of the District Court is affirmed.

AFFIRMED.

LARRY R. BANDO, APPELLANT, V. ESTHER M. COLE ET AL., APPELLEES.

250 N. W. 2d 651

Filed February 23, 1977. No. 40823.

1. **Contracts.** Generally, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are construed together as one instrument.
2. **Contracts: Evidence: Trial.** Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties.
3. **Contracts: Damages: Penalties: Forfeitures.** Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages.
4. ———: ———: ———: ———. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach.

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

Wellensiek, Rehmeier & Skudlarek, for appellant.

E. Dean Hascall of Hascall & Jungers, for appellees.

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

BOSLAUGH, J.

This is an action to recover the downpayment made pursuant to a contract for the sale of real estate. The action was tried to the court which found generally

for the defendants. The plaintiff has appealed. The assignments of error allege in substance that the plaintiff was entitled to judgment as a matter of law.

The facts for the most part are undisputed. Where there are conflicts in the evidence, they must be resolved in favor of the defendants. In determining the sufficiency of the evidence to support the judgment it must be considered in the light most favorable to the defendants, all conflicts must be resolved in their favor, and they are entitled to the benefit of every inference that may be reasonably deduced from the evidence.

The record shows that on January 19, 1972, the plaintiff, Larry R. Bando, and his father, Ralph H. Bando, inquired of the defendants, Esther M. Cole and Leo H. Cole, concerning a sale of their 160-acre farm in Otoe County, Nebraska. The parties arrived at an agreement for the sale of the land to Larry R. Bando for the sum of $80,000. The sum of $12,000 was to be paid at the date of the execution of the contract with the balance of $68,000 to be paid on March 1, 1972.

The parties met at the office of Vantine A. James that afternoon to execute a written agreement. A contract was prepared by James on a printed form which was signed and ackknowledged by the plaintiff and the defendants. The contract, which is exhibit 2, provided specifically that if the purchaser did not consummate the purchase upon the terms set forth, all right or claim of the purchaser under the agreement might be terminated at the option of the sellers "in which case the purchaser shall forfeit all payments made."

At the time exhibit 2 was executed James cautioned the plaintiff and his father several times that if they did not complete the contract they would forfeit the $12,000 downpayment. Ralph replied to the effect there was no problem with financing because he could obtain the money from several sources.

After exhibit 2 had been executed by the parties, Ralph wrote out checks to the defendants totaling $12,000. The plaintiff then produced a printed form for an "Option to Purchase Real Estate" prepared by the Farmers Home Administration (FHA). The plaintiff explained that he needed to have this form executed so that he could obtain a loan from the FHA. James made several changes in the form at the request of the defendants and filled in the necessary information. The option agreement, which is exhibit 1, was then executed and acknowledged by the plaintiff and the defendants.

Exhibit 1 recited that the consideration for the option was $12,000 and other valuable consideration. It further provided the option was given to enable the buyer to obtain a loan insured or made by the FHA; that the buyer's efforts to obtain a loan constituted a part of the consideration for the option; and in the event a loan could not be processed by FHA or obtained from another source, any downpayment would be refunded.

The plaintiff and his father were unable to obtain financing so the purchase was never consummated. This action was commenced on July 8, 1974, to recover the downpayment of $12,000.

The petition pleaded only the option agreement, exhibit 1, and alleged the facts concerning the inability of the plaintiff to obtain financing. The answer of the defendants pleaded the contract, exhibit 2, and alleged the parties intended for it to govern the sale of the property. The answer further alleged that the option agreement, exhibit 1, was executed solely as an accommodation to the plaintiff in order to enable him to obtain financing through the FHA.

The plaintiff's principal contention is that the option agreement, exhibit 1, superseded the contract, exhibit 2, because exhibit 1 was executed after exhibit 2 had been executed.

Generally, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are legally one instrument and will be construed together as if they were as much one in form as they are in substance. Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties. Olds v. Jamison, 195 Neb. 388, 238 N. W. 2d 459.

Exhibit 1 and exhibit 2 were executed by the parties at approximately the same time and as part of the same transaction. They are in conflict as to whether the downpayment should be refunded or forfeited. Exhibit 2, the sale contract, provides that all payments will be forfeited if the purchaser fails to complete the contract. Exhibit 1, the option agreement, provides that the downpayment will be refunded in the event the purchaser is unable to obtain financing.

The evidence sustains a finding that the parties understood the $12,000 would be forfeited by the plaintiff if he was unable to complete the contract and the option agreement was intended only as an accommodation to the plaintiff so that he could obtain financing through FHA. The defendants demanded the 15 percent downpayment because they were required to deliver possession of the property on or before March 1, 1972. To perform the contract the defendants were required to move out of their house and sell their farm equipment. They offered evidence to show they had disposed of their farm equipment and were ready to perform on March 1, 1972.

The plaintiff did not notify the defendants that he was unable to complete the transaction until on or about May 28, 1972. The defendants offered evidence to show they had difficulty in finding a tenant by that

time and suffered heavy crop losses due to the resulting delay in planting the land.

The plaintiff also contends the forfeiture provision in the contract was not enforceable because the amount exceeded the damages the defendants sustained as the result of the plaintiff's failure to perform. This issue was not raised in the pleadings in the District Court, and the plaintiff objected to the evidence offered by the defendants to show the damages they had sustained as a result of the plaintiff's failure to perform.

Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Growney v. C M H Real Estate Co., 195 Neb. 398, 238 N. W. 2d 240. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach. See, also, Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682; Tarry v. Johnston, 114 Neb. 496, 208 N. W. 615.

The evidence shows the plaintiff and his father went to the defendants' home and solicited the sale of the property. The defendants were unwilling to sell unless they received their price and 15 percent of the price was paid in advance. In reliance on the contract they disposed of their farm equipment and prepared to vacate the property on March 1, 1972. When the plaintiff finally conceded that he could not perform, the normal planting dates were past and it was difficult to find a tenant. The defendants offered to prove that because of late planting they received a yield of only 15 bushels per acre as compared to an average yield of 89 bushels per acre.

While the evidence on this phase of the case is not as complete as would ordinarily be required, the plaintiff in this case is in no position to complain because he

did not raise the issue in the District Court and prevented the defendants from proving in greater detail the damages they actually sustained. Under these circumstances we believe the judgment for the defendants should be affirmed.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NILE OSTERMAN, APPELLANT.

250 N. W. 2d 654

Filed February 23, 1977. No. 40849.

1. **Criminal Law: Appeal and Error: Probation and Parole: Guilty Plea.** Where an appeal was not taken from an order of probation, the question of the voluntariness of the original guilty plea could not be considered.
2. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

W. Gerald O'Keif, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

SPENCER, J.

Defendant appeals from an order revoking his probation and sentencing him to a flat term of 10 years in the Nebraska Penal and Correctional Complex. Defendant essentially alleges two assignments of error. (1) He argues his plea of guilty to the original offense was not a voluntary one. (2) He attacks the sentence as excessive. We affirm.

Pursuant to a plea bargain, defendant entered a plea of guilty to first-degree arson. The plea bargain involved the dismissal of a second count of grand larceny. On May 22, 1975, defendant was placed on probation for 5 years. No appeal was taken from that sentence. On December 18, 1975, defendant was found to be in violation of probation for possession of a firearm and for conviction of assault. After a presentence investigation, defendant was sentenced to 10 years in the Penal Complex.

Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. The order placing defendant on probation was a final and appealable order. See State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66 (1965). In State v. Williams, 194 Neb. 483, 233 N. W. 2d 772 (1975), we held where an appeal was not taken from an order of probation the question of the voluntariness of the original guilty plea could not be considered. No appeal was taken herein from the sentence of 5 years probation, so State v. Williams, *supra,* is controlling.

The only issue properly before this court is whether the sentence imposed is excessive. Section 29-2268, R. R. S. 1943, provides that upon revocation of probation the court may impose such new sentence as might have been imposed originally for the crime for which defendant was convicted. Section 28-504.01, R. R. S. 1943, provides for a term of not less than 2 years or more than 20 years upon conviction for the crime of first-degree arson.

The sentence imposed was a sentence of 10 years which under section 83-1,105(2), R. S. Supp., 1976, in actuality is an indeterminate sentence of from 2 to 10 years. We have repeatedly held that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Overstreet, *ante* p. 625, 250 N. W. 2d 246 (1977).

Defendant was shown a great deal of leniency when he was placed on probation. He had given a statement to the authorities to the effect that he had stolen $1,400 from his employer's residence and set fire to the house to cover up the crime. His past record showed several arrests and convictions for no-fund checks. He served 8 months in the Nebraska Penal and Correctional Complex in 1965, following conviction on two counts of issuing no-fund checks. On November 4, 1975, defendant pled guilty to assault and was sentenced to 90 days in the county jail. It is evident that the defendant was unable to rehabilitate himself on probation. There has been no abuse of discretion herein.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL W. KING, APPELLANT.
250 N. W. 2d 655

Filed February 23, 1977. No. 40853.

Statutes: Courts: Evidence: Witnesses. Under section 27-608(1), R. R. S. 1943, whether a showing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court.

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

Judy L. Raetz, 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.

WHITE, C. J.

The defendant was charged with felonious destruction of personal property. He pled not guilty to the charge. A jury trial was had and a verdict of guilty rendered. The defendant's motion for a new trial was overruled and he now appeals. We affirm the judgment of the District Court.

The factual background of this case is briefly as follows: On the night of December 31, 1975, the defendant picked up a friend, Anthony Jones, and the two drove to Alliance, Nebraska. They drove around Alliance for several hours, drinking beer. Then they returned to Hemingford, Nebraska, arriving around 2 a. m. Jones testified that the defendant and he discussed and agreed to steal a firetruck from the Hemingford Rural Fire District as a prank. The defendant drove to near the fire station and let Jones off, who then took the firetruck and drove it out of town and over the bank of a dam. Jones then met up again with the defendant and the two returned to town.

The sole question presented in this appeal is whether the District Court erred in refusing to permit the defendant to introduce evidence of his reputation for truth and veracity.

During cross-examination, the defendant admitted that during the course of his testimony, and as to previous written statements, he had made several inconsistent statements, and admitted that portions of his previous testimony and prior statements were false. Thereafter, the defendant attempted to call a witness who would have testified as to the defendant's reputation for truthfulness and veracity. This offer of evidence was refused by the District Court.

Section 27-608(1), R. R. S. 1943, provides: "(1) The credibility of a witness may be * * * supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) the evidence may refer only to character for truthfulness * * * and (b) evi-

dence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Section 27-608, R. R. S. 1943, is part of the Nebraska Rules of Evidence, adopted by our Legislature in 1975. Section 27-608, R. R. S. 1943, was designed to be in accordance with the long-standing common law rule that character evidence in support of credibility is admissible only after the witness' character has first been attacked. See McCormick on Evidence, § 49, p. 105 (2d Ed., 1972).

The defendant argues that the State's cross-examination, during which inconsistent statements made by the defendant were brought out, constituted an attack upon his credibility and that he should have been allowed to bring in evidence supporting his credibility. The State argues that pointing out inconsistent statements of the defendant does not constitute an attack upon his credibility as contemplated by section 27-608, R. R. S. 1943, and thus the defendant was not entitled to introduce evidence concerning his reputation for truth and veracity.

At common law there were three viewpoints concerning the admissibility of evidence of a witness' reputation for truth and veracity after that witness had been impeached by evidence of inconsistent statements. Some jurisdictions held that where a witness testified, and the opposite party, either on cross-examination of the witness or by the introduction of independent testimony, impeached the witness by proof that he made contradictory and inconsistent statements out of court, it was competent to corroborate him by evidence of his general reputation for truth and veracity. See, Annotation, 6 A. L. R. 862, and cases cited therein. This is the defendant's position.

Other jurisdictions held that testimony as to the truth and veracity of a witness was not admissible unless the witness' reputation in this respect had been as-

sailed and that questioning his credibility by showing that he had made inconsistent statements was only a contradiction of his testimony and not an impeachment of his truthfulness. Under such circumstances, these courts held that sustaining testimony should be excluded. See, Annotation 6 A. L. R. at p. 878, and cases cited therein. This is the position of the State.

Kansas appears to have followed neither of the above views, holding that by showing contradictory statements the credibility of a witness is directly attacked and testimony as to his reputation for truth and veracity is admissible in the sound discretion of the trial court. Colvin v. Wilson, 100 Kan. 247, 164 P. 284, 6 A. L. R. 859 (1917); Annotation, 6 A. L. R. at p. 887.

For a general discussion of this issue, see, 98 C. J. S., Witnesses, § 623, p. 637; 81 Am. Jur. 2d, Witnesses, § 638, p. 645; McCormick on Evidence, § 49, p. 105 (2d Ed., 1972).

The State urges us to adopt the position that under section 27-608(1), R. R. S. 1943, a showing that the witness made inconsistent statements is not an attack upon his credibility, thus precluding the introduction of evidence concerning the witness' reputation for truth and veracity. The defendant urges us to adopt the opposite position, that a showing the witness made inconsistent statements is an attack upon his credibility and that evidence concerning the witness' reputation for truth and veracity may be introduced.

Section 27-102, R. R. S. 1943, states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Rather than adopting a hard and fast rule concerning the admissibility of evidence of a witness' reputation for truth and veracity under these circumstances, we find that the general approach to this problem taken

by the Kansas Supreme Court which emphasizes the discretion of the trial court is preferable. As stated in McCormick on Evidence, § 49, p. 107: "Convenient as automatic answers to these seemingly minor trial questions may be, surely it is unrealistic to handle them in this mechanical fashion." A more sensible view is the notion that the judge should consider in each case whether the particular impeachment for inconsistency and the conflict in testimony or either of them, amounts in net effect to an attack on character for truth and should exercise his discretion accordingly to admit or exclude the character support.

"Determination of admissibility generally rests within the sound discretion of the trial court." State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973). The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness falls within the discretion of the trial court and, absent an abuse of discretion, is not grounds for reversal. State v. Zobel, 192 Neb. 480, 222 N. W. 2d 570 (1974); Hampton v. Struve, 160 Neb. 305, 70 N. W. 2d 74 (1955). We have also held that: "* * * the admission of prior consistent statements, after a witness has been impeached with a prior inconsistent statement, is largely a matter within the discretion of the trial court. Anderson v. Evans, 168 Neb. 373, 96 N. W. 2d 44." Siciunas v. Checker Cab. Co., Inc., 191 Neb. 766, 217 N. W. 2d 824 (1974). There is nothing in section 27-608(1), R. R. S. 1943, which removes or diminishes the large amount of discretion traditionally accorded the trial judge over the admissibility of evidence.

We hold that under section 27-608(1), R. R. S. 1943, whether a showing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court.

We have reviewed the record before us and find no abuse of discretion by the District Court in refusing the testimony offered by the defendant concerning his reputation for truth and veracity.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE EYNON, APPELLANT.

250 N. W. 2d 658

Filed February 23, 1977. No. 40867.

1. **Criminal Law: Limitations, Statute of: Arrest.** Section 29-110, R. R. S. 1943, is a statute of limitations. The provision therein for issuance of an arrest warrant is not a condition precedent to a prosecution.
2. **Statutes: Criminal Law: Trial: Burglary: Rape.** An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape.
3. **Criminal Law: Evidence: Trial: Intent.** Evidence of other crimes is admissible where relevant and competent as proof of intent.
4. **Criminal Law: Burglary: Rape: Intent.** An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent.
5. **Criminal Law: Trial: Evidence: Verdicts.** In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
6. **Criminal Law: Trial: Evidence: Witnesses: Statutes.** A witness whose presence is shown by a party to be essential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses.
7. **Trial: Evidence: Statutes: Witnesses.** In all cases in which evidence of character or a trait of character of a person is ad-

missible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. § 27-405, R. R. S. 1943.

8. **Criminal Law: Words and Phrases.** While there are in this state no common law crimes, the definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.

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

Kirby, Duggan & McConnell, 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.

CLINTON, J.

Defendant Eynon was found guilty by a jury of a charge of burglary with intent to commit rape as defined by section 28-532, R. R. S. 1943, and was sentenced to a term of 18 months to 3 years in the Nebraska Penal and Correctional Complex. On appeal to this court he makes the following assignments of error: (1) The trial court erred in refusing to dismiss the complaint for the reason that no warrant had been issued for the arrest of the defendant before trial. (2) The trial court failed to hold a pretrial hearing in accordance with the provisions of section 28-408.05, R. R. S. 1943, for the purpose of determining relevance of the victim's or the defendant's past sexual conduct. (3) The evidence was insufficient to sustain the conviction because there was no evidence of assault to commit rape and because the testimony of the prosecutrix was insufficiently corroborated. (4) The court erred in denying the motion of the defendant to exclude the prosecutrix from the courtroom during the testimony of other witnesses, including the testimony of the defendant. (5) The court

erred in permitting the county attorney to rebut evidence of the defendant's reputation for nonviolence by allowing, during cross-examination of the character witness, inquiry as to his knowledge of the defendant's previous convictions of crimes of violence. (6) The information fails to state a crime because the new statutes defining sexual assault have repealed the statute defining rape and the failure of the Legislature to amend section 28-532, R. R. S. 1943, to substitute sexual assault for rape in that statute has the result of repealing the crime of burglary with intent to rape. We affirm.

Defendant's first assignment is founded upon the provisions of section 29-110, R. R. S. 1943, which states that no person shall be prosecuted for rape unless a complaint is filed within 3 years after the offense "and a warrant for the arrest of the defendant shall have been issued." This contention is wholly frivolous. First of all, the defendant was not being prosecuted for the crime of rape. Secondly, section 29-110, R. R. S. 1943, is a statute of limitations which, among other things, defines what tolls the statute, to wit, filing of a complaint and issuance of a warrant. There is no limitation question in this case. The issuance of a warrant is not, as defendant seems to contend, a condition precedent to the court's jurisdiction of the prosecution.

The defendant's second assignment rests upon the provisions of section 28-408.05, R. R. S. 1943, which provides for an in camera hearing "in a prosecution in a case of sexual assault" to determine the relevance of either the defendant's or the victim's past sexual conduct. That statute is inapplicable because his was not a prosecution for sexual assault, nor a prosecution "under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929" referred to in subsection (3) of section 28-408.05, R. R. S. 1943, prohibiting introduction of evidence of "Specific instances of prior sexual activity between the victim and any person other than the de-

fendant . . . unless consent by the victim is at issue."

During the trial the court received evidence of a previous incident in which the defendant entered the residence of the victim of the current crime and allegedly committed a rape upon her. The evidence was admissible for the purpose of showing the intent with which the breaking and entering was done in the present instance. Evidence of other crimes is admissible where relevant and competent as proof of intent. State v. Ray, 191 Neb. 702, 217 N. W. 2d 176. Previous to the admission of such testimony the prosecutrix in this case testified that in the instant case the defendant said, making apparent reference to the earlier incident, he was going to let her have it again.

We now turn to the claim that evidence of an assault is necessary. An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent. 12 C. J. S., Burglary, § 2 b, c, p. 668. We note in passing that in this case the evidence of the necessary intent was supported not only by the defendant's statement previously mentioned and the prior assault, but also by evidence of an actual assault in this case. The record is undisputed that defendant made a forced entry into the victim's home through a window.

The record shows that after the defendant left, the victim made an immediate complaint to the police. We add here that the statement just made is not to be taken to imply that the crime of burglary with intent to commit rape need necessarily be corroborated. We do not reach that question in this case.

The evidence is clearly sufficient to support the verdict. "In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to

support a verdict of guilty beyond a reasonable doubt." State v. Richards, 193 Neb. 345, 227 N. W. 2d 18.

The defendant next contends that the court erred in not excluding the victim from the courtroom during the defendant's testimony and that of other witnesses. Section 27-615, R. R. S. 1943, requires exclusion of witnesses, but contains three exceptions, one of which is "(3) a person whose presence is shown by a party to be essential to the presentation of his cause." The record establishes that in this case the victim comes within the exception.

The defendant called a witness who testified that the defendant did not have a reputation as a violent man. On cross-examination the county attorney asked the witness if he had knowledge of the defendant's convictions on certain dates for assault and battery and malicious destruction of property. No objection was made to these questions, but even had objection been made, such objection would have been properly overruled. Section 27-405, R. R. S. 1943, provides in part: "(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." See, also, State v. Newte, 188 Neb. 412, 197 N. W. 2d 403.

The defendant next argues that repeal of the rape statute in effect repeals the crime of burglary with intent to commit rape. Although the crime of rape no longer exists, eo nomine, rape in its former statutory and common law definition is still one of the offenses included in first degree sexual assault. § 28-408.03, R. R. S. 1943. There are two answers to the defendant's contention. First, section 28-532, R. R. S. 1943, by its express terms includes not only burglary with intent to commit rape, but also burglary with intent to "commit any felony." It is obvious there is no implied repeal of

section 28-532, R. R. S. 1943, even in part. Secondly, even though rape as such no longer exists, section 28-532, R. R. S. 1943, still refers to it as a crime. While there are in this state no common law crimes, the definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. De Wolfe, 67 Neb. 321, 93 N. W. 746; State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454. Section 28-532, R. R. S. 1943, makes it a crime to commit burglary with intent to rape. The definition of rape may be determined by reference to the common law.

AFFIRMED.

SHERMAN HUSKINSON, APPELLEE, V. LAMBERT H. VANDERHEIDEN ET AL., APPELLANTS.
251 N. W. 2d 144

Filed March 2, 1977. No. 40631.

1. **Trial: Verdicts.** A motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence on behalf of the party against whom the motion is directed.
2. ———: ———. Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
3. **False Imprisonment: Damages.** A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment.
4. **Trial: Verdicts: Damages.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

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

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

HAMILTON, District Judge.

This action was commenced by appellee, Sherman Huskinson, for false arrest and imprisonment against the defendant, Lambert H. Vanderheiden, and his employer, Flobert Industries, Incorporated. The trial judge ruled that appellee's arrest was unlawful as a matter of law and so instructed the jury which returned a verdict against the appellants in the sum of $5,000.

The case arose from a contractual dispute. Flobert Industries, Incorporated, of Elgin, Nebraska, and A & K Railroad Materials, Inc., of Clearfield, Utah, entered into a contract on January 30, 1973. This contract required Flobert Industries to sell A & K a certain amount of relay rails salvaged from a discontinued railroad. The contract specified for a $20,000 downpayment, which was made, and "balance to be paid before material is removed from premises."

The procedure followed was that A & K employees or agents would load material from a stock pile site near Elgin, Nebraska, then take the load to Elgin Mills to be weighed. The cost of the load would be deducted from the $20,000 downpayment. This procedure was followed until appellee, a truck driver for A & K, arrived for the 17th load. The record indicates that load 17 used up the $20,000 downpayment and left a balance owing of $725.04.

There is a dispute in the testimony concerning the circumstances surrounding load 17. The appellee denies having any conversation with Mr. Vanderheiden

in the afternoon when he weighed his load, however Vanderheiden testified that he spoke with appellee after load 17 was weighed and told him not to leave until there were funds to pay for the load, and that appellee said he would stay in town. There is a certain amount of confusion and contradiction in the testimony of Vanderheiden regarding the instructions to appellee concerning the movement of load 17. All of said testimony is denied by appellee.

The evidence reflects that appellee stayed in town at the local motel and departed somewhere near 10 a.m. the following morning toward the direction of Schuyler, Nebraska. The appellee was stopped near Schuyler at about noon by the Nebraska Highway Patrol and taken to the sheriff's office in Schuyler, where, according to the evidence, he was relieved of his belongings and was under arrest from 12:31 p.m. to 3:42 p.m.

The appellee was stopped and arrested as a result of a radio broadcast advising that the appellee had left Elgin without paying for a load of rails. Vanderheiden acknowledges calling the Nebraska Highway Patrol stating that a load of iron had left town without payment and that he wanted the man apprehended, giving a license number and a description of the truck.

The trial judge's ruling on the motion for a directed verdict on the lawfulness of the arrest was based upon the fact that the evidence established that no felony had been committed. The trial judge concluded that the evidence supported the fact that title had passed to appellee's employer, and even accepting Vanderheiden's testimony as true, there was no crime of grand larceny committed.

The principal contention of appellants is that the trial judge erred in ruling as a matter of law that appellee's arrest was unlawful.

It is a well-established principal of law that where different minds may draw different conclusions or inferences, or where there is a conflict in the evidence,

the matter at issue must be submitted to the jury. Sacher v. Petersen, 184 Neb. 305, 167 N. W. 2d 384 (1969).

It is also true that a motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have every controverted fact found in his favor, and have the benefit of fair inferences deducible from the evidence. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531 (1960).

Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605; Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

A false imprisonment consists in the unlawful restraint against his will of an individual's personal liberty and any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go. Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105; Cimino v. Rosen, 193 Neb. 162, 225 N. W. 2d 567. A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. Jensen v. Barnett, 178 Neb. 429, 134 N. W. 2d 53.

In order to attach liability to appellants it was necessary to prove the unlawfulness of the arrest as provided for in section 29-402, R. R. S. 1943, which permits arrest by persons other than police officers. The arrest by a law enforcement officer without a warrant pursuant to and instigated by a private citizen must have a basis in fact, establishing that a petit larceny or a felony has been committed, and there is reasonable

ground to believe the person arrested guilty of such offense. § 29-402, R. R. S. 1943.

Since the evidence is undisputed that the value of load 17 exceeded the jurisdictional limits of petit larceny, the question presented to the trial judge was whether the crime of grand larceny had been committed.

In order to commit a larceny as defined in section 28-506, R. R. S. 1943, the person must steal goods or chattels "the property of another." The trial judge in finding that title had passed to the appellee's employer negates the larceny if it finds support in the evidence.

The contract for the sale of the material provides:

"The buyer, A & K Railroad Materials, Inc., will select from a designated storage inventory the above materials. The above-mentioned material will be loaded on buyer's equipment at no cost to seller, and will remit on the basis of $40.00 per net ton, plus a $2.00 per net ton transportation allowance on all the mentioned material. The above material will be loaded and scaled at Elgin Mills. All material will be loaded from the agreed stockpile within a reasonable length of time and the area restored to a condition satisfactory to the seller after completion of agreement.

"Seller hereby acknowledges an advance payment of $20,000.00, balance to be paid before material is removed from the premises."

It is true that the Uniform Commercial Code controls. Section 2-401, U. C. C., provides in part: "(1) * * * title to goods passes from the seller to buyer in any manner and on any conditions explicitly agreed on by the parties.

"(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods * * *."

The contract does not explicitly refer to the passage of title, therefore title passes under section 2-401, U.

C. C., subsection (2), upon the physical delivery of the goods.

The undisputed evidence reflects that appellee was permitted to load the iron from the designated stock pile, and accepting appellants' version as true was permitted to leave the Elgin scale conditionally.

The physical delivery of the iron was completed and the seller completed performance when the goods were loaded and scaled, and permission granted to leave the premises. The attempt to unilaterally amend the contract with regard to payment was a nullity and at most amounted to an attempt to retain a security interest in the goods. Ownership of the goods having passed to A & K, the appellee having come into possession of the goods lawfully had every right to leave town not having committed any crime.

The undisputed and conceded facts establish that no felony had been committed, therefore it is unnecessary to discuss the reasonableness of appellants' actions.

Appellants assert that the trial judge erred in not submitting the defense of probable cause pursuant to section 29-402.01, R. R. S. 1943, which provides: "A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention."

The fallacy of appellants' argument lies in the fact that ownership of the iron had already passed from the appellants to A & K, making the statute inapplicable,

and for the further reason that section 29-402.01, R. R. S. 1943, by its plain terms is a statute enacted for the protection of merchants from shoplifters. The appellants were not merchants with goods for sale as contemplated by the statute, nor did the statute apply where ownership of the goods was not with the parties claiming protection under the statute.

Appellants assert that the verdict is excessive requiring a new trial or remittitur. "A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105. See, also, Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376.

There is evidence that appellee suffered a loss of $455, the value of working time or earnings lost. The evidence with respect to physical discomfort and mental anguish is not overwhelming but does reflect that appellee suffered in both respects. The record on the other hand is devoid of any evidence that would tend to inflame the passions or prejudices of the jury. There is no absolute or accurate method to determine mental anguish since the basis for it rests within the mind where it is conceived. In awarding damages for physical discomfort and mental anguish a jury must rely on the totality of the circumstances surrounding the incident, the credibility of the evidence and witnesses, and the weight to be given to all these factors rests in the sound discretion of the jury. This court is reluctant to interfere with a jury verdict where the law provides no accurate measurement.

The assignments of error are without merit and the judgment of the District Court is affirmed.

AFFIRMED.

SCHULER-OLSEN RANCHES, INC., A CORPORATION, APPELLEE, V. MARGARET E. GARVIN, APPELLANT, IMPLEADED WITH DONALD A. NELSON, APPELLEE.
250 N. W. 2d 906

Filed March 2, 1977. No. 40641.

1. **Property: Deeds: Vendor and Purchaser: Crops.** Growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved.
2. **Trial: Judgments.** The judgment of a trial court in an action at law where the jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong.
3. **Leases: Covenants: Encumbrances.** An outstanding leasehold interest is an encumbrance and is within a covenant against encumbrances.
4. **Deeds: Covenants: Encumbrances: Actions.** A covenant in a deed that the premises are free from encumbrances, if untrue, is broken as soon as made, and the grantee's right of action against the grantor at once accrues thereon.

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

Oscar A. Drake, for appellant.

Russell E. Lovell and Russell E. Lovell, II, for appellee Schuler-Olsen Ranches, Inc.

Atkins, Ferguson, Hahn & Coll, for appellee Nelson.

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

WHITE, C. J.

The plaintiff, Schuler-Olsen Ranches, Inc. (hereinafter referred to as "Schuler"), commenced this action against the defendant, Margaret E. Garvin, and the defendant Donald A. Nelson, seeking a judgment declaring that it was the absolute owner of wheat growing on a ranch which it had purchased from Mrs. Garvin by reason of its purchase of the ranch, and that Nelson's lease on the ranch had expired and that Nelson was not entitled to the wheat. Schuler asked that the court

order Nelson to refrain from claiming ownership of the wheat and to execute appropriate instruments to convey sole title to the wheat to Schuler. In the alternative, should the court find ownership of the wheat to be in Nelson pursuant to his lease with Mrs. Garvin, Schuler asked for a judgment declaring that by virtue of the existence of Nelson's leasehold interest in the wheat, Mrs. Garvin breached the warranty of title provision in the warranty deed she conveyed to Schuler, and that Schuler is therefore entitled to a judgment against Garvin for the value of the tenant's share of the wheat.

In defense to Schuler's claim, the defendant Garvin contended that she had conveyed full and good title to Schuler as Nelson did not have a bona fide entitlement to the wheat since his leasehold interest had expired at the time of the conveyance. Defendant Nelson contended that he had a valid leasehold interest in the wheat on the ranch by virtue of his lease with Mrs. Garvin or by virtue of an oral lease by Mrs. Garvin extending the terms of the written lease until the crops were harvested.

The case was tried to the court. The court found that Mrs. Garvin purported to sell, by contract and warranty deed, the real estate involved here and all growing crops thereon to Schuler. The court found that the entire wheat crop on the ranch sold to Schuler by Mrs. Garvin was subject to a valid farm lease agreement between Mrs. Garvin and Nelson, and that, under the customary farm practices and under the farm lease agreement, Nelson is entitled to two-thirds of the wheat. The court further found that the Nelson leasehold interest in the wheat constituted a breach in the warranties in the deed and contract of sale between Mrs. Garvin and Schuler and that Schuler had been damaged in the sum of $7,729.20. The court rendered judgment in favor of Schuler, and against Mrs. Garvin in the sum of $7,729.20, and further rendered judgment

that Nelson is entitled to possession of the wheat as evidenced by the warehouse receipts held jointly between Schuler and Nelson. The defendant Garvin appeals the findings and judgment of the District Court. We affirm.

The factual background of this dispute is as follows: On October 1, 1973, Mrs. Garvin contracted to sell a ranch located in Morrill County, Nebraska, to Schuler. On March 1, 1974, the settlement date in the contract, Mrs. Garvin found it impossible to tender possession of the ranch to Schuler because Nelson was in possession by virtue of a written lease and he refused to redeliver possession of the premises to either Mrs. Garvin or Schuler. The reason for this refusal was that he had planted approximately 145 acres of winter wheat in the fall of 1973, to be harvested in July 1974, and that he claimed ownership of two-thirds of this wheat.

On March 8, 1974, Mrs. Garvin filed a complaint against Nelson in the county court of Morrill County for forcible detention seeking restitution of the leased premises. This matter was settled out of court by the parties prior to trial, by Nelson surrendering the premises, and by Garvin dismissing the complaint. On April 5, 1974, Mrs. Garvin's husband and her attorney drove to the ranch, inspected the premises, and padlocked the dwelling thereon. On April 8, 1974, the sale of the ranch was closed with Schuler paying the balance due on the purchase price and Mrs. Garvin delivering a warranty deed to Schuler. Immediately thereafter Schuler went into possession.

In July 1974, when Schuler commenced harvesting the wheat on the ranch, the wife of defendant Nelson stood in front of the combines to prevent the harvest. She demanded that they stop combining because the wheat belonged to the Nelsons. Schuler had law enforcement officers called in an attempt to remove the Nelsons, but the sheriff took no action. Thereafter, an agreement was worked out with the Nelsons by Schuler's at-

torney permitting the harvesting of the wheat. The harvested wheat was taken to a grain company in Bridgeport, Nebraska, and stored in the names of Schuler and Nelson. Since Nelson was only claiming two-thirds of the wheat, a tenant's share, Schuler was allowed to take the uncontested one-third of the wheat from storage and sell it. This litigation followed.

It is settled law in Nebraska that growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved. Dixon v. O'Connor, 180 Neb. 427, 143 N. W. 2d 364 (1966); Kobza v. Spath, 166 Neb. 623, 90 N. W. 2d 246 (1958); In re Estate of Andersen, 83 Neb. 8, 118 N. W. 1108 (1908). The deed given to Schuler by Mrs. Garvin contained no reservation of crops and thus the growing crops on the described real estate were conveyed to Schuler with the real estate.

The warranty deed given to Schuler by Mrs. Garvin contained the following provision: "And the grantor does hereby covenant with the grantee and with grantee's heirs and assigns that grantor is lawfully seised of said premises; that they are free from encumbrances (no exceptions); that grantor has good right and lawful authority to convey the same; and that grantor warrants and will defend the title to said premises against the lawful claims of all persons whomsoever." The words "no exceptions" were a typewritten addition to this printed clause in the deed.

The District Court found that the entire wheat crop was sold by Mrs. Garvin to Schuler subject to a valid farm lease between Mrs. Garvin and Nelson, and that under customary farm practices and the farm lease agreement, Nelson was entitled to a tenant's share of the wheat. "The judgment of a trial court in an action at law where the jury has been waived has the effect of a jury verdict, and it will not be set aside on appeal unless clearly wrong." Mickelson & Mickelson Hay Contractors v. Christensen, *ante* p. 34, 246 N. W. 2d 655

(1976). See, also, Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976). "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." H. D. Fager Oil Co., Inc. v. Vanice, 192 Neb. 789, 224 N. W. 2d 372 (1974). "The credibility of witnesses and the weight to be given their testimony are for the triers of fact." First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115 (1973).

The record shows that on February 7, 1968, Nelson received a 3-year lease on Mrs. Garvin's ranch. On February 9, 1968, Oscar Drake, attorney for Mrs. Garvin, requested from Nelson an amendment to this lease to permit Mrs. Garvin's previous tenant to reenter the land and harvest the wheat crop he had planted the previous fall. Mr. Nelson testified that Mrs. Garvin visited the leased premises toward the end of the first lease, at which time he was planting wheat in the fall of 1970, to be harvested in 1971, after his lease was to terminate. On October 22, 1970, Nelson was given a new 3-year lease by Mrs. Garvin. This lease, which was to terminate on March 1, 1974, contained no provision concerning the possession of crops planted during the lease term which were to be harvested after the lease had terminated. There is no evidence in the record that Nelson was directed not to plant a wheat crop in the fall of 1973 by Mrs. Garvin.

As the 1970 lease was nearing its end, the Nelsons sought to purchase the ranch they were leasing from Mrs. Garvin. On September 14, 1973, the Nelsons drove to the Garvin residence in Kearney to discuss selling the ranch. Mr. and Mrs. Nelson testified that during these conversations they reminded the Garvins that if they did not get to purchase the ranch, two-thirds of the wheat and various improvements on the ranch belonged to them. Mr. Nelson testified that the Garvins responded, " 'Yes. We know that, Don. Yes, we know that.' " Mrs. Nelson testified they told the Garvins

that they had been busy planting wheat prior to the visit and that they had been rained out, and so had a chance to come down and visit.

There was testimony that in western Nebraska, wheat is customarily planted on a dry-land farming operation around the tenth of September of the year and harvested the following July. Mr. Arthur Erickson, a 60-year-old resident of Morrill County, and engaged in the banking business for over 50 years, testified that he had loaned out money on wheat during this period. He testified that based upon his experience the custom in this area was that the tenant harvests the wheat which he summer fallowed and planted, even though the lease expires. He testified that such wheat is the property of the tenant and that he loans out money on that basis.

On October 1, 1973, Mrs. Garvin sold the ranch to Schuler. Francis Garvin, Mrs. Garvin's husband, testified that at the September 14, 1973, meeting with the Nelsons there was no mention of wheat, nor had the wheat been previously discussed. He testified that the first time wheat was mentioned by Nelson was on October 2 or 3, when he asked him, " 'What about my wheat?' "; he testified that he replied, " 'I don't know anything about your wheat.' "

Mr. Schuler testified that at the time of the execution of the contract he was aware there was a 101-acre wheat allotment on the ranch. He testified that the wheat crop on the ranch was discussed during his negotiations with the Garvins. In making his decision on his offer, he stated that he allocated between $12,000 and $13,000 for the growing wheat.

There was sufficient evidence to support the District Court's finding that under his lease agreement with Mrs. Garvin, and under customary farm practices, Nelson had a valid interest in a tenant's share of the wheat crop which was growing on the Garvin ranch at the time it was sold to Schuler.

An outstanding leasehold interest is an encumbrance and is within a covenant against encumbrances. Albin v. Parmele, 73 Neb. 663, 103 N. W. 304 (1905); Grand Island Hotel Corp. v. Second Island Development Co., 191 Neb. 98, 214 N. W. 2d 253 (1974). A covenant in a deed that the premises are free from encumbrances, if untrue, is broken as soon as made, and the grantee's right of action against the grantor at once accrues thereon. Brass v. Vandecar, 70 Neb. 35, 96 N. W. 1035 (1903); Bryant v. Mosher, 96 Neb. 555, 148 N. W. 329 (1914).

The interest of Nelson in the wheat crop was an encumbrance upon the title conveyed to Schuler, and as such constituted a clear breach of Mrs. Garvin's warranty of full and good title, entitling Schuler to appropriate damages.

The District Court found that Schuler was entitled to damages against Mrs. Garvin in the amount of $7,729.20. The evidence showed that the July 1974 harvest reaped 3,392.16 bushels of wheat and that the expenses of harvesting incurred by Schuler and Nelson was $1,542.70. There was evidence that the cash price for wheat futures on July 10, 1974, varied from $4.25 to $4.30 per bushel; on July 11 from $4.22 to $4.31; and on July 12, from $4.37 to $4.52 per bushel. Emmett Smith, a grain dealer in Bridgeport, Nebraska, testified that he purchased No. 1 wheat, similar to that involved here, on July 10, 11, and 12, 1974, and paid between $4.05 and $4.20 per bushel. The District Court found that the value of the wheat at the time of harvest was $4.10 per bushel. The court determined Schuler's damages as follows: Two-thirds of the wheat harvested ($2/3 \times 3{,}392.16 = 2{,}261.44$ bushels) times $4.10 per bushel ($2{,}261.44 \times \$4.10 = \$9{,}271.90$) minus the harvesting expense, $\$9{,}271.90 - \$1{,}542.70 = \$7{,}729.20$). There is ample evidence to support the District Court's determination of damages sustained by Schuler as a result of Mrs. Garvin's breach of warranty.

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

AFFIRMED.

HOWARD BONSALL, DOING BUSINESS AS THE BONSALL COMPANY, APPELLEE, V. KRISTINA M. STERRETT ET AL., APPELLANTS, IMPLEADED WITH ROBERT RIDER, DOING BUSINESS AS RIDER DRILLING CO., APPELLEE.
250 N. W. 2d 910

Filed March 2, 1977. No. 40713.

Appeal and Error: Mechanics' Liens: Equity: Evidence: Witnesses. 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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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.

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

Gerald E. Matzke of Martin, Mattoon & Matzke, for appellants.

Peetz, Dorwart & Peetz, for appellee Bonsall.

Richard H. Williams of Nelson, Harding, Marchetti, Leonard & Tate, for appellee Rider.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

HAMILTON, District Judge.

This is an action brought by Howard Bonsall, doing business as The Bonsall Company, to foreclose a mechanic's lien in the amount of $5,238.09, against real

property owned by the appellants, Kristina M. Sterrett, Ray Sterrett, Olava Hansen, and Albert Michael Sterrett.

Appellee contracted in writing to construct a swimming pool for appellants at the mobile home park of the appellants in Sidney, Nebraska. The construction contract provided for a contract price of $21,441, to be paid in three payments, the final payment payable on completion of the contract. Approximate completion date of the contract was June 7, 1973, with the provision that the pool would be deemed completed when "plastering or painting is done and equipment installed."

The first two payments were made on the contract as agreed. Defendants refused to pay the balance due claiming that the painting was not completed and the equipment to operate the pool was not hooked up.

The issues tried to the District Court were whether the plaintiff completed his contract and substantially constructed the pool in the manner agreed to by the plaintiff.

The trial court found that plaintiff substantially completed his contract; that the omissions and defects in plaintiff's performance were slight; and that defendants were entitled to $25.73 set off for some minor items not delivered by plaintiff. The trial court allowed the mechanic's lien and recovery of judgment therein in the sum of $5,212.36.

The defendants assign as error that the decision of the trial court finding that plaintiff had substantially performed the contract was contrary to law and said finding was not sustained by sufficient evidence.

The defendants' evidence consisted principally of the testimony by Kristina M. Sterrett of alleged defects and omissions on the part of the contractor, in addition to the testimony of Ray Sterrett concerning the cost of correcting the claimed defects. The testimony of

Howard Bonsall and his employees directly contradict each claimed defect and omission.

The trial judge, in addition to hearing the testimony of the witnesses, personally inspected the premises and found that the contractor had substantially performed the contract, and nothing in the record justifies a contrary conclusion by this court.

"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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of 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." Satterfield v. Dunne, 180 Neb. 274, 142 N. W. 2d 345. This court reached the same conclusion in Cape Co. v. Wiebe, 196 Neb. 204, 241 N. W. 2d 830.

No useful purpose would be served by detailing the conflicting testimony of the witnesses. The trial court's observations of the witnesses and the premises control the conflicting contentions.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALEX V. HORN, APPELLANT.
250 N. W. 2d 912

Filed March 2, 1977. No. 40733.

1. **Criminal Law: Appeal and Error: Misdemeanors: Courts.** In criminal misdemeanor cases, appeals to the District Court are

heard upon the record and the District Court is not permitted to receive additional evidence.

2. **Criminal Law: Appeal and Error: Attorney and Client.** Where a defendant voluntarily chooses to represent himself at trial, his conviction will not be reversed by this court on the ground that the trial court did not take adequate precautions to protect his rights when the defendant received a fair trial and a fair opportunity to present his side of the case.
3. **Criminal Law: Trial: Evidence.** Errors in ruling on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal.

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

Paul M. Conley, for appellant.

Charles Humble and Norman Langemach, Jr., for appellee.

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

BRODKEY, J.

Defendant, Alex V. Horn, appeals to this court from a judgment entered by the District Court for Lancaster County affirming his conviction in the municipal court of Lincoln, Lancaster County, Nebraska, for violation of an ordinance of that city making it illegal "* * * to fire or discharge any gun or firearm, including any pistol, revolver, shotgun or rifle, within the corporate limits, or on any property of the City of Lincoln outside of the corporate limits." The penalty set in the ordinance for the violation thereof is imprisonment in the city jail for a period not to exceed 6 months, or by a fine not to exceed $500 and costs, or both. See §§ 9.28.010 and 30.04.040, Lincoln Municipal Code. Following appellant's plea of not guilty to the charge, the matter was tried to the court. Appellant concedes in his brief that he did not seek counsel in the municipal court proceedings, and voluntarily chose to represent himself at his trial. After taking evidence from both

sides, the appellant was found guilty of the ordinance violation and was sentenced to pay a fine of $150 and costs. In the hearing in District Court on appeal, the court reviewed the case on the record from the municipal court, and correctly refused to hear additional evidence. § 29-613, R. R. S. 1943; Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50 (1976); State v. Clark, 194 Neb. 487, 233 N. W. 2d 898 (1975). The District Court affirmed the conviction of the appellant and imposed the identical sentence of the municipal court. We affirm.

Although appellant assigns as error in his appeal to this court that there was insufficient evidence in the trial court to sustain a finding of guilt, and also that the sentence was excessive, the main thrust of his complaint is that the trial court did not protect the appellant's rights to a sufficient degree, considering he was not represented by an attorney during the proceedings, and was, in fact, representing himself. Appellant claims that the trial court erred in failing to explain the procedure of trial to the accused and in allowing the prosecutor to ignore settled rules of evidence. He also claims that the District Court, on appeal, erred in not permitting further evidence to be introduced at the appellate level and in wrongfully explaining the procedure to be followed.

We have carefully reviewed the entire record in this case and find that the evidence contained therein is more than ample to sustain the conviction of the defendant for the offense with which he was charged. Officers of the Lincoln police department were called to appellant's premises at 1415 South 7th Street in Lincoln, Nebraska, on April 18, 1975, on a complaint that a shotgun was discharged within the city limits. It appears from the record that a new employee of City Sanitary Garbage, which collects refuse in the City of Lincoln, had attempted to pick up appellant's garbage, apparently unaware that on prior occasions there had

been trouble between the appellant and the company regarding claimed trespasses on appellant's property, and that the company had ceased making collections of garbage at that address but had failed to inform the new employee of that fact. Appellant came out of his house with a shotgun, pointed it at the new employee, and told him to drop his bucket and run, which he did. He returned shortly thereafter with some other employees of the garbage company, but at the time of the incident in question they were not on the property of the appellant, but were in the alley behind appellant's residence. Appellant again threatened the employees with his shotgun, assured them that he was serious in his threat to shoot them, and to prove his point discharged the shotgun into the air. Not only did the employees testify at the trial that appellant had indeed fired the shotgun into the air, but the appellant himself admitted that he had done so.

In defense of his actions, appellant claimed that he had a right to protect his property, and also that he fired his shotgun in self-defense. Even assuming that one of the employees may have trespassed on his property on the occasion in question, at the time of the firing of the shotgun the employees were no longer trespassing upon his property; and, in any event, the mere trespass, inadvertent in this case, would not by any stretch of the imagination serve as justification for appellant firing his shotgun. Appellant also claimed that the employees of the company were threatening to do damage to his shrubbery, but this allegation was denied by all the employees. Even if it were true, it would in no manner suffice as justification for the discharge of the weapon, and could not justify the discharge of the weapon by the appellant under a claim of self-defense. The evidence sustaining the conviction of the appellant was clearly sufficient.

We also dispose of the claim that the sentence was excessive by pointing out that the maximum permissible

sentence under the ordinance was not to exceed 6 months in the city jail or by a fine not to exceed $500, or both. The fine imposed upon the defendant in this case was $150, clearly within the permissible range of the authorized fines. Considering the gravity of the offense, we do not feel that a fine of $150 under the circumstances was excessive.

We turn now to the principal issue in the appeal, which deals with the duty of the court to assist and protect a defendant who chooses to represent himself. No complaint is made in this appeal as to the failure of the court to appoint counsel for the defendant, who chose to represent himself, but the complaint appears to be that the judges in the two courts did not go far enough in protecting his interests. We have reviewed the record of the trial in municipal court and find that although it is true that the trial judge did sustain numerous objections on the part of the city attorney to questions asked of witnesses by the appellant, it appears that the sustaining of the objections by the court was proper, and that the matters inquired of were not relevant or material. In several instances the court did not sustain objections made by the city attorney. We have searched the entire record and do not find any instances of objections made by the appellant. On at least two occasions, references were made to extending the appellant latitude in his questioning because of his not being represented by counsel. There was ample and sufficient testimony by witnesses at the trial to sustain the conviction of the defendant, which evidence was properly admissible, even if it had been objected to by a counsel employed by defendant. The trial court allowed appellant a great deal of latitude in presenting his evidence.

Moreover, on appeal, the District Judge allowed appellant more than one opportunity to secure counsel, but he failed to do so. He gave the appellant a full opportunity to present his case under the rules of law

applicable to appeals in criminal matters from municipal court. The District Court was also correct in informing appellant that the trial on appeal would be on the record from the municipal court and that the court was not permitted to receive additional evidence. Although counsel for appellant contends this was error, we believe he was confusing the rule in appeals in civil matters with the rule applicable to appeals in criminal matters. State v. Clark, *supra*; Phillippe v. Barbera, *supra*. Notwithstanding this fact, the trial court gave the appellant full and ample opportunity to tell his entire story about what had transpired at the time of his sentencing, and undoubtedly was aware of all the facts claimed by appellant which could conceivably be a defense to the charge against him, although, under the rules above stated, he could not lawfully receive appellant's statement as evidence in the appeal.

The only case cited by appellant in support of his claim that the trial court did not sufficiently protect his rights is Grubbs v. State of Indiana, 255 Ind. 411, 265 N. E. 2d 40 (1970). The court in that case stated that a trial court cannot sit idly by when a defendant represents himself, but must actively direct the course of the trial so as to protect the ultimate purpose of that trial, which is to bring about a decision by the judge or jury which is based upon relevant and nonhearsay evidence. The court held that the trial court should not permit the prosecutor to ignore settled rules of evidence. However, we are impressed by the language of Judge Arterburn in his concurring opinion in that case that: "When a man of intelligence voluntarily decides to be arraigned and go to trial without a lawyer, the constitution undoubtedly gives him that right. I am afraid from the tenor of the majority opinion that it will be interpreted to hold that a trial judge becomes a lawyer for the defendant who has no lawyer. With this I cannot agree. If true, it would

be much better for the defendant in most cases to have the judge trying the case as his lawyer than to have some outside attorney defending him. It takes the judge out of the position of being an impartial presiding officer and gives him a duty to assume a partisan view, looking out at all times for the defendant's interests.

"The next step would be to hold that the judge is obligated to introduce certain evidence or subpoena certain witnesses for the defendant where the record appears afterwards to show such would have been helpful to the defendant's interest."

We concede that there may be instances where the decision as to where to draw the line between assisting a criminal defendant who is representing himself and acting as lawyer or advocate may become difficult of determination. It does not appear to be so in this case. The ultimate test is whether or not the appellant received a fair trial and a fair opportunity to present his side of the case. In this case he did.

We have had no specific errors in the reception of evidence in the trial in the municipal court pointed out to us by appellant, nor have we noticed any which might affect the substantial rights of the appellant. In any event, we have held that errors in ruling on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Hogan, 194 Neb. 207, 231 N. W. 2d 135 (1975).

We conclude that none of appellant's assignments of error are meritorious, and that the judgment of the District Court should be and hereby is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

LAWRENCE J. GAUGHEN ET AL., APPELLANTS, V. EDWARD F. SLOUP ET AL., APPELLEES.
250 N. W. 2d 915

Filed March 2, 1977. No. 40735.

1. **Municipal Corporations: Statutes.** A statute is not to be read as if open to construction as a matter of course.
2. ———: ———. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

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

William G. Line of Kerrigan, Line, Martin & Hanson, for appellants.

Larry E. Welch of McGroarty, Welch & Langdon, and George Svoboda, for appellees.

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

McCOWN, J.

This is an action against the mayor and council of the City of North Bend, Nebraska, to enjoin the paving of certain streets and the assessment of plaintiffs' property for the paving. The District Court found in favor of the defendants mayor and council and dismissed plaintiffs' petition.

Plaintiffs own property in North Bend, Nebraska, a city of the second class. Prior to 1963, paving districts in such cities could only be created under the provisions of sections 17-509 through 17-512, R. R. S. 1943. Under those sections the council, acting by itself, could not create a paving district over the objections of abutting property owners except where the work was to be done upon a federal or state highway in the city or upon a main thoroughfare that connected with a federal or state highway.

In 1963, the Legislature enacted sections 18-2001 to 18-2003, R. R. S. 1943. Section 18-2001 now provides: "Any city or village may, without petition or creating a street improvement district, grade, curb, gutter and pave any portion of a street otherwise paved so as to make one continuous paved street, but the portion to be so improved shall not exceed two blocks including intersections or thirteen hundred and twenty-five feet whichever is the lesser, and such city or village may also grade, curb, gutter and pave any unpaved street or alley which intersects a paved street for a distance of not to exceed one block on either side of such paved street." Section 18-2002 now similarly authorizes the paving of "any side street or alley within its corporate limits connecting with a major traffic street for a distance not to exceed one block from such major traffic street." Section 18-2004, enacted in 1965, provides that nothing in sections 18-2001 to 18-2004 shall be construed to repeal or amend any statutes not specifically repealed, and provides that sections 18-2001 to 18-2004 shall be construed as an independent and complete act. That section also provides that other statutes may be relied upon if need be to supplement and effectuate the purposes of the act. These statutes in Chapter 18 are frequently referred to as the "Gap and Extend Law."

In 1966, the City of North Bend began to use sections 18-2001 to 18-2004 to pave various gaps and extensions in existing paving. In 1969, the city filed a road and street program with the State of Nebraska which was a plan for paving the entire city using both Chapter 17 and Chapter 18 statutes. In 1969, several small sections were paved under Chapter 17 statutes. In 1970, approximately 12 blocks were paved using Chapter 17 statutes, and 13 blocks were paved using Chapter 18 statutes. Additional paving was constructed using both Chapter 17 and Chapter 18 statutes in the years 1971 to 1974.

Some of plaintiffs' property was assessed for paving

projects carried out under Chapter 18 statutes in 1970 and 1971, and these assessments were paid. The 1974 paving in dispute in this case is in two separate paving units. Unit No. 64 consists of 1 block of paving connected to previously existing paving. Paving Unit No. 76 consists of 2 blocks of paving which extends existing paving.

At a council meeting on July 15, 1974, the plaintiffs requested the defendants to defer executing a paving contract because they were contemplating litigation. The paving contract was executed by the mayor on behalf of the City of North Bend on July 29, 1974, and this suit was filed July 30, 1974. After the paving was completed, the mayor and council, after due notice and hearing, assessed plaintiffs' property specially benefited by the paving. Plaintiffs objected to the assessment on the basis that the matter was then in litigation. Plaintiffs have not paid the assessments.

The plaintiffs concede that the city complied with all specific requirements of the statutes with respect to the paving units involved here. The plaintiffs contend that the provisions of Chapter 18 were unconstitutionally applied to them in that the Legislature did not intend the law to be used to pave an entire city and thus eliminate the taxpayers' rights to object which are protected under the provisions of Chapter 17. The evidence does not support that contention. The evidence establishes that well over half of all the paving in North Bend to and including 1974 was done under the paving district statutes of Chapter 17. The remaining paving was done under the provisions of Chapter 18 from 1966 through 1974.

Plaintiffs argue that the power and authority of a city to construct local improvements and levy assessments for payment thereof must be strictly construed, and that any reasonable doubt must be resolved in favor of the taxpayer. That rule has no application here. The argument assumes that the language of sections

18-2001 through 18-2004, R. R. S. 1943, is ambiguous and must, therefore, be interpreted.

A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189; Doolittle v. County of Lincoln, 191 Neb. 159, 214 N. W. 2d 248. The provisions of the gap and extend law are clear and unambiguous.

The Legislature specifically provided that the gap and extend law was not to be construed to repeal or amend any statutes it did not specifically repeal, and that it was to be construed as an independent and complete act. Section 18-2004, R. R. S. 1943, also provided that other statutes might be relied upon if need be to supplement and effectuate the purposes of the gap and extend law. Under such circumstances it is clear that the Legislature intended to supplement previously existing authority to pave streets and did not intend to limit the application of the gap and extend law in some unspecified manner. All the specific requirements of the law were complied with in this case. The judgment of the District Court was correct.

AFFIRMED.

LAWRENCE W. TRAUDT ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE.
251 N. W. 2d 148

Filed March 2, 1977. No. 40787.

1. **Evidence: Contracts.** The usual statement of the parol evidence

rule is that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement.

2. ———: ———. The parol evidence rule is designed to preserve the integrity and certainty of written documents against disputes arising from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing. It is in no sense a rule of evidence, but a rule of substantive law.
3. ———: ———. Where the parties have embodied their transaction into a writing, the rule applies to exclude evidence dehors the writing or prior or contemporaneous negotiations or agreements in regard to the same subject matter.
4. **Evidence: Courts: Contracts.** The applicability of the parol evidence rule depends in general upon whether the agreement has been integrated. There are various tests to determine whether the transaction is integrated. It is the duty of the court, in any given case, to ascertain which of the tests is appropriate in the determination of whether a transaction is integrated.
5. **Evidence: Contracts.** Where an agreement has been only partially integrated, the rule against disputing the terms of the document will be applicable to as much of the transaction as is embodied.
6. **Contracts: Evidence: Consideration.** Mere recitals of receipt of consideration are not terms of the agreement, but simply statements of facts, the truth or untruth of which may be established by extrinsic evidence.
7. **Courts: Contracts: Evidence.** The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing, that is, the question of integration.
8. **Demurrer: Evidence: Pleadings.** In a proper case, the application of the parol evidence rule may be decided upon a demurrer raising the question of whether a petition states a cause of action. Allegations of fact, which are legally ineffective, although admitted by the demurrer, must be disregarded.

Appeal from the District Court for Hamilton County: JOHN D. ZEILINGER, Judge. Affirmed.

E. H. Powell, for appellants.

Barlow, Johnson, DeMars & Flodman, for appellee.

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

CLINTON, J.

In 1973, plaintiffs, landowners, brought this action against the defendant, power district, to recover additional compensation for a power line easement across the plaintiffs' land which they had conveyed to the defendant in 1968. The defendant demurred to the plaintiffs' petition as amended, and the court sustained the demurrer. After the plaintiffs elected to stand on their petition, the court dismissed the action. The plaintiffs have appealed to this court and the question is whether the petition as amended stated a cause of action.

The plaintiffs allege that they were the owners of a certain quarter section of land in Hamilton County, Nebraska; that in 1968 the power district purchased an easement across their land; that as a part of the negotiations for said easement the defendant promised the plaintiffs that " 'if any other land owners get more money, then you will get more money' "; and that said statement was made orally and was not put in writing. Plaintiffs also alleged that they interpreted the words " 'other land owners' to mean persons who own lands in Hamilton County" from whom the defendant had purchased easements. The petition also alleged that the defendant had acquired a similar easement from another named party by virtue of eminent domain proceedings which "were finally determined in September, 1972." The petition alleged that "Defendant owes to Plaintiffs additional funds for the purchase by Defendant of said easement." An executed copy of the easement was attached to the petition and incorporated by reference. The contents of this conveyance will be discussed later in the opinion. The petition prayed for "damages caused by said easement in the sum of $16,000.00, computed to be the sum of $100.00 per acre for said lands."

The underlying legal questions are two: First, was proof of the alleged contemporaneous oral agreement

to pay some additional money barred by the parol evidence rule, and secondly, could such issue be properly determined upon demurrer. We answer both questions in the affirmative and uphold the judgment of the District Court dismissing the petition.

A succinct and cogent discussion of the parol evidence rule is contained in the manual, Evidence, Nebraska State Bar Association (1966), pp. 28-1 to 28-27, and affords a quick access to the basic authorities on all aspects of the subtle problems associated with the rule. In the discussion which follows we use the material therein contained, not only for its source material, but also for its format, and freely quote from it without specific acknowledgment and without indicating where we have made language changes to suit our own taste, or used other material.

The principles which govern this case are the following. The usual statement of the rule is that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement. See Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375. The rule is designed to preserve the integrity and certainty of written documents against disputes arising from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing. McCormick on Evidence, § 210, p. 427 (1954). ". . . *the rule is in no sense a rule of Evidence*, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. . . . What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course . . . results in forbidding the fact to be proved at all. . . ." 9 Wigmore on Evidence (3d Ed., 1940), § 2400, p. 3. See, also, Theno v. National Assurance Corp., *supra;* Arman v. Structiform Engineering Co., Inc., 147 Neb. 658, 24 N. W. 2d 723.

Where the parties have embodied their transaction into a writing, the rule applies to exclude evidence dehors the writing of prior or contemporaneous negotiations or agreements in regard to the same subject matter. Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132; Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849. The applicability of the rule depends in general upon whether the agreement has been integrated. Gerdes v. Omaha Home for Boys, *supra.* The usual controversy arises in cases of partial integration. Here the rule against disputing the terms of the document will be applicable to as much of the transaction as is embodied. 9 Wigmore on Evidence (3d Ed., 1940), § 2430, p. 97; Arman v. Structiform Engineering Co., Inc., *supra;* Elvidge v. Brant, 131 Neb. 1, 267 N. W. 169; Restatement, Contracts, § 239, p. 335.

The crucial question in this particular case is: In what manner is it to be determined whether the transaction was integrated into the conveyance which is the grant of the easement? Professor Corbin suggests that in the usual case the conveyance is not intended to be a complete integration of the terms of the agreement, e.g., recitals of receipt of consideration are not terms of the agreement, but simply statement of facts, the truth or untruth of which may be established by extrinsic evidence. Likewise, under some circumstances the fact that additional consideration was to be paid may be established. 3 Corbin on Contracts, §§ 586, 587, pp. 491, 501, 504; Norman v. Waite, 30 Neb. 302, 46 N. W. 639; Wiltrout v. Showers, 82 Neb. 777, 118 N. W. 1080; Schommer v. Bergfield, 178 Neb. 140, 132 N. W. 2d 345; Weiner v. Hroch, 188 Neb. 389, 196 N. W. 2d 907. Corbin recognizes, however, that if the transaction is completely integrated then evidence bearing or adding to the conveyance is not admissible. 3 Corbin on Contracts, § 586, p. 495.

What tests are to be applied to determine whether

the transaction has been completely integrated? The tests established by the Nebraska cases are three. One is that the question whether the writing embodies the whole or only a part of the transaction depends upon the "completeness" of the writing. A corollary of this test is that the writing is the "sole criteria" of its own completeness. A second test often used is that the question depends upon whether the evidence outside the writing "varies or contradicts" the terms of the writing. One of several opinions of this court stating the first test is S. Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415. Dawson County State Bank v. Durland, 114 Neb. 605, 209 N. W. 243, states the corollary of that rule. S. Spiegal & Son v. Alpirn, *supra,* as well as Cornhusker Development & Inv. Group, Inc. v. Knecht, 180 Neb. 873, 146 N. W. 2d 567, and other decisions of this court state the second test. The evidence manual we earlier referred to states that Wigmore criticizes both tests and that the question of integraion or partial integration depends upon intent, viz., whether the writing was intended to cover a certain subject of negotiation. Intent should be determined from the "conduct and language of the parties and the surrounding circumstances." This court appears to have, in some cases, approved the statements of Wigmore as well as the rule of Restatement. Arman v. Structiform Engineering Co., Inc., *supra;* 9 Wigmore on Evidence, § 2430, p. 97. See, also, Elvidge v. Brant, *supra.*

We quote from Restatement, Contracts, section 240, page 335: "(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and

"(a) is made for separate consideration, or

"(b) is such an agreement as might naturally be

made as a separate agreement by parties situated as were the parties to the written contract.

"(2) Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative."

The court, not the jury, decides as a preliminary matter the extent to which the transaction is embodied in the writing, that is, the question of integration. Arman v. Structiform Engineering Co., Inc., *supra.*

It seems to us that the tests, including those of Wigmore and Restatement, are not necessarily mutually exclusive. Sometimes the court will have to look no further than the instrument itself and sometimes it will be proper to consider the surrounding circumstances, including the conduct and language of the parties as the Wigmore rule would require.

In this case we have before us the written instrument and the surrounding circumstances and language dehors the writing as alleged by the plaintiffs, which allegations must be accepted as factual since the demurrer admits the facts but, of course, does not give them effect if as a matter of law they are incompetent.

The time has now come to discuss the instrument of conveyance. It is in a common form of grant of easement and, after naming the grantors, states: ". . . in consideration of $1.00, receipt of which is hereby acknowledged, and the further payment of a sum to make a total payment of $1,000.00 for 4 poles . . . when set." It then contains the granting clause and description of the easement, together with describing various other rights of the grantee and the grantors. The instrument shows how the stated consideration is calculated as follows: "Scheduled payment for rights herein granted shall be made to the Grantor in the

amount above provided, which has been calculated on the following basis:

"In Untillable Field or Pasture"
Per Pole . . . . . $———————
In Cultivated Fields In Irrigated Fields
$——————— $ 4 poles $250.00 ea." Like spaces and lines for the categories "Per Anchor," "Tree Cutting & Trimming," and "Overhang of Conductors," as well as a blank space for an additional item and for a dollar insertion are all left unfilled. The instrument also contains the following provision: "The Grantee agrees to pay the Grantors or lessee, as their interests may appear for any damage to personal property, fences, livestock, and to growing crops caused by the survey, construction, reconstruction, inspection, repair, maintenance, operation, and removal of said line. Final payment shall be made on or before 60 days after completion of the construction stated herein. It is further agreed that in the future, all claims for damages must be submitted to the Grantee in writing within 90 days of such occurrence; otherwise, it is agreed that said claim for damages shall have been waived."

So far as the subject of consideration for the easement is concerned, the conveyance clearly does three things. It provides for a "total payment of $1000.00"; it shows how the amount was computed; and it makes a special provision for certain types of probable future damages which might arise from *future use* of the easement. It is clear that the instrument was designed to, and apparently did, deal with the whole subject of consideration and damages as then known and contemplated. It would appear to exclude any additional future payment *for the acquisition* of the easement, which is clearly the subject of this action.

No matter which of the tests is to be applied here, it appears that the determination of the trial court was correct. The instrument itself appears to be complete on the subject of consideration to be paid for the ease-

ment and the elements of damage for which future payment would be made when and if such damage occurred. The allegation in the petition that there was made a contemporaneous oral agreement to pay in the future some unspecified additional amount for the acquisition, depending upon whether other persons later received more money, contradicts the provision, making "a total payment of $1000.00."

Let us now apply Wigmore's rule to the facts alleged. He says: ". . . the inquiry is whether the writing was intended to cover a *certain subject* of negotiation; for if it was not, then the writing does not embody the transaction on that subject; and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing." 9 Wigmore on Evidence (3d Ed.), § 2430, p. 97. He goes on to say: "What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable." 9 Wigmore on Evidence (3d Ed.), § 2430(2), p. 98. He also says: "In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotia-*

tion is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element . . . ." 9 Wigmore on Evidence (3d Ed.), § 2430(3), p. 98.

Applying the foregoing rule we conclude that clearly the subject of total consideration was so a part of the transaction that "if reduced to writing at all, [it] must be governed by the same writing." Secondly, the subject of consideration was in fact dealt with in the instrument.

If we look to the Restatement rule we conclude: (1) The oral agreement was not for a separate consideration. Only one thing was being conveyed. There was no separate consideration for an additional payment. (2) An oral agreement for an unspecified future payment dependent upon extraneous events is not such an agreement as might naturally be made as a separate agreement between persons dealing at arm's length for property which would be the subject of eminent domain proceedings if negotiations fail. This seems particularly true where any agreement to convey an easement, in order to be valid and enforceable, must be evidenced by a memorandum sufficient to satisfy the statute of frauds and signed by the party to be bound. This conclusion seems also fortified by the circumstance that if the parties were seeking to avoid eminent domain proceedings, any such agreement would provide for the determination of how the added consideration was to be determined. Otherwise litigation would be in any event almost inevitable.

This case is clearly distinguishable from that category of cases such as: Norman v. Waite, *supra*, which was a suit to foreclose a mortgage and proof was permitted to show that there was a failure of consideration for the note supporting the mortgage (the evi-

dence in that case did not in any way contradict or vary the terms of the note and mortgage); Wiltrout v. Showers, *supra,* where the agreed consideration for the purchase of land was $3,800, but only $3,300 was paid, and the court permitted proof that the balance of $500 was to be paid by assuming the existing mortgage; Schommer v. Bergfield, *supra,* where the question was whether the stated consideration had in fact been paid; and Weiner v. Hroch, *supra,* involving essentially the same circumstances as Wiltrout v. Showers, *supra.*

The last question to be answered is whether the issue may be decided upon demurrer. The answer, at least insofar as is applicable under the facts here pleaded in the petition, is found in A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687. In that case the plaintiff pled a contemporaneous oral agreement which attempted to vary the terms of the written instrument, a promissory note. The court pointed out that in ruling on the demurrer the court does not consider facts which are irrelevant, immaterial, incompetent, or allegations of fact which are legally ineffective. That covers this case.

AFFIRMED.

NEWTON, J., concurs in the result.

McCOWN, J., dissenting.

I have no quarrel with the general principles of law set out in the majority opinion with respect to the parol evidence rule. The application of those rules to the facts pleaded, however, requires an interpretation and construction of the pleadings as well as the facts. In making that interpretation here the majority opinion has failed to apply another basic rule of law. A party who stands on a general demurrer to a petition thereby admits all material facts well pleaded and must take all the consequences which result from such admission. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. May Plumbing Co. v. Shaver, 182 Neb.

251, 153 N. W. 2d 911. The ruling of the District Court in sustaining a demurrer must be determined in the light of those requirements. See Hester v. Young, 154 Neb. 227, 47 N. W. 2d 515. While the pleadings might have been more artfully drawn here, they are nevertheless entitled to the benefit of those rules.

Paragraph 2 of plaintiffs' petition pleaded in toto: "That the Defendant purchased an easement across Plaintiffs' said lands in September, 1968; as part of the negotiations therefor Defendant's easement purchaser promised to Plaintiffs that if they would sign Defendant's proposed easement and Defendant thereafter had to pay more than said amount to other land owners, that Defendant would then pay Plaintiffs additional funds for said easement to equalize such payments."

A reasonable inference can be drawn that the portion of the agreement dealing with the easement was integrated but the entire agreement was not. Restatement, Contracts 2d, T.D. No. 5, section 236, page 127, deals with complete and partially integrated agreements. Comment a states in part: "Even though there is an integrated agreement, consistent additional terms not reduced to writing may be shown, unless the court finds that the writing was assented to by both parties as a complete and exclusive statement of all the terms."

Restatement, Contracts 2d, T.D. No. 6, section 239, page 28, dealing with the effect of an integrated agreement on prior agreements under the parol evidence rule states at comment a: "Where an agreement is partly oral and partly written, the writing is at most a partially integrated agreement. See § 235."

Section 24, Restatement, Contracts 2d, T.D. No. 6, section 242, page 45, provides: "Consistent Additional Terms. (1) Evidence of a consistent additional term is admissible to explain or supplement an integrated agreement unless the court finds that the agreement was completely integrated.

"(2) An agreement is not completely integrated if it

omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing."

The alleged oral agreement in no way challenges the easement nor the fact that it was executed and integrated. The pleading concedes that the easement was final and binding on the plaintiffs but it does not concede that the easement represented an integration of the complete agreement but instead alleges a separated or unintegrated oral agreement for a different or separate consideration with consistent additional terms. The alleged oral agreement does not vary or contradict any of the terms of the easement nor dispute its validity in any way.

By reasonable intendment plaintiffs have alleged that in consideration for plaintiffs executing the easement the defendant agreed that if it thereafter paid other landowners a higher unit price per pole for similar easements it would then pay to plaintiffs the difference between the unit amount paid to plaintiffs and the higher unit amount paid to any such other landowners.

Such an oral agreement, if established by the evidence, and if sufficiently specific, would not be barred by the parol evidence rule but the issues involved cannot be determined on the basis of the pleadings without evidence. To dispose of this case on the pleadings, as the court does, fails to give the plaintiffs the benefit of the rule that a demurrer to a petition admits all material facts well pleaded and any reasonable and fair intendments which may be implied from the facts stated.

BOSLAUGH and BRODKEY, JJ., join in this dissent.

SUSAN DIANE BRANDL, APPELLANT, V. ALVIN LAWRENCE BRANDL, APPELLEE.
251 N. W. 2d 155

Filed March 2, 1977. No. 40795.

1. **Statutes: Divorce: Parent and Child: Infants.** When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1974.
2. ———: ———: ———: ———. During the pendency of dissolution proceedings the court may enter ex parte orders determining temporary custody of minor children.
3. **Divorce: Parent and Child: Infants.** The doctrine of Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, which permits the court to act summarily in child custody matters in the best interests of the children, applies only where the court has previously placed the children in court custody.

Appeal from the District Court for Madison County: GEORGE H. DITTRICK, Judge. Remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellant.

Mueting, DeLay & Spittler, for appellee.

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

CLINTON, J.

This is an appeal by the petitioner wife from an order of the District Court for Madison County modifying a previous order concerning child custody entered in an action for dissolution of marriage. By the order of modification the court awarded physical custody of the parties' only child to the respondent husband annually during the period September 1st to May 31st

and to the petitioner wife for the remainder of the year.

The question which is determinative of this appeal is whether the court in entering the order of modification was entitled to act summarily under the doctrine of Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, or whether it should have acted after hearing and receipt of competent evidence in accordance with the doctrine laid down in the line of cases of which Erpelding v. Erpelding, 176 Neb. 266, 125 N. W. 2d 688, is one. Since those cases were decided, sections 42-347 to 42-379, R. R. S. 1943, have been enacted and former statutes repealed.

A summary of the procedural history of this case is useful. After 7 days of trial between April 15, 1975, and May 5, 1975, the court, on May 5, 1975, entered a decree of dissolution. On September 11, 1975, oral argument was heard and the court entered an order which, insofar as it is pertinent to the matter in issue on this appeal, was as follows: "The legal custody of Chris Brandl, the child of the parties, should be awarded to the Chief Probation Officer of the Second Probation District with the following directions." The order then gave physical custody of the child to the wife for the period September 20, 1975, to March 1, 1976, and to the husband for the period March 1st to September 1st; thereafter alternating custody each 6 months. The order also provided that: "The legal custodian shall supervise both the petitioner and respondent and call to the attention of the court any acts of either inimical to the child's best interests."

On September 22, 1975, the husband filed an application for modification of the custody order in which he requested that he have physical custody from September 1st to May 31st and the wife have physical custody June 1st to August 31st each year.

On September 25, 1975, the wife filed a motion to strike the application to modify, alleging that there had

been no change of circumstances since the original order. On October 17, 1975, a hearing, of sorts, was held. The motion to strike was overruled. The wife asked for time to file an answer to the application to modify. This was denied and the court entered the order from which, after the overruling of a motion for a new trial, this appeal was taken.

At the hearing of October 17, 1975, the husband offered an instrument entitled affidavit. No objection was made and it was received. The affidavit is unexecuted both as to signature and jurat. Another affidavit, identical as to contents but executed, is contained in a supplemental transcript. Even if this were to be considered competent evidence because unobjected to, it cannot be considered by us because it is not included in the bill of exceptions which consists simply of a short colloquy between the court and counsel and the unexecuted affidavit. The record of the earlier trial is not included in any bill of exceptions and we, of course, are in no position to make any judgment on the merits.

So far as we can determine from the scanty record before us, this case is unlike Benson v. Benson, *supra,* where the court itself retained custody of the children and where the case history justified summary action in the best interests of the children. Here the court appears to have been acting on a party's motion to modify. It denied the party opponent an opportunity to respond. It acted upon incompetent evidence.

Section 42-364, R. S. Supp., 1974, provides: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and

hearing." Section 42-356, R. R. S. 1943, provides: "Hearings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions. The court may in its discretion close the hearing and may restrict the availability of the evidence or bill of exceptions." Under the provisions of section 42-357, R. S. Supp., 1974, the court, during the pendency of the action, is authorized to enter ex parte orders related to several matters, including "(3) determining the temporary custody of any minor children of the marriage."

In the case before us the court itself did not retain custody in the order which it later modified, but placed that custody in a third person, the probation officer. Benson v. Benson, *supra,* appears not to be applicable in this instance. It is also clear that the court was not entering a temporary order.

As noted above, we express no view on the merits, but decide only the procedural questions presented. Since much time has elapsed since October 17, 1975, it is apparent that any order which is to be hereafter entered must depend upon the best interests of the child as indicated by current conditions as shown by competent evidence.

The cause is remanded for such further proceedings as either of the parties shall care to initiate. Each party shall pay his own costs in this court.

REMANDED FOR FURTHER PROCEEDINGS.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion. I call attention to the fact that a District Judge has inherent power to vacate or modify its judgments at any time during the term at which they are entered. See Fanning v. Richards, 193 Neb. 431, 227 N. W. 2d 595. Furthermore, such vacation or modification of a judgment at the same term may be made on the court's own motion. See Netusil v. Novak, 120 Neb. 751, 235 N. W. 335.

The record in the present case does not disclose that the court acted after the expiration of the term at which the original judgment was entered. I therefore submit that the modified judgment is valid and that this case should be affirmed in the absence of a showing that the modified judgment is incorrect on its merits.

BOSLAUGH, J., concurring.

I am in full agreement with the decision of the court that this case must be remanded to give the appellant an opportunity to be heard upon the order of October 17, 1975, modifying the decree entered September 11, 1975.

I do not believe this case can be distinguished from Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, on the ground that in this case custody was placed in a third person, the probation officer, instead of the court. The order of October 17, 1975, provides in part: "* * * and that this Court, at the time of said decree, *retained custody of the parties minor child* by awarding the legal custody of said child to the District Probation Officer, of the 9th Judicial District; * * *." (Emphasis supplied.) An award of child custody to a probation officer with physical custody in the parents is for most purposes the legal equivalent of retaining custody in the court with possession in the parents.

Benson v. Benson, *supra,* involved a modification order, made after an evidentiary hearing, which gave the defendant father possession of the children from June 9, 1972, until August 6, 1972, instead of for 1 month during the summer as provided in an order entered on February 17, 1972. The order was in the nature of an adjustment of visitation rights which had been a subject of controversy between the parties since the date of the original decree.

The decree in this case, entered on September 11, 1975, divided the physical custody equally between the parties. The order of October 17, 1975, responding to the application for modification, awarded physical cus-

tody to the respondent for 9 months of each year. The order was not temporary in nature, and deprived the petitioner of a substantial right that had been awarded to her in the decree. Under the circumstances it was an order that should have been made only after notice and an opportunity for an evidentiary hearing.

SPENCER and MCCOWN, JJ., join in this concurrence.

DONALD NOVAK, APPELLEE AND CROSS-APPELLANT, V. TRIANGLE STEEL COMPANY, APPELLANT AND CROSS-APPELLEE.
251 N. W. 2d 158
Filed March 2, 1977. No. 40809.

1. **Workmen's Compensation: Pleadings: Time.** When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation.
2. ———: ———: ———. A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute.
3. **Workmen's Compensation: Pleadings: Time: Limitations, Statute of.** The limitation provided by section 48-317, R. R. S. 1943, starts to run from the time it becomes reasonably apparent that a compensable claim exists.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and dismissed.

William J. Lamson, Jr., and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Thomas R. Wolff, for appellee.

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

SPENCER, J.

Triangle Steel Company, defendant, appeals from a compensation award to Donald Novak, plaintiff. He was awarded temporary total and permanent partial

disability, hospital and medical expenses, and vocational rehabilitation services. Plaintiff cross-appeals, contending the temporary total disability should have been awarded for a longer period. The question raised by the defendant is the applicability of the statute of limitations. We reverse the judgment and dismiss the action.

On November 29, 1972, plaintiff injured his back as the result of an accident arising out of and in the course of his employment by the defendant. The injury was diagnosed as a herniated disc between the fourth and fifth lumbar vertebrae. A partial hemilaminectomy was performed on December 7, 1972. Plaintiff returned to work for defendant on March 28, 1973, doing the same type of work as before. Plaintiff testified he continued to have soreness in his back following the operation and that he last consulted the doctor about the problem in June 1973.

Plaintiff and defendant entered into a lump sum settlement to compensate plaintiff for the injury. The settlement was approved by the District Court for Douglas County on March 28, 1973. It contained a provision releasing defendant from any further liability arising out of that injury.

Plaintiff was injured again on October 23, 1973, while employed by the defendant. He twisted his ankle in some loose sand while stepping down from a crane and fell, striking his right hip and shoulder. After resting for 20 minutes he returned to work for the day.

The following morning he went to the emergency room of Methodist Hospital for treatment of his ankle and right shoulder. X-rays taken of his ankle and shoulder proved negative. Some 2 or 3 days later plaintiff visited his family physician. Plaintiff testified his back was sore, but he attributed this to his original injury. Defendant's compensation carrier paid all medical and hospital bills through October 1973.

Plaintiff returned to work on October 30, 1973. He

continued to work in the same capacity until December 28, 1973. Plaintiff testified that during this time his feet were numb, he could not lift his left arm, he had cramps, and he eventually could work with only one arm.

Plaintiff consulted a doctor on December 31, 1973, and was placed in the hospital. A myelogram performed on January 5, 1974, revealed an extruded lumbar disc in the lumbosacral space on the right side. Surgery was performed on January 10, 1974, and the disc between the fifth lumbar and the sacrum was removed. The incision for this surgery was made through the scar tissue of the first surgery as the injuries were approximately 2 inches apart. Plaintiff testified that despite inquiries he made, the doctors did not inform him why the second surgery was required. The surgeon could not recall whether he advised plaintiff that the second injury involved a different disc.

Plaintiff did not return to work for defendant following this surgery. The doctor released him to do light work in June 1974. Plaintiff was unable to obtain permanent employment until August 1975, when he began his present job as a salesman. Plaintiff did not make a compensation claim for the 1974 surgery. He did file an insurance claim with the defendant's group health carrier, which was paid.

In August 1974, while consulting with an attorney on an unrelated legal matter, plaintiff discussed his back problem. He was referred to his present attorney who investigated the possibility of a malpractice action.

Plaintiff alleges that he was not aware he might have a compensable claim for the back surgery of January 10, 1974, until November 1, 1974. Until that time, he did not know the surgery in 1974 was on a different disc than that removed in November of 1973.

Plaintiff's attorney sent a letter to defendant on November 25, 1974, informing it for the first time of No-

vak's possible compensation claim for a back injury. A copy of this letter was forwarded to the employer's compensation carrier on December 5, 1974. This action was filed February 6, 1975.

After an award by a single judge of the Workmen's Compensation Court, defendant gave notice of a waiver of a rehearing before the Nebraska Workmen's Compensation Court en banc. It appealed directly to the District Court for Douglas County, Nebraska. The District Court affirmed the award.

The issue in this appeal is whether Novak's claim is barred by the provisions of section 48-137, R. R. S. 1943, of the Workmen's Compensation Act. It provides, so far as material here: "* * * all claims for compensation shall be forever barred unless * * * within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173."

There is no controversy surrounding the fact that Novak was injured on October 23, 1973, during the course of his employment by defendant. It is also undisputed that the October 23 injury directly necessitated the surgery performed on January 10, 1974. Novak's testimony that he did not know he had suffered a compensable claim for his back injury of October 1973, until November of 1974, is also undisputed. Novak filed his petition with the Workmen's Compensation Court on February 5, 1975, or more than 15 months after the injury.

This case is controlled by Raymond v. Buckridge, Inc., 195 Neb. 212, 237 N. W. 2d 412 (1976). In that case we held: "When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation."

For the purposes of this opinion we accept the conclusion that Novak continued to have problems with

his back following his first back surgery. He returned to the hospital in January of 1973, because of drainage problems. He continued seeing the doctor through June of 1973, because of a soreness at the point of the incision and because of a tingling sensation in his lower back. He was told by his doctor that he would just have to live with these problems. When he went to the hospital emergency room after his injury of October 23, 1973, he had treatment on his ankle and his right shoulder. While he testified his back was sore, he made no claim he had any problem with it.

The myelogram performed on January 5, 1974, revealed an extruded lumbar disc in the lumbosacral space on the right side. Surgery was performed on January 10, 1974, to remove the disc between the fifth lumbar and the sacrum. In the previous surgery a partial hemilaminectomy had been performed. That operation involved the disc at the L4 - L5 interspace, or approximately 2 inches above the veterbrae removed in the subsequent surgery.

The District Court held the action was not barred by the statute of limitations. It concluded that plaintiff had mistakenly believed the second back problem was an aggravation of or the result of the original injury for which he had been compensated. It held this to be a mistake of fact which would prevent the statute of limitations from running until November 1974, when plaintiff became aware that the injuries were unrelated.

We disagree with the trial court's conclusion. Novak had sufficient facts to put a reasonable man on notice. When he entered the hospital in December 1973, Novak knew he had suffered a disabling injury. He related that injury to the accident of October 23, 1973. He accepted benefits from his employer's group health carrier for hospitalization and surgical care between December 31, 1973, and January 17, 1974.

When his case history was taken by the doctor, No-

vak stated that he was injured in a fall on October 23, 1973. His mistake was that he did not know compensation was available to him as a result of the October 23 accident for a new injury. He knew this accident increased his back problem, but believed his injury was not compensable. At trial, Novak testified that he didn't go to the doctor for his back problem. "I didn't think it was that severe; and besides, I didn't have no claim on my back." Yet, the fact that a myelogram was performed pointed up a possible back problem. The surgery confirmed it.

Plaintiff is placing great reliance on Borowski v. Armco Steel Corp., 188 Neb. 654, 198 N. W. 2d 460 (1972), and Williams v. Dobberstein, 182 Neb. 862, 157 N. W. 2d 776 (1968). Those cases involved lack of knowledge of the seriousness of a latent injury, not the question present herein. Here, we are dealing with the lack of knowledge that a disability sustained from an injury is compensable, which is the type of situation dealt with in Raymond v. Buckridge, Inc., 195 Neb. 212, 237 N. W. 2d 412 (1976).

Novak's excuse that he didn't think he could get any more compensation because of the previous lump sum settlement is not a mistake of fact. Rather, it is mistake of law. In certain limited situations it might be possible to recover. Here, however, it is a new injury which is involved.

On the excusability of a mistake of law to prevent the running of the statute of limitations, Larson in his treatise, Workmen's Compensation Law, Volume 3, section 78.47, states: "A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute."

Novak's brief has the following alleged quote from Surratt v. Otoe Food Products Co., 146 Neb. 854, 21 N. W. 2d 862 (1946): "The Statute of Limitations commences to run from the time the employee has full

knowledge that an accident has caused a compensable claim." He also has this statement as Proposition of Law III, with the Surratt decision as authority for it: "The Statute of Limitations commences to run from the time the employee has full knowledge that an accident has caused a compensable claim." The quoted language is not in the Surratt case.

The rule plaintiff is contending for is probably an adaptation of the rule applicable to latent and progressive injuries. Where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability of any class from an accident, if the employee is aware that the disability is due to his employment. Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237 (1965).

Plaintiff does not contend his injury was latent or progressive. His contention is he did not realize he had a compensable injury because he thought the lump sum settlement foreclosed him from making a claim for anything further related to the 1972 back injury.

Plaintiff is now contending that although his back hurt at the time of the 1973 injury, he did not mention it because of the belief that it was not covered. When, however, the myelogram performed on January 5, 1974, revealed an extruded lumbar disc, he had sufficient information to raise a question as to its cause. On January 10, 1974, when the disc between the fifth lumbar and the sacrum was removed, it was unquestionably evident that he had an injury which flowed from an accident. It was then Novak's obligation to ascertain whether or not there was any relation between this operation and the first injury. Any investigation would have disclosed that the second operation was not in any way related to the first one. The limitation provided by section 48-137, R. R. S. 1943, starts to run

from the time it becomes reasonably apparent or should have become reasonably apparent that a compensable claim exists.

To permit a claimant to ignore facts of this nature and to toll the statute of limitations would, in effect, be a repeal of section 48-137, R. R. S. 1943. A moment's reflection will show the ease with which the intent of the statute could be thwarted. If we sustain Novak's contentions, all a future claimant would have to do to get around the statute would be to claim that he did not know he had suffered a compensable claim. If the statute is to be repealed, the Legislature should do it.

We reaffirm our holding in Raymond v. Buckridge, Inc., 195 Neb. 212, 237 N. W. 2d 412 (1976). When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and the filing of the action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation.

The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

McCOWN, J., dissenting.

The majority opinion ignores the specific findings of fact of both the Workmen's Compensation Court and the District Court and determines that the only mistake in this case was a mistake of law and not a mistake of fact. Therefore this court holds that plaintiff's claim for compensation is barred by the statute of limitations.

It is undisputed that plaintiff had injured his back in a previous accident on November 29, 1972, and had thereafter made a lump sum settlement for that injury. It is undisputed that the plaintiff was still having difficulties with the 1972 back injury up to the time of the second accident on October 23, 1973. It is also undisputed that the October 1973, accident caused an

ankle and shoulder injury and only some back pain, and that plaintiff experienced no immediate disability because of his back, but his "main concern after the October 23rd incident was the ankle and shoulder." The critical issue of fact is whether the plaintiff knew or reasonably should have known that the back problems he suffered subsequent to the 1973 accident were the result of the 1973 accident rather than the result of the 1972 accident. The issue is not at all whether he thought they were compensable or not compensable. The issue is one of fact and was so treated by both the Workmen's Compensation Court and the District Court. The Workmen's Compensation Court specifically found: "(T)hat plaintiff reasonably believed that the low back and toe numbness symptoms he experienced following his October 23, 1973, accident and injury were a reoccurrence of the back injury of November, 1972, since the same area of his low back was involved and did not know until November 1, 1974, that said symptoms were the result of the October 23, 1973, accident and injury and involved the L5-S1 area rather than the L4-L5 area of his low back; * * *."

The District Court specifically found: "The evidence also establishes that the back injury suffered October 23, 1973, did not immediately manifest itself; that the plaintiff assumed that the L-4 disc was involved; and that the plaintiff was not told until November of 1974 that the L-5 injury, traced to the October 23, 1973, accident, was not the same as that caused by the November 1972 incident."

The opinion of the District Court states: "It is my opinion that the plaintiff reasonably did not know or suspect until November of 1974 that the second back injury was or might be compensable; that the plaintiff honestly, though mistakenly, thought the second back problem was an aggravation or result of the original injury for which he had been compensated; that plain-

tiff's mistake was one of fact; * * * and that there has not been a showing of prejudice to the employer."

Obviously the District Court, as well as the compensation court specifically found that the plaintiff reasonably did not know that the second back injury was or might have been the result of the second accident rather than the original 1972 injury. The plaintiff did not even know until November 1974, that the second injury and operation involved a different disc in his back, which was only 2 inches away from the 1972 injury. In fact, the same point of incision was used for both surgeries, leaving only one longer scar. The majority opinion has not only ignored specific findings of fact, but has converted them into a conclusion that the plaintiff's only mistake was a mistake of law. The foundation for that conclusion is that plaintiff did not know that an aggravation to the first injury, if caused by the second injury, would have been compensable. There was more than that that he did not know. He didn't know that the second back injury and operation were the result of the second accident rather than the first.

Our cases dealing with the statute of limitations in workmen's compensation cases such as this have consistently held that the statute of limitations begins to run against an employee from the time it becomes reasonably apparent or should have become reasonably apparent that he has a compensable disability of any class from *an* accident or injury, if the employee is aware that the disability is due to his employment. *An* accident or injury under such holdings means only the accident or injury out of which the claim for compensation arises. The fact that there may have been other former accidents or injuries in the course of the employment, whether those injuries were compensable or not compensable, does not destroy the requirement that the employee must have known or had reasonable

grounds to know of the causal connection between the specific accident or injury and the disability.

This case was tried before the provisions of section 48-185, R. S. Supp., 1976, became effective and made findings of fact of the Workmen's Compensation Court have the same force and effect as a jury verdict. Nevertheless, the law requires in this case if there is reasonable competent evidence to support the findings of fact in the Workmen's Compensation Court and the District Court, the award will not be modified for insufficiency of the evidence on appeal to this court. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. The Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Thomsen v. Sears Roebuck & Co., 192 Neb. 236, 219 N. W. 2d 746. The majority opinion here ignores both of those principles. The judgment of the District Court should have been affirmed.

CLINTON, J., concurring.

I concur generally in the majority opinion. What follows, will, I hope, make apparent the reason for a separate concurrence. I think it may be conceded that the plaintiff did not know until November 1974 that he had suffered a new and different accidental injury to his back on October 23, 1973. It is hardly conceivable that had he been informed by his doctor after the surgery in January of 1974, that that surgery involved a different disc from that in the previous surgery, he would not have promptly made claim for workmen's compensation. It should be equally clear that, had the plaintiff inquired of his doctor what the surgery showed, he would have been informed of what he did not know until November 1974. The question is, was he required to make such inquiry? It is in this connection that the dissenting opinion indicates some confusion about what tolls the statute. The dissent says: "The majority opinion has not only ignored specific findings of fact,

but has converted them into a conclusion that the plaintiff's only mistake was a mistake of law. The foundation for that conclusion is that plaintiff did not know that an aggravation to the first injury, if caused by the second injury, would have been compensable. There was more than that, that he did not know. He didn't know that the second back injury and operation were the result of the second accident rather than the first." The confusion which this statement shows is as to the standard which is applicable. The standard, as the opinion of the court indicates, is the same as in case of latent and progressive injuries, that is, the statute begins to run from the time "it becomes reasonably apparent *or should have become reasonably apparent*" that he had a disability which arose from an accidental injury arising out of and in the course of his employment. (Emphasis added.) Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237. This court has apparently never attempted to precisely define "should have become reasonably apparent" in cases of this type. Other courts have indicated that this means "in the exercise of reasonable care should know." 100 C. J. S., Workmen's Compensation, § 436, p. 304, cases cited Note 48.

In this case it is apparent that both the Nebraska Workmen's Compensation Court and the District Court were applying the wrong standard. Their findings related to the objective lack of knowledge of the petitioner. Where a mere inquiry by the patient of his surgeon would have disclosed the information, it must be said that as a matter of law the injury and the cause "should have been readily apparent" to the workman. This is not a case such as Borowski v. Armco Steel Corp., 188 Neb. 654, 198 N. W. 2d 460, where the petitioner's ignorance was caused by the inability of a number of doctors to diagnose the injury and to determine its cause.

I further wish to point out for the purpose of clari-

fying the issue, that the plaintiff had a compensable injury whether he suffered an entirely new injury because of the incident of October 23, 1973, or whether, by reason of accidental injury arising out of and in the course of his employment on that date, he merely aggravated the earlier injury, i.e., the changed condition was not merely a natural progression of the first injury. Turner v. Beatrice Foods Co., 165 Neb. 338, 85 N. W. 2d 721. I think the majority opinion does not make this quite clear. It is, of course, no longer necessary, that in order for an injury to be compensable, there be an accident — although in this case the evidence indicates there was. It is only necessary that there be "an unexpected or unforeseen injury happening suddenly and violently . . . and producing at the time objective symptoms of an injury." § 48-151(2), R. R. S. 1943. See, also, Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461. There is no dispute here that the petitioner knew on October 23, 1973, that he had had an accident and suffered an injury. In January of 1974, following the surgery, a simple inquiry of his surgeon would have informed him of its nature and its cause.

GIL GRADY, APPELLEE, V. DONALD E. DENBECK ET AL., APPELLANTS.
251 N. W. 2d 164

Filed March 2, 1977. No. 40812.

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. Upon a motion for summary judgment, the court examines 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.
2. **Jury: Verdicts: Appeal and Error.** A verdict by a jury based

upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

3. **Contracts: Consideration.** A "consideration" for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other; the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request.

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

Forrest F. Peetz of Magnuson, Magnuson & Peetz, for appellants.

Edward E. Hannon of Cronin & Hannon, for appellee.

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

WHITE, C. J.

This is an action to recover on a promissory note executed by the defendants. Prior to trial, the defendants filed a motion for summary judgment. Their motion was overruled and the case proceeded to trial. A jury trial was had on March 9, 1976, and that same day the jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $21,125. The plaintiff was also awarded interest and costs. The defendants' motions for a new trial were overruled and they now appeal. We affirm the judgment of the District Court.

On appeal, the defendants contend as follows: That the District Court erred in denying their motion for summary judgment; that the verdict was not supported by the evidence; and that the court erred by giving instruction No. 5 to the jury. We shall examine each of these contentions in order.

The defendants first argue that the District Court erred when it denied their motion for a summary judgment, for the reason that no real issue of fact then existed, in that there was a complete lack of want of consideration to support the promissory note.

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 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. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976); Randall v. Erdman, 194 Neb. 390, 231 N. W. 2d 689 (1975).

Before the court, at the time it was called to rule upon the defendants' motion, were the pleadings of both parties, and depositions by the plaintiff and both defendants. The plaintiff, in his pleadings, alleged a promissory note dated September 1, 1971, in the amount of $21,125. The defendants in their second amended answer admitted the execution of the note, but denied that there was any consideration for it.

In his deposition, the plaintiff testified that the note in question was signed at the same time as a real estate transaction in Searcy, Arkansas. The plaintiff was the broker for this sale, and the defendants were the buyers. The agreement for sale and purchase of the real estate, a motel in Searcy, Arkansas, contained the following provision:

"That the brokerage commission due and owing as a result of this sale in the amount of $21,125 - shall be paid to Gil Grady on or before Sept 1, 1973 together with 7% interest payable annually. Said amount shall be payable by second parties promissory note executed on closing day." The defendants were the second parties in this agreement.

In his deposition, the plaintiff was asked: "Now in reference to the note for $21,125, what services, if any, did you provide for Mr. Denbeck for that promissory note?", to which he replied: "Negotiated the sale and purchase of the Holiday Inn at Searcy, Arkansas, and the purchase price that the sellers were to receive was

adjusted by a like amount to compensate for the note that Mr. and Mrs. Denbeck executed."

In his deposition, defendant Donald E. Denbeck testified that the promissory note was executed to satisfy and in accordance with the above-mentioned provision in the sale and purchase agreement. In defendant Denbeck's deposition, the following exchange took place:

"Q. Isn't it true that there was an adjustment of the purchase price downward by $26,000, and your agreement, then, was to pay the commission which would have otherwise been payable by the sellers?

"A. This was just the way the contract went — was put together.

"Q. You agreed to pay this commission, did you not, sir?

"A. Yes, sir."

It was proper for the District Court to deny the defendants' motion for summary judgment. The above evidence clearly indicates a genuine issue of fact relating to consideration. There is no merit to this contention.

The defendants next allege that the evidence was insufficient to support the verdict of the jury. In testing the sufficiency of evidence to support a verdict, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and he should have the benefit of every inference that can be drawn therefrom. Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44 (1974). A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Moser v. Jeffrey, 194 Neb. 132, 231 N. W. 2d 106 (1975). At the trial, the evidence presented to the court on the summary judgment motion was expanded upon.

A settlement sheet dated September 1, 1971, the closing day for the transaction, introduced into evidence, indicated that the defendants paid the commission of

$21,125. The defendant Donald Denbeck admitted receiving a copy of the settlement sheet.

The sale and purchase agreement called for a purchase price of $409,319.97, plus the commission. The listing agreement for the motel called for a commission of 6 percent of the total selling or trading price. The purchase price, $409,319.97 plus commission $26,125, is $435,444.97. Exhibit 2 at the trial, the purchase and sale agreement provided that the buyers would pay the plaintiff a commission of $21,125. There was testimony that the figure was originally $26,125 and that it was reduced by $5,000 by the plaintiff, because the defendants claimed he owed them $5,000 from the sale of a previous motel.

The defendant Denbeck testified that the paragraph in the purchase and sale agreement concerning payment of the plaintiff's commission was placed in the agreement on September 1, 1971. He testified that he gave the promissory note to the plaintiff because the plaintiff was to list and resell the same motel for them. The plaintiff testified that the paragraph in the agreement concerning payment of commission was placed in the agreement on July 27, 1971, and that the defendants' testimony as to when this provision was placed in the agreement was incorrect.

There was sufficient evidence to support the jury's finding in favor of the plaintiff. There is no merit to this contention.

Lastly, the defendants claim that the District Court erred in giving instruction No. 5 relating to consideration. It reads as follows: "A 'consideration' for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other but the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request."

This was a correct statement of the law. Adair v. Adair, 192 Neb. 571, 222 N. W. 2d 908 (1974). There

was no error by the District Court in giving this instruction.

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

AFFIRMED.

JOY M. SCHMER, APPELLANT, V. WILLIAM D. SCHMER, APPELLEE.

251 N. W. 2d 167

Filed March 2, 1977. No. 40831.

1. **Divorce: Alimony: Property.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
2. **Divorce: Parent and Child: Infants: Appeal and Error.** 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.
3. **Divorce: Parent and Child: Infants.** In determining the question of who should have the care and custody of a child upon dissolution of marriage, the paramount consideration must be the best interests and welfare of the child.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Cronin, Shamberg & Wolf, for appellant.

Cunningham, Blackburn, Von Seggern & Livingston, for appellee.

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

WHITE, C. J.

This is an action for dissolution of marriage brought by Joy M. Schmer, petitioner and appellant, against William D. Schmer, respondent and appellee. The pe-

titioner, age 30, and the respondent, age 36, were married in 1964. They are the parents of two children, Paige Jodene, age 10, and Samuel Louis, age 7.

The trial court found the marriage to be irretrievably broken and made a property division between the parties. Custody of both minor children was awarded to the respondent. The petitioner filed a motion for a new trial, which was overruled, and she now appeals. We affirm the decree of the District Court.

On appeal, the petitioner challenges the division of property and the failure of the District Court to grant her alimony.

The property acquired by the parties during the marriage and divided by the court consisted of the following: Equity from the sale of the house $8,180.52; Skagway Profit-Sharing Plan equity $8,147.31; 1971 Dodge automobile $1,800; 1965 Ford automobile $200; and savings account $50. The value of the foregoing items were stipulated to by the parties. Additionally, the court found the balance of a checking account to be $2,400. The value of household goods was estimated at $3,000 by the respondent, and $800 by the petitioner. Liabilities of $2,250 were stipulated to by the parties.

The record shows that the respondent had been employed for over 9 years at the Skagway Department Store in Grand Island, Nebraska. The petitioner had been employed intermittently, on a part-time basis, during the marriage. The respondent received, during the marriage, various gifts from an uncle totaling approximately $12,000 and an inheritance of $4,400.

The court directed that the liabilities be paid from the equity from the sale of the family home and that the balance be divided equally between the parties. The household goods, 1965 Ford automobile, and savings account were awarded to the petitioner. The 1971 Dodge automobile, the balance in the checking account, and the Skagway Profit-Sharing equity were awarded

to the respondent. This division of property resulted in the respondent receiving a total of approximately $15,200 and the petitioner receiving approximately $4,050 to $6,250, depending upon the valuation placed on the household goods.

The rules for determining alimony or the division of property in an action for dissolution of a marriage provide no mathematical formula by which such awards can be precisely determined. Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407 (1976). "The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal." Essex v. Essex, 195 Neb. 385, 238 N. W. 2d 235 (1976). As stated in Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975), "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; nor can we say that the District Court abused its discretion by failing to award petitioner alimony.

The petitioner next contests the awarding of custody of both minor children to the respondent. "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, 196 Neb. 784, 246 N. W. 2d 475 (1976). See, also, Peterson v. Peterson, 196 Neb. 328, 243 N. W. 2d 51 (1976).

In determining the question of who should have the care and custody of a child upon dissolution of marriage, the paramount consideration must be the best interests and welfare of the child. Knight v. Knight, 196 Neb. 63, 241 N. W. 2d 360 (1976).

Pursuant to an agreement between counsel, the par-

ties and the children were examined and tested by Dr. Michael O'Neill, a clinical psychologist. Dr. O'Neill testified at the trial, and his written report was received into evidence. Dr. O'Neill determined that the emotional needs of each child were different, but that at this point in their lives their most important need was for security and protection. In his evaluation of the parties he described the petitioner's orientation as "strongly in the direction of spontaneity, emotional reactivity, immediacy of motivation, feelings and the avoidance of unpleasantness." He described the respondent as being "oriented just as strongly in the direction of sustained effort in the pursuit of purpose, control, planning and intelligent decision-making." Dr. O'Neill gave his opinion that in the long run the best interests of the children would be served by placing them with their father. He made it clear that his recommendation should not be construed as a statement that the petitioner would not be a fit parent. There was evidence that the boy, Samuel, desired to be with the respondent, and the girl, Jodene, wished to be with the petitioner.

There was sufficient evidence to support the determination of the trial judge, who saw and observed the parties and witnesses, regarding custody of the children and we are not inclined to disturb his ruling on appeal.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEBRA C. KOFOED, APPELLANT.
251 N. W. 2d 170

Filed March 2, 1977. No. 40837.

Criminal Law: Sentences. A sentence imposed within statutory

limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

WHITE, C. THOMAS, J.

Defendant plead no-contest to one count of robbery and one count of larceny from the person. Pursuant to a plea bargain, a second count of robbery was dismissed. She was sentenced to the Nebraska Center for Women at York, Nebraska, for a term of 3 years on the robbery charge and for 1 year on the larceny from the person charge. The terms are to run concurrently. Defendant appeals solely on the ground that her sentence was excessive.

According to the defendant, she was sitting in a restaurant in Omaha on August 30, 1975, wondering how she was going to get enough money to pay her bills. One of her friends mentioned that one way is to grab purses, loot them, and then place them in a mail box. Later while driving around Omaha, the defendant and two friends, Michael Miller, age 17, and Linda Smart, age 15, saw a lady at a bus stop and "decided to get her purse." Two more incidents took place a month later in a similar manner. The defendant drove the car at all times while the other two performed the actions involved with the victims. Following an anonymous phone call, the defendant was arrested. Two months later it was discovered that the defendant was the source of the call.

The presentence investigation reveals that the de-

fendant was 22 years old at the time of the crimes. She is a high school graduate and is gainfully employed as a key punch operator. She is not married and still lives at home with her parents. There is evidence that the defendant does have a problem with drugs, particularly heroin. She does not have a significant criminal record.

Defendant's counsel argues that probation is the proper sentence. He notes that the defendant has severe emotional problems and her lack of a criminal record is stressed. It is also pointed out that the defendant has made attempts since her arrest at resolving her drug problem by participating in a drug-dependency program. We find these facts to be persuasive but not decisive.

It is a well-established rule that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. See, State v. Abram, 195 Neb. 199, 237 N. W. 2d 153 (1976); State v. Keller, 195 Neb. 209, 237 N. W. 2d 410 (1976). The penalty for robbery is set out in section 28-414, R. R. S. 1943. It is imprisonment for not less than 3 years nor more than 50 years. The penalty for larceny from the person is set out in section 28-505, R. R. S. 1943. It is imprisonment for not less than 1 year nor more than 7 years. The defendant received the minimum sentence for each crime. We cannot say that the trial court has abused its discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM SHIFFBAUER, APPELLANT.

251 N. W. 2d 359

Filed March 9, 1977. No. 40740.

1. **Criminal Law: Statutes: Due Process.** The prohibition against excessive vagueness does not invalidate every statute which a

reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden.

2. **Criminal Law: Statutes: Notice.** In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which defendant is charged.
3. **Criminal Law: Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
4. **Criminal Law: Constitutional Law: Statutes.** Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court.
5. **Criminal Law: Instructions: Lesser-Included Offenses: Evidence.** It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request.
6. **Criminal Law: Sentences: Time.** The court, as a condition of its sentence, may require the offender to be confined periodically in the county jail or to return to custody after specified hours, but not to exceed 90 days.
7. **Criminal Law: Courts: Hearings: Rules of Court: Time.** It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Ronald J. Palagi of Shrout, Christian, Krieger, Nestle & Palagi, 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.

SPENCER, J.

Defendant, William Shiffbauer, was found guilty by

a jury of knowingly or intentionally delivering a substance which he represented to be a controlled substance but which was not in fact such a substance. He was sentenced to 1 year probation and 60 days imprisonment in the Douglas County jail was imposed as one of the conditions of probation. Defendant appealed, alleging four assignments of error: (1) Section 28-4,125(7), R. R. S. 1943, under which he was charged, is violative of fundamental principles of due process; (2) the evidence is insufficient to sustain the verdict; (3) the trial court refused to instruct the jury as to a lesser offense; and (4) the trial court erred in making a 60-day period of imprisonment a condition of probation. We affirm.

On the night of June 16, 1975, an undercover agent established contact with the defendant in Omaha. The undercover agent told the defendant he wanted to buy some amphetamines. The defendant offered to sell the agent 100 tablets of dexedrine for $25. Dexedrine is a controlled substance under the Uniform Controlled Substances Act. The agent gave the defendant $25 and received a plastic bag full of white pills similar to aspirin tablets in return. The substance was analyzed by a research chemist. The tablets were caffeine, not dexedrine. Caffeine is not a controlled substance. The defendant was charged with knowingly or intentionally delivering a substance which he represented to be a controlled substance but which, in fact, was not such a substance, in violation of section 28-4,125(7), R. R. S. 1943.

The defendant on this appeal challenges the constitutionality of section 28-4,125(7), R. R. S. 1943. That subsection is a part of the Uniform Controlled Substances Act and provides: "(7) It shall be unlawful for any person to knowingly or intentionally deliver, distribute, or dispense a substance that such person expressly or implicitly represents to be a controlled substance but which is not in fact such a substance. Any

person violating the provisions of this subsection shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars, or by imprisonment in the Nebraska Penal and Correctional Complex for not less than one year nor more than five years, or by both such fine and imprisonment."

The Nebraska Uniform Controlled Substances Act was adopted in 1971. It was modeled after the Federal Comprehensive Drug Abuse, Prevention, and Control Act of 1970, and the Uniform Controlled Substances Act which are essentially identical. In 1974, subsection (7), the subsection involved here, was added to section 28-4,125, R. R. S. 1943. There is no similar provision in the federal law nor in the Uniform Act. The legislative history demonstrates an intent to restrict the illegal traffic in controlled substances by making it criminal to sell any substance represented to be a controlled substance which is not.

This court stated in State v. Adkins, 196 Neb. 76, 241 N. W. 2d 655 (1976): "A penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Any statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law." But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. Rose v. Locke, 423 U. S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

It is obvious the Legislature intended to make it unlawful to deliver a substance represented to be a controlled substance. "In determining the sufficiency of

the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." Parker v. Levy, 417 U. S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974). See, also, State v. Guy, 196 Neb. 308, 242 N. W. 2d 864 (1976), wherein it was stated: "Since this ordinance does not involve First Amendment rights, the challenge thereon on the ground of vagueness must be examined in the light of the facts at hand." The facts show defendant represented he was selling dexedrine, a controlled substance. This is clearly the type of activity made illegal by the statute.

The essential elements of the offense are: (1) That the defendant knowingly or intentionally deliver, distribute, or dispense a substance; (2) that the defendant expressly or implicitly represent the substance to be a controlled substance; and (3) that the substance is not, in fact, a controlled substance.

It is not necessary to decide whether "implicitly represents" is vague. It is undisputed that defendant made an express representation that he was selling a controlled substance. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U. S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

Defendant also lacks standing to challenge the statute on the ground of overbreadth. The fact that some innocent conduct, such as the dispensing of an uncontrolled substance by a physician or pharmacist, may come within the terms of the statute does not affect defendant. "Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. Broadrick v. Oklahoma (1973), 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830." State v. Brown, 191 Neb. 61, 213 N. W. 2d 712 (1974).

Defendant's second assignment attacks the sufficiency of the evidence. Apparently the basis of his argument is that the statute under which he was convicted requires him to know the substance he sold was not a controlled substance. It is his contention the jury could not have reasonably inferred such knowledge and therefore he argues the evidence was insufficient to support the jury verdict. Defendant misinterprets the statute.

We doubt if the statute can be read to require that the defendant know the substance he sold was not a controlled substance if he actually represents it to be. The knowingly refers to his representation of the substance to be a controlled substance, not the fact he knows it is not. That question, however, is immaterial herein. The trial judge, over objection by the State, instructed the jury that in order to return a verdict of guilty it must find that the defendant knowingly or intentionally delivered a substance which he expressly or implicitly represented to be a controlled substance and which he knew was not a controlled substance.

There was evidence in the record that the defendant had been selling drugs for 8 years. There is direct testimony that the purchaser of the drugs was told by the defendant that the tablets were dexedrine, a controlled substance. There was testimony that the substance was actually caffeine. The defense called no witnesses to dispute any of this testimony.

Defendant's third assignment of a lesser-included offense relates to his position that he should have been charged with obtaining money under false pretenses. It is obvious that the court correctly refused the proposed instruction as the material elements of section 28-4,125(7), R. R. S. 1943, do not encompass all the elements of the crime of obtaining money under false pretenses. That offense, as described in section 28-1207, R. R. S. 1943, requires the intent to cheat or defraud. As stated in O'Bryan v. State, 111 Neb. 733, 197 N. W. 609 (1924): "Intent to cheat and defraud the persons

wronged is, however, made an ingredient of the crime and this intent necessarily includes knowledge."

It is precisely this "knowledge" or "intent to cheat and defraud" which is not a necessary element of the offense described in section 28-4,125(7), R. R. S. 1943, upon which the defendant here was convicted. Knowledge of the identity of the substance, i.e., knowledge or intent to cheat or defraud another bears no relation to the offense involved herein.

It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request. State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152 (1966).

Defendant's fourth assignment challenges the 60-day period of confinement as a condition of probation. There is no merit to the defendant's contention. Section 29-2262, R. R. S. 1943, as amended by L.B. 289, Laws 1975, provides: "(1) When a court sentences an offender to probation it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.

"(2) The court, as a condition of its sentence, may require the offender: * * *

"(b) To be confined periodically in the county jail or to return to custody after specified hours, but not to exceed ninety days; * * *."

Considering the fact that defendant was on probation for an offense committed in California, the trial court was more than lenient herein.

The only question which remains is that L.B. 289 became effective 3 months after the adjournment of the 1975 Legislature, or August 24, 1975. The offense was committed on June 16, 1975. Trial was held January 7, 1976, and defendant was sentenced on February 19, 1976. Thus, L.B. 289 became effective after the offense was committed, but prior to trial and sentencing. L.B. 289 is an act relating to criminal procedures which

provide probation conditions. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. Durousseau v. Nebraska State Racing Commission, 194 Neb. 288, 231 N. W. 2d 566 (1975).

There is no merit to any of the defendant's assignments. The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion tacitly concedes that subsection (7) of section 28-4,125, R. R. S. 1943, might be unconstitutional if the State attempted to enforce it in many different situations and against various classes of persons. Nevertheless, the court holds that the defendant has no standing to challenge the constitutionality of subsection (7), even though he has been convicted under it, because the court determines that the statute clearly applies to the defendant's conduct, and that such conduct could constitutionally have been made criminal. The real issue is whether subsection (7) of section 28-4,125, R. R. S. 1943, is unconstitutional, not whether some other version of the statute might have been constitutional.

Subsection (7), under its terms, clearly applies to all sorts of essentially innocent conduct as well as to what is presumptively criminal conduct. We have not previously been so concerned with procedural problems of standing in challenges to the constitutionality of other provisions of the Uniform Controlled Substances Act. In State v. Adkins, 196 Neb. 76, 241 N. W. 2d 655, the defendants moved for a dismissal of charges prior to trial on the ground that the statute was unconstitutionally vague and overbroad on its face in contravention of the Due Process and Equal Protection Clauses of the Constitution. In that case we held the subsection

under consideration unconstitutionally vague and overbroad without any evidence of the particular conduct the defendants had engaged in. We said there: "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." We also determined in Adkins that the subsection there involved was so "indefinite as to embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal." In that regard we said: "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."

Subsection (7) of section 28-4,125, R. R. S. 1943, by its specific terms applies to all sorts of essentially innocent conduct in even more obvious fashion than the subsection involved in Adkins. The court, however, now ignores the basic constitutional issues and resorts to procedural issues of "standing." The majority opinion might even be taken to approve the constitutionality of subsection (7). It should be pointed out here that the constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions. See Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189.

Subsections (1) and (3) of section 28-4,125, R. R. S. 1943, which make it a crime to manufacture, dis-

tribute, deliver, dispense, or possess a controlled substance or a counterfeit controlled substance, each contain specific exemptions for conduct otherwise authorized by the Uniform Controlled Substances Act. Subsection (7) does not contain any such exceptions. The subsection simply makes it unlawful to knowingly or intentionally "deliver, distribute, or dispense" an *uncontrolled* substance which has been represented to be a controlled substance. The quoted words are specifically defined in section 28-4,115, R. R. S. 1943. "Dispense" is defined to mean only a delivery pursuant to a lawful order or prescription of a licensed physician, and "dispenser" includes only a licensed pharmacist or other practitioner. "Distribute" is defined to mean to deliver other than by administering or dispensing, and "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another.

The Uniform Controlled Substances Act applies only to controlled substances. The act specifically does not apply to any non-narcotic substance which may be lawfully sold over the counter without a prescription. Subsection (7) of section 28-4,125, R. R. S. 1943, is therefore the only portion of the act which pertains to *uncontrolled* substances, and the first sentence of that subsection contains the complete specification of all the elements of the crime. "It shall be unlawful for any person to knowingly or intentionally deliver, distribute, or dispense a substance that such person expressly or implicitly represents to be a controlled substance but which is not in fact such a substance." There are obviously no exemptions or exceptions in the subsection. It can be argued that the Legislature intended to include the same exceptions set out in other parts of the act under which possession, handling, and selling of controlled substances is authorized and lawful. These exceptions revolve around prescribing and handling by licensed physicians, pharmacists, and practitioners. Any conclusion that the Legislature inadvert-

ently omitted the exceptions is destroyed, however, because the word "dispense" is used in subsection (7) without any qualification whatever. "Dispense," by specific definition in the act, means only a delivery pursuant to a lawful order or prescription of a licensed physician, and "dispenser" includes only a licensed pharmacist or other practitioner. The subsection therefore sweeps with a broad broom, and goes far beyond illegal sales or offers to sell and deliver made in the course of the illegal traffic in controlled substances.

Except for subsection (7), the acts which that subsection prohibits and makes criminal were otherwise not unlawful. In Nebraska there is no statute which makes it a crime to *offer* to sell a controlled substance. Neither is there any criminal statute which forbids representing an uncontrolled substance to be a controlled substance.

Subsection (7) does not require that an accused know that the substance delivered is not a controlled substance. The majority opinion interprets the subsection that way. The State vigorously supports that interpretation and asserts in its brief: "Thus a simple reading of the language of Section 28-4,125(7), indicates that the accused need not know that the substance is not controlled, as long as he intentionally or knowingly delivered, dispensed or distributed the substance which he expressly or implicitly represented to be a controlled substance." It is argued by the defendant that a mistaken or erroneous belief as to the nature of the substance delivered is a defense. The State contends that the prohibited delivery or dispensing furnishes the only criminal intent required by the statute.

The issue of whether or not an accused must know that the substance delivered is not, in fact, a controlled substance is only a part of the broader issue of whether or not subsection (7) is clear and definite. A far greater problem on the issue of indefiniteness arises in attempting to determine the meaning of "implicitly

represents." In contrast with the word "expressly," it is uncertain what statements or conduct can be said to implicitly represent a substance to be a controlled substance. The dictionary meaning of the word "implicit" is: tangled or twisted together, tacitly involved in something else, capable of being understood from something else though unexpressed, capable of being inferred. The term could include conduct alone. It could also include ambiguous or otherwise inaccurate or erroneous statements. A mistaken statement that a substance is obtainable only on prescription might well be said to "implicitly represent" it as a controlled substance, even though the statement is erroneous and made innocently. At the least, subsection (7) fails to fairly define what specific conduct is criminal, and fails to provide ascertainable standards of law enforcement which are free from arbitrary and discriminatory action. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt sufficient to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678.

Subsection (7) as drawn goes far beyond the illegal traffic in controlled substances and the sale of substituted substances. It sweeps within its prohibition all sorts of actions not normally considered to be criminally culpable. As it stands, the subsection makes it a crime for a physician to prescribe or administer a pla-

cebo which he represents to be a controlled substance, or for a pharmacist to accidently or negligently dispense an uncontrolled substance represented to be a controlled substance. The subsection even makes it a crime for a person to give aspirin to a friend mistakenly representing and believing it to be a controlled substance issued only under a prescription. Clearly there is no reasonable relationship between the conduct prohibited and the public purpose to be achieved.

A legislative decision to restrict certain activity must be grounded on a rational basis. The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be legitimate and the means employed to effect it must be reasonable. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N. W. 2d 443.

Even if the specific intent of the Legislature in adopting subsection (7) of section 28-4,125, R. R. S. 1943, were clearly ascertainable, this court could not interpret the subsection by limiting its application without completely rewriting it. As we said in State v. Adkins, 196 Neb. 76, 241 N. W. 2d 655: "(I)f drastic surgery is necessary to preserve it, the surgery should, in our opinion, be performed by the Legislature and not by the court."

"A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes * * *." Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794.

Only two other states have enacted legislation in this area as an addition to the Uniform Controlled Substances Act. Each statute differs from that of Nebraska, and each is different from the other. Neither of them use the word "dispense," and both attempt to differentiate between sales or deliveries which would be lawful or unlawful if other provisions of the Uniform Controlled Substances Act were applicable. Apparently

the constitutionality of the statutes has not yet been determined. See, Cal. Health & Safety Code, § 11355 (West, 1975); Ill. Ann. Stat., Ch. 56½, § 1404 (Smith-Hurd Supp., 1977).

Subsection (7) of section 28-4,125, R. R. S. 1943, is unconstitutionally indefinite and overbroad. It should not be glossed over by tacit approval. The attention of the Legislature ought to be specifically directed to the subsection to permit the Legislature to enact proper and constitutional legislation directed at the specific conduct which the Legislature desires to prohibit.

BRODKEY, J., joins in this dissent.

BOSLAUGH, J., dissenting in part.

I concur generally in the decision of the court that the judgment should be affirmed. I disagree with that part of the opinion which holds that knowledge on the part of the defendant, that the substance he sold was not the substance he represented it to be, is not an element of the offense. The better rule is that a prescribed culpability requirement should apply to all material elements of the offense. See Model Penal Code, § 2.02(4).

TREAVER LEE JAMES, A MINOR, AGE 5 YEARS, BY AND THROUGH DONNA JEAN SINNETT, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. RAINCHIEF CONSTRUCTION COMPANY, GRAND ISLAND, NEBRASKA, ET AL., APPELLEES.
251 N. W. 2d 367

Filed March 9, 1977. No. 40797.

1. **Workmen's Compensation: Parent and Child: Infants.** Under our former statute, a child not living with his parent is not conclusively presumed to be dependent on his deceased parent but must prove such to be the fact.
2. ———: ———: ———. Our former statute provided that a partial dependent was entitled to compensation benefits only in the proportion which the amount contributed bore to the total wages of the deceased.

3. **Workmen's Compensation: Evidence: Burden of Proof.** The burden of proof in a workmen's compensation proceeding is on the claimant.
4. **Workmen's Compensation: Parent and Child: Infants.** Where a deceased father had partially contributed to the support of a child residing with a former wife, such child was a partial dependent.
5. **Workmen's Compensation: Evidence: Appeal and Error.** When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will not be considered de novo on appeal.
6. **Workmen's Compensation: Courts: Contracts.** An agreement relative to payment of workmen's compensation benefits, entered into between the parties, is void and of no effect unless in writing, filed with the compensation court, and approved by the court.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Cunningham, Blackburn, Von Seggern & Livingston, for appellant.

John A. Wagoner, for appellees.

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

NEWTON, J.

In this action Donna Jean Sinnett seeks to obtain further workmen's compensation benefits for her 6-year-old mongoloid son as a dependent of his deceased father Michael James. Two hearings were held in the Workmen's Compensation Court and one in the District Court. In each instance plaintiff's claim was rejected. We affirm the judgment of the District Court.

Donna Jean Sinnett obtained a divorce from Michael James on October 22, 1971, in Salina, Kansas. The decree provided that custody of the son should be awarded to his mother and that Michael James should contribute $11.50 per week to the support of the son. Three weekly payments were made in October and November 1971. No further payments were made until January

1973, following an action under the Uniform Reciprocal Enforcement of Support Act brought in the District Court for Hall County, Nebraska. An order was entered directing Michael to pay $50 per month to comply with the $11.50 weekly requirement and an additional $10 per month to apply on the unpaid deficit which had accrued. Three $60 payments were made prior to Michael's accidental death on April 6, 1973.

Defendants paid benefits in the total sum of $5,952 at the rate of $62 per week, the maximum benefit provided by statute. See § 48-122, R. S. Supp., 1972. The son continued to live with his mother throughout the period mentioned. Her earnings amounted to take-home pay of $320 per month.

The primary question presented is whether the son was totally or partially dependent upon his father. The Nebraska statutes in force at the time of the accident provided that a child was not conclusively presumed to be a dependent on his parent unless he was living with such parent at the time of the parent's death, otherwise dependency became a question of fact. See § 48-124, R. S. Supp., 1972. The statutes further provided that partial dependents "shall be paid on account of the benefits provided in subsection (1) of this section for persons wholly dependent, in the proportion that the average amount regularly contributed by the deceased from his wages for a reasonable time immediately prior to the accident, to such persons who were partially dependent, bears to the total wages of the deceased during the time." § 48-122 (3), R. S. Supp., 1972. Section 48-122 (1) provided also that a dependent was entitled to compensation benefits for 325 weeks. If a total dependent, plaintiff is entitled to further compensation at the rate of $62 per week for the remainder of the 325-week period. If a partial dependent, plaintiff was entitled to only $11.50 per week for a period of 325 weeks and this sum has been paid.

The Kansas divorce decree provided that the father

"should be ordered *to assist* in the support of said minor child." (Emphasis supplied.) For a period of approximately 14 months extending from November 1971 to January 4, 1973, Michael James failed to make any child-support payments and his son was wholly dependent upon his mother. Three monthly payments were then made in January, February, and March 1973. In her testimony before the Workmen's Compensation Court the mother stated that at the time she initiated the action under the Uniform Reciprocal Enforcement of Support Act, she needed $50 per month to support her son and this was the sum needed for his food and clothing. The statement represented the sum awarded as child support in the decree of divorce which the court found to be a sum needed "to assist" in the boy's support. On the basis of the mother's testimony, the $50 per month was sufficient to pay only for the boy's food and clothing. Obviously he was dependent upon his mother for all other necessary items of support such as housing, heat, lights, care while the mother was away at work, medical and dental attention, etc.

We have held that, under the circumstances here presented, a child is not presumed to be a dependent but must prove dependency in fact. See, Palmer v. Hamer, 133 Neb. 362, 275 N. W. 322; Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849. At both the one and three-judge hearings in the Workmen's Compensation Court and the hearing in the District Court, it was concluded that plaintiff had failed to sustain the burden of proof regarding total dependency. The burden of proof in a workmen's compensation proceeding is on the claimant. See Parrish v. Karl Kehm & Sons Contractors, 186 Neb. 252, 182 N. W. 2d 422. We have also held that: "Where a deceased father, pursuant to court order, contributed $30 per month to the support of a child residing with a former wife, and the evidence shows that such amount only partially supported the child, such child is a partial dependent under section

48-124, R. R. S. 1943." Copple v. Bowlin, 172 Neb. 467, 110 N. W. 2d 117.

"When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will be not considered de novo on appeal." Jensen v. Western Printing Co., 193 Neb. 481, 227 N. W. 2d 839.

The record reflects the presence of reasonable and competent evidence to sustain the finding of the Workmen's Compensation Court and the case will not be considered de novo.

Plaintiff also contends that a binding agreement was reached between the parties resulting in the payment of compensation as heretofore noted. Section 48-136, R. R. S. 1943, permits the parties to settle matters of compensation between themselves, provided that a copy of the settlement be filed with the compensation court, but it shall not be binding unless in accordance with the provisions of the compensation act. Each party had sent a copy of a letter, indicating that the defendant insurance company would pay the maximum benefits, to a judge of the compensation court. This is the basis for the alleged agreement. The judge stated he had no recollection of the letters and did not file them but ordinarily turned such things over to the court's legal counsel. It is evident that an agreement such as is contemplated in the statute was never filed or approved. In the absence of such compliance the alleged agreement is void and of no effect. See, Duncan v. A. Hospe Co., 133 Neb. 810, 277 N. W. 339; Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810.

The contention that defendants are now estopped to deny the purported agreement is without merit. Plaintiff has not been injured or damaged thereby. In fact, plaintiff gained by defendants' mistake as more compensation has been paid than plaintiff was entitled to.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. The issue as I see it is whether the mongoloid son of the deceased workman was totally or partially dependent upon his father. While it is true that the child was not living with his father at the time of the father's death, the undisputed testimony of the mother is that she needed $50 per month for the support of this child. This was the amount allowed in the divorce decree and was the amount provided in the uniform reciprocal enforcement of support action filed in this state. In my judgment, he was totally dependent upon his father.

On the record before us, the workman was paying the total amount needed to support the child at the time of the workman's death. The record indicates the child's dependency on the workman was total at the time of the death of the workman.

This was a Kansas and not a Nebraska divorce. The Kansas court found $50 was necessary for the support of the child. The mother testified the amount was adequate. To enforce it, the mother filed a uniform reciprocal enforcement of support action in this state. In the absence of evidence to the contrary, we should not ignore the mother's testimony and take judicial notice that it must have cost more than $50 a month to support the child. We should find on her testimony $50 is the amount which was required for his support at the time of the father's death.

On the record I would find the mongoloid child totally dependent upon his father, the workman, at the time of the father's death, and reverse the judgment of the trial court.

McCOWN, J., joins in this dissent.

JAMES E. WAEGLI, APPELLANT, V. CATERPILLAR TRACTOR CO., A CORPORATION, ET AL., APPELLEES.

251 N. W. 2d 370

Filed March 9, 1977. No. 40835.

1. **Trial: Evidence: Verdicts.** The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every in ference that can reasonably be deduced from the evidence.
2. **Negligence: Employer and Employee.** There is no duty to warn of a known danger.
3. **Torts: Negligence: Strict Liability.** Where the existence of a defect in a product is known to the claimant prior to an accident and injury, no basis for recovery under the doctrine of strict liability in tort exists.

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

Herbert J. Friedman of Friedman & Berry, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, Knudsen, Berkheimer, Endacott & Beam, and Barlow, Johnson, DeMars & Flodman, for appellees.

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

WHITE, C. THOMAS, J.

This action for personal injuries was dismissed by the trial court at the conclusion of the plaintiff's case-in-chief. Plaintiff appeals. We affirm.

Plaintiff James E. Waegli was on the date of accident a 22-year-old heavy equipment operator, engaged specifically by Seward County to operate a Caterpillar model 613 tractor scraper. The 613 consists of a power or tractor unit, mounted on two wheels, with the engine and cab in front of the wheels and a large scraper unit attached to the power unit mounted on two wheels to the extreme rear of the unit.

The machine is designed to gather and transport ap-

proximately 11 cubic yards of earth by means of a hydraulically operated blade and an elevating unit. The combined unit is nearly 32 feet long and, unloaded, weighs approximately 27,000 pounds.

Plaintiff, who will be referred to as Waegli, was hired by Seward County in July 1971, and received approximately 1½ hours of instructions in the operation of the unit.

The 613 sold to the county was not equipped with a parking brake which was an optional item. The evidence discloses that the subject of equipping the machine with a parking brake was not discussed with Seward County by the other defendants.

On September 15, 1971, Waegli and other employees of the county were engaged in road repair in rural Seward County. An old bridge had been removed and replaced with a steel culvert. Fill dirt was being scraped and hauled in the 613 to the culvert site where a road grader operated by another county employee would level and smooth the fill.

In some manner not described in the evidence, the road grader slipped off the road surface into a ditch from where it could not be extricated under its own power.

Waegli saw the grader in difficulty, dumped his load, and drove to the grader. He backed the 613 close enough to the grader so that a chain might be fastened to pull it out. The 613 did not leave the road surface.

After stopping the engine of his unit, Waegli hydraulically dropped the bowl, or scraping blades and compartment designed to hold the fill dirt, to the ground, and dismounted. The chain was hooked from the 613 to the grader, and the grader was pulled onto the road surface. After pulling the grader about 30 feet, the units were stopped, the transmission of the 613 was placed in neutral, the bowl again was lowered to the roadway, and the blade was pushed into the ground about 4 to 6 inches. Waegli again dismounted. He un-

hooked the chain from the 613, and, with his back to the 613, removed the chain from the grader. The 613 then rolled back and pinned Waegli between the two machines, injuring him seriously. The evidence discloses that the grade in the area was 7 percent rise from horizontal to the south. The 613 faced south and rolled back to the north.

This action was brought against the Caterpillar Tractor Co., Johnson Manufacturing Company, Lubbock, Texas, and the supplier Lincoln Equipment Company on three theories: Strict liability in tort, breach of warranty, and negligence. Seward County was joined by virtue of the workmen's compensation paid plaintiff and is not a part of this appeal. The trial court sustained a demurrer to the second theory. The case was tried on the remaining two theories.

Waegli here assigns as error the dismissal of his petition. The defendants asserted as grounds for the directed verdict 14 separate specifications. The trial court entered an order without specifying the grounds on which the dismissal was entered.

In Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971), this court held that as a condition of a recovery under the doctrine of strict liability the "plaintiff was unaware of the claimed defect." This holding has been criticized, NJI (1977 P.P.), Comment, § 11:20, p. 60, but to the effect that the knowledge of plaintiff to the claimed defect more properly ought to be an affirmative defense. We make no determination of that issue, but simply point out that in either circumstance, Waegli was conclusively shown to have knowledge of the claimed defect, i.e., the absence of a parking brake. The doctrine of strict liability is not applicable.

The only remaining issue is that of negligence of the defendants. Essentially the issue dispositive of the matter is whether the plaintiff's own evidence discloses

contributory negligence as a matter of law sufficient to bar recovery.

"In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed." Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N. W. 2d 82 (1974). See, also, Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605 (1959).

The party against whom a motion for directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144 (1956).

Prior to the accident, Waegli had operated the 613 an average of 9 hours a day, 5 days a week, for 5 to 6 weeks. He knew that the 613 was not equipped with a parking brake. Cases cited by Waegli concerning the duty to warn are not applicable.

There is no duty to warn of a known danger. Anstine v. Briggs, 191 Neb. 489, 215 N. W. 2d 878 (1974). Waegli had studied the operator's manual and was familiar with both the description and methodology of the "parking system" of the 613. Briefly, the system suggests that when parking, the bowl be lowered and the wheels of the tractor unit be turned to the side, in a direction at a 90-degree angle from the scraper unit. Waegli knew prior to the accident that hydraulically driving the blade into the earth and thus raising the rear wheels would prevent the 613 from rolling from the parked position. He admitted that the accident could have been avoided if he had followed that procedure. This testimony was supported by Waegli's expert witness McMinn who testified to the identical fact and conclusion.

Waegli also knew that the 613 could roll backwards, even though he had lowered the bowl, if it was parked on a slope. On two separate occasions the 613 had rolled from its parked position by reason of insufficient lowering of the bowl. On the first occasion he stopped the rolling by placing a piece of railroad tie under the wheels. On the second occasion Waegli stopped it from rolling by lowering the bowl to a greater depth into the earth.

Waegli was totally and completely familiar with the existence of the claimed defect. He knew the tendency of the machine to roll and failed to take steps known to him to insure that the rolling did not take place. Waegli was contributorially negligent as a matter of law sufficient to bar his recovery in an action for negligence.

The trial court was correct in dismissing the petition at the close of the plaintiff's case and its judgment is affirmed.

AFFIRMED.

GENEVIEVE JOSEPHINE CHISHOLM, APPELLEE, V. DANIEL KENT CHISHOLM, APPELLANT.
251 N. W. 2d 171

Filed March 9, 1977. No. 40838.

Divorce: Parent and Child: Statutes. In determining the amount which an obligor should be required to pay to discharge his duty of support under the Revised Uniform Reciprocal Enforcement of Support Act, the trial court must consider the ability of the obligor to contribute to the support of the dependent.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Tedd C. Huston, for appellant.

Rodney W. Schwasinger, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Revised Uniform Reciprocal Enforcement of Support Act. The complaint was filed in the District Court for Custer County, Nebraska, on July 16, 1974. On August 7, 1974, a temporary order was entered which required the defendant to pay $100 per month pending receipt of medical evidence concerning the condition of John D. Chisholm, defendant's son. On December 31, 1975, the defendant was ordered to pay $50 per month for the support of John commencing January 15, 1976. The defendant has appealed from this order.

The parties were divorced in California in 1971. Their son, John, was then 19 years of age. Pursuant to the divorce proceeding the defendant entered into a property settlement agreement in which he agreed to pay $100 per month for the support of John, the payments to continue after the child reached his majority "so long as said health problem and requirements exist."

John suffers from regional enteritis, a chronic intestinal disease which is incurable and disabling. Although he has been employed for varying lengths of time in the past, the medical evidence shows he is unable to work at this time. He is now 25 years of age and receives $225.80 per month in social security benefits. His medical expenses are paid by Med-Cal and, according to the complaint, are charged in part to the County of Sutter, California, which claims a right to reimbursement.

The defendant contends he should be relieved of all obligations to support his son because his son is now receiving social security benefits and is emancipated. The defendant relies upon the rule that the legal obligation to support a child terminates, generally, when the child

reaches his majority, and the fact that a child has an independent source of income may be considered in determining whether a parent should be relieved of his obligation to support. See Annotation, 1 A. L. R. 2d 910.

The defendant's obligation to support his son arises in this case from the California divorce proceeding and property settlement agreement. § 42-763(b), R. R. S. 1943. The difficult question is to what extent is the defendant now able to contribute to the support of his son.

Under the statute the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state. Moore v. Moore, 252 Iowa 404, 107 N. W. 2d 97; Swan v. Shelton (Mo. App.), 469 S. W. 2d 943. The ability of the obligor to contribute to the support of the dependent must be considered in fixing the amount of the payment. Commonwealth v. Shaffer, 175 Pa. Super. 100, 103 A. 2d 430.

The defendant is 64 years of age. He is employed as a cook and jailer at the county jail in Custer County, Nebraska. He earns $450 per month gross which amounts to $360 net. He also receives $240 in social security benefits which will be reduced by over one-half because of his earnings. He estimates his living expenses at $300 to $350 per month. It is apparent that the defendant has but a limited ability at this time to contribute to the support of his son. As the defendant grows older this ability will be further reduced.

We think the finding of the trial court that the defendant should not be required to pay $100 per month for the support of his son was correct and is sustained by the record. The defendant is able to make some contribution and the amount fixed by the trial court is reasonable under the circumstances. The order is subject to modification when there has been a further change in the circumstances of the parties.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE APPLICATION OF IRVING STEWART WISE FOR A WRIT OF HABEAS CORPUS.

IRVING STEWART WISE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

251 N. W. 2d 373

Filed March 9, 1977. No. 40842.

1. **Extradition: Criminal Law: States: Statutes.** Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute.
2. **Extradition: Criminal Law: Statutes: Words and Phrases.** In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be.
3. **Extradition: Criminal Law: Habeas Corpus: States: Courts.** In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.
4. **Extradition: Criminal Law: States: Constitutional Law: Statutes.** The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943.
5. **Extradition: Criminal Law: States: Trial: Time.** Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Paul E. Galter, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder for appellee.

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

CLINTON, J.

This is a habeas corpus action commenced in the District Court for Nemaha County against the sheriff of that county. The action is in resistance to a warrant of extradition issued by the Governor of the State of Nebraska upon a requisition of the Governor of the State of South Dakota and is founded upon a charge against the defendant in South Dakota of conspiracy to obtain money under false pretenses. After hearing, the trial court denied the relief requested by the petitioner and he appeals.

The errors assigned here are: (1) The requisition by the Governor of South Dakota is insufficient to meet the requirements of the extradition statutes. (2) The State of South Dakota denied the petitioner a right to a speedy trial upon the charge which is the foundation of the requisition for extradition and the State of Nebraska is not required to assist the demanding state in violating the petitioner's constitutional rights.

The brief record before us shows that an information on the charge was filed against the defendant in South Dakota in June 1973 and that this information was dismissed by the South Dakota court on December 15, 1975, without prejudice to refiling. The stated ground for the dismissal was that the cause had not been brought to trial on or before the second term after the one in which the information was filed. The information was refiled on December 16, 1975, and it is

on that information that the extradition request is founded.

The petitioner's first claim of error is founded upon the allegations that (1) the information does not charge a crime; (2) the information and affidavit accompanying the request are not properly authenticated; and (3) the defendant is not a fugitive from justice. We have examined the proceedings and conclude that the petitioner's assignments are not well founded. The request of the Governor of South Dakota and the accompanying papers are in proper form and are sufficient. The applicable rule is: "Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute." Gorgen v. Tomjack, 160 Neb. 457, 70 N. W. 2d 514. The authentication by the Governor is sufficient. The rules are: "In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. . . . The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be." Austin v. Brumbaugh, 186 Neb. 815, 186 N. W. 2d 723. The petitioner, in his petition for the writ of habeas corpus and in his brief, makes various factual claims to the effect that he is not a fugitive from justice. These claims find no support in the record and are insufficient to overcome the recitals in the proceedings which, as we have noted, are in proper form.

With reference to the petitioner's second assignment relative to denial of a speedy trial by the State of South Dakota, the plaintiff cites several cases which he claims support the proposition that the surrendering state need not honor the request of the demanding state where the record tends to establish that the petitioner

has been deprived of his rights to a speedy trial. There is nothing in the record except as we have outlined above to support the claim that the petitioner was in fact deprived of his constitutional right to a speedy trial in South Dakota. We know nothing whatever about why the petitioner was not brought to trial on the first information. It is obvious that the facts recited do not in and of themselves constitute deprivation of a right to a speedy trial. Further, none of the authorities cited by the petitioner stand for the proposition that the state upon which requisition is made rather than the demanding state is to decide such constitutional questions. It would seem obvious, at least in the absence of a complete record of the facts upon which the issue must depend, that we should not do so. Such an issue goes essentially to the merits of the prosecution and ought to be decided by principles which are applicable to a determination of the merits of the prosecution. We have previously said: "In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state." Gorgen v. Tomjack, *supra*.

The petitioner suggests in his brief that the principle embodied in the extradition statutes, "is not one of right, however, but one of courtesy. . . ." The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Extradition proceedings and habeas corpus review thereof should not be used as a vehicle to challenge acts undertaken

by a sister state to enforce its criminal laws. Bryan v. Conn, 187 Colo. 275, 530 P. 2d 1274; Ault v. Purcell, 16 Ore. App. 664, 519 P. 2d 1285. This is true even though the petitioner may claim that the demanding state has violated his constitutional right. Bryan v. Conn, *supra* (probable cause — revocation of parole — due process); Ault v. Purcell, *supra* (probable cause to believe crime committed — Fourth Amendment); Roscoe v. Warden, Baltimore City Jail, 23 Md. App. 516, 328 A. 2d 64 (former jeopardy). Such matters are to be determined by the courts of the demanding state.

AFFIRMED.

IN RE APPLICATION OF SPECTOR FREIGHT SYSTEM, INC., CHICAGO, ILLINOIS, ET AL.
SPECTOR FREIGHT SYSTEM, INC., CHICAGO, ILLINOIS, ET AL., APPELLANTS, V. HERMAN BROS., INC., ET AL., APPELLEES.
251 N. W. 2d 376

Filed March 9, 1977. No. 40847.

1. **Public Service Commissions: Public Utilities.** The Public Service Commission may approve a transfer of intrastate operating authority if the proposed transfer is consistent with the public interest, does not unduly restrict competition, and the applicant is fit, willing, and able to properly perform the proposed service.
2. **Public Service Commissions: Public Utilities: Evidence.** Proof of public convenience and necessity is required if the authority proposed to be transferred is dormant or the transfer will permit or result in a new or different service or operation as to territorial scope.
3. **Public Service Commissions: Public Utilities: Evidence: Motor Carriers.** Although the proposed transfer may tend to enlarge competition, proof of public convenience and necessity is required only if the transfer involves passenger motor carriers.
4. **Public Service Commissions: Public Utilities: Motor Carriers.** The purpose of regulation of motor carriers by the Public Service Commission is to permit regulated competition productive of efficient service at minimum cost.

Appeal from the Nebraska Public Service Commission. Affirmed in part, and in part reversed.

Rodney Peake of Peake and Navis and Lloyd J. Marti of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

James E. Ryan and Patrick E. Quinn, for appellees.

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

BOSLAUGH, J.

This is an appeal from an order of the Public Service Commission denying an application to transfer the intrastate operating authority of Hennis Freight Lines, Inc., of Nebraska (Hennis) to Spector Freight System, Inc. (Spector). The application was filed as a result of a merger between several corporations, including Hennis, in which Spector became the surviving motor carrier operating company.

Hennis held the following operating authority which the application sought to transfer to Spector: "SERVICE AUTHORIZED: Commodities generally (including perishables requiring refrigeration) except (1) livestock and (2) liquid bulk products by tank vehicles. ROUTE OR TERRITORY AUTHORIZED: Regular route operations: (1) Between Omaha and Lincoln, Nebraska via US-6. Irregular route operations: Between all points in Nebraska over irregular routes."

The commission denied the application in all respects, one commissioner dissenting. The applicants concede that the intrastate authority of Hennis was dormant as to all service authorized except the transportation of bulk cement, limestone, and limestone products over irregular routes. On this appeal the applicants contend only that the transfer of the authority to transport bulk cement and limestone products by irregular routes should have been approved.

The commission found that the transfer of the au-

thority to transport bulk cement and limestone products should be denied because the applicants failed to prove that Hennis of Nebraska had been an effective competitor for the transportation of these commodities; that a transfer would result in a new or different service or operation as to territorial scope; and the transfer would tend to enlarge competition over that presently existing without any showing that public convenience and necessity required the service.

The applicable statute is section 75-318, R. R. S. 1943. It provides, generally, that when two motor carriers propose to consolidate or merge certificates of public convenience and necessity into one ownership they shall present an application to the commission which shall notify interested parties and hold a public hearing. The statute then provides: "If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control of the properties, or any part thereof, certificates or permits or the whole, or any part thereof, upon such terms and conditions as it shall find to be just and reasonable; Provided, that if any of the certificates or permits proposed to be merged, consolidated, transferred, or leased are dormant the commission may approve an application for consolidation, merger, transfer, or lease only upon proof of and a finding that such merger, consolidation, transfer, or lease is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311; and provided further, that if the proposed merger, consolidation, transfer, or lease of the certificates or permits will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered

or engaged in by the respective parties, or, as to passenger motor carriers, will tend to enlarge competition over that then existing, the commission may approve such an application for merger, consolidation, transfer, or lease only upon the basis of proof of and a finding that the proposed merger, consolidation, transfer, or lease is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311."

The statute establishes three requirements which are applicable to all applications filed under section 75-318, R. R. S. 1943: (1) The proposed transaction will be consistent with the public interest; (2) it does not unduly restrict competition; and (3) the applicant is fit, willing, and able to perform the proposed service. See Andrews Van Lines, Inc. v. Smith, 187 Neb. 533, 192 N. W. 2d 406.

The commission made no finding specifically concerning these three requirements but the evidence before the commission established that these requirements had been satisfied. Spector is well-financed and has equipment available to perform all transportation service that is tendered to it. Specialized equipment is available from lessors, and where the traffic justifies the purchase of specialized equipment Spector will purchase such equipment. Spector has satisfied all requirements of the commission concerning licensing of equipment, insurance, and similar matters.

The transfer would not unduly restrict competition but would probably increase competition. Spector would be substituted for Hennis and the evidence is that Spector would probably be more aggressive in soliciting traffic than Hennis has been in the past.

There is no evidence to support a finding that the proposed transfer would not be consistent with the public interest unless evidence that Spector would be a more aggressive competitor than Hennis has been could be said to support such a finding. The language of the

order demonstrates that the principal ground for denying the application to transfer the authority to transport bulk cement and limestone products was that Spector would be a greater competitor for this business than Hennis has been. This is not a proper ground for denying an application to transfer if the authority is not dormant.

The statutory provision in regard to dormancy is not involved here because the evidence establishes the authority of Hennis to transport bulk cement and limestone products by irregular routes was not dormant; the commission found that it was not dormant; and the protestants concede that part of the authority was not dormant.

All the parties and the commission cite Dahlsten v. Harris, on reargument, 191 Neb. 714, 217 N. W. 2d 813. The Dahlsten case involved an application by Harris who was engaged in heavy hauling to transfer a certificate which included authority to transport contractor's supplies, equipment, and other commodities requiring the use of special equipment over irregular routes. The commission revoked the authority to transport cement, in bulk and bag, and limestone products, but approved the transfer of the rest of the authority subject to restrictions. The evidence showed that Harris had never hauled cement or limestone in pneumatic trailers except on one occasion in 1966 when he used equipment owned by the customer. The evidence established that this part of the Harris' authority was dormant and could not be transferred without proof of public convenience and necessity. Unlike the Dahlsten case, the authority of Hennis in this case to transport bulk cement and limestone products was not dormant.

Proof of present and future public convenience and necessity is not required unless the authority to be transferred is dormant or the transfer will result in a new or different service or operation *as to territorial scope*. Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d

684. The statutory provision in regard to a transfer that will permit or result in a new or different service as to territorial scope is not involved because the authority in dispute here is statewide over irregular routes. See Transit Homes, Inc. v. National Trailer Convoy, Inc., 173 Neb. 391, 113 N. W. 2d 638.

The statutory provision in regard to a transfer that will tend to enlarge competition over that then existing is not involved because the proposed merger does not involve *passenger motor carriers.*

There are only two protestants in this case who have authority which conflicts with that of Hennis to transport bulk cement and limestone products. Dokter Trucking Corp. holds authority to transport rock, agricultural limestone, ground or pulverized limestone, and road and dam construction materials (except cement in bulk) over irregular routes. Herman Bros., Inc., holds authority to transport cement in bulk and limestone products over irregular routes.

The purpose of commission control is not to establish an unbridled monopoly by the elimination of fair competition, nor is it to create unfair or destructive competition resulting in inadequate service to the public. The object of commission control is to permit a regulated competition, productive of efficient service at a minimum cost, operated for reasonable profit in the interest of public users of the service, without endangering or impairing the operations of certified common carriers in the field. Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665 at p. 670, 90 N. W. 2d 268.

The evidence before the commission did not support a denial of the transfer of the authority of Hennis to transport bulk cement, limestone, and limestone products between all points in Nebraska over irregular routes. To that extent the order was unreasonable and arbitrary and must be reversed.

That part of the order of the commission which de-

nied a transfer of the authority of Hennis to transport bulk cement, limestone, and limestone products between all points in Nebraska over irregular routes is reversed; the order in all other respects is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

BILLY P. EVANS, APPELLEE, V. GEAR DRILLING COMPANY, APPELLANT.
251 N. W. 2d 173

Filed March 9, 1977. No. 40872.

Workmen's Compensation: Damages: Evidence: Witnesses. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed.

Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Wright & Simmons, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff was employed as a roughneck on a drilling rig by the defendant. He was injured on January 7, 1974, when he slipped while walking down the steps from the doghouse which were snow-packed and icy. He slipped on the second step from the top and fell against the railing at the side of the steps. He slid down about 8 steps to the ground with his right arm draped over the railing. He worked the next day but had difficulty using his right arm be-

cause his neck and arm were stiff and sore. He also experienced dizziness whenever he tried to look up.

On the day after the accident he consulted his family physician who referred him to Dr. Grizzle, a neurological surgeon. The plaintiff saw Dr. Grizzle on February 11, 1974, and was hospitalized for 11 days. After being discharged from the hospital he continued to see Dr. Grizzle at monthly intervals. He returned to work in April 1975. He worked as a roughneck until December and then became a driller. A driller is in charge of the rig during his shift and has 3 or 4 hands working under him.

After the hearing before a single judge of the compensation court the plaintiff recovered an award for temporary total disability from February 11, 1974, to January 7, 1975. The compensation court found the evidence did not show that the plaintiff had sustained any disability after January 7, 1975; the compensation due the plaintiff had been paid in full by the defendant; and the plaintiff's medical and hospital expenses had been paid by the defendant.

On rehearing before a three judge compensation court, the court found that the plaintiff had sustained a 5 percent permanent partial disability to the body as a whole for which he was entitled to compensation and that he had additional medical and drug expense which should be paid by the defendant. From this award the defendant has appealed to this court.

The defendant contends there is no competent evidence to support the award for additional compensation made on rehearing. An award may be modified, reversed, or set aside by this court if there is not sufficient competent evidence in the record to warrant the making of the award. § 48-185, R. S. Supp., 1976.

The plaintiff offered no medical evidence at the rehearing other than reports and letters from Dr. Grizzle. There was no foundation for these exhibits and the defendant's objections on the grounds of hearsay and lack

of foundation were sustained. The plaintiff attempted to testify as to his opinion concerning the extent of his disability in terms of percentage of disability to the body as a whole. An objection to this testimony on the ground of lack of foundation was sustained. A similar objection was sustained to an offer of proof.

The defendant offered the deposition of Dr. Robertson, a neurosurgeon, who had examined the plaintiff on December 5, 1974. Dr. Robertson testified that it was his opinion the plaintiff had no permanent disability fairly attributable to the accident with reasonable medical probability. Dr. Robertson found the plaintiff had a full range of painless neck motion at the time of the examination although there was tenderness of the lower cervical spine to percussion. Dr. Robertson found no objective symptoms of a disturbance in the neck-shoulder area and was of the opinion that the plaintiff was able to return to work as a roughneck. He attributed the plaintiff's complaints of dizziness to an auditory disturbance which was not related to the accident.

The defendant contends the award for permanent partial disability must be reversed because there is no medical evidence to sustain it. The plaintiff relies upon Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15, and argues that expert medical evidence is not required to sustain a finding of permanent partial disability.

The Clark case involved a volunteer fireman who was injured while fighting a fire. A medical witness testified that the injured fireman had a limitation of motion of his left arm, "clawed" fingers on both hands, and scars on his face and arms, all of which were permanent injuries. From this testimony and the other evidence this court held the trial court could find that the plaintiff had sustained a 35 percent permanent partial disability to the body as a whole. We said: "In personal injury cases where the injuries are objective

and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. * * * Here the cause of the injuries and their permanency is not questioned. They are objective. The trial court heard the testimony and was able to observe the injuries."

The plaintiff's principal complaints in this case are pain and dizziness. These are not objective injuries and there is no medical evidence that the injuries are permanent if they exist. What medical evidence there is in the record is to the effect that the plaintiff sustained no permanent disability as a result of the accident and his dizziness is the result of an unrelated cause. Under these circumstances the finding that the plaintiff sustained a 5 percent permanent partial disability to the body as a whole is not sustained by any competent evidence and must be set aside.

The compensation court found, on rehearing, that the defendant should reimburse the plaintiff in the amount of $69.30 for prescription drugs purchased since October 22, 1975, and $156 for 10 trips to Cheyenne, Wyoming; and should pay $15 to Dr. Grizzle.

At the hearing the plaintiff testified he had paid for all his prescriptions, but did not have the bills with him, and had made a number of trips to Cheyenne, Wyoming, to see Dr. Grizzle for which he had not been reimbursed. The plaintiff further testified that he had the prescription bills and a list of the trips to Wyoming at his home. The compensation court granted the plaintiff permission to file the bills and transportation statement with the court after the hearing with the understanding the defendant could make written objections. The exhibits were supplied pursuant to this arrangement. The defendant objected to the exhibits by letter on the ground they were hearsay and there was no foundation for their admission in evidence, which objections were overruled.

The foundation for these exhibits was somewhat meager but it was within the discretion of the compensation court to determine that it was adequate. The procedure which was followed deprived the defendant of any opportunity to cross-examine the plaintiff as to the exhibits which were filed after the hearing. However, we conclude that the part of the award on rehearing which orders the defendant to reimburse the plaintiff in the amount of $225.30 is sustained by the evidence.

The finding that the defendant should pay Dr. Grizzle $15 is based upon exhibit 10, a statement for that amount which was received in evidence. The testimony concerning this exhibit established that it had been paid but not by the plaintiff. The evidence does not support a finding that the defendant should pay Dr. Grizzle for this statement.

That part of the award on rehearing which finds that the defendant should reimburse the plaintiff in the amount of $225.30 is affirmed; and that part of the award which finds that the plaintiff sustained a 5 percent permanent partial disability to the body as a whole and that the defendant should pay $15 to Dr. Grizzle is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

BENJAMIN JOHNSON, APPELLEE AND CROSS-APPELLANT, V. VILLAGE OF WINNEBAGO ET AL., APPELLANTS AND CROSS-APPELLEES.

251 N. W. 2d 176

Filed March 9, 1977. No. 40877.

1. **Workmen's Compensation; Statutes: Evidence: Appeal and Error.** A judgment of the Workmen's Compensation Court may be reversed, modified, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. § 48-185, R. S. Supp., 1976.

2. **Workmen's Compensation: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to support an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from it.
3. **Workmen's Compensation: Burden of Proof.** In a workmen's compensation case, the burden is on the claimant to establish that the accidental injury arose in the course of his employment as well as out of his employment.
4. **Workmen's Compensation: Disability: Words and Phrases.** Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Ray C. Simmons, for appellants.

Robert G. Scoville of Ryan, Scoville & Uhlir, for appellee.

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

WHITE, C. THOMAS, J.

This is an appeal from the award of the Nebraska Workmen's Compensation Court finding that the plaintiff suffered an accidental injury during the course of his employment with the Village of Winnebago on August 19, 1974. The compensation court found that the plaintiff had suffered a permanent partial disability of the body as a whole of 10 percent and allowed temporary total disability and certain medical expenses. The judgment of the three-judge court reversed an earlier finding by the one-judge court which held that the plaintiff failed to maintain the burden of proving by a preponderence of the evidence a causal connection between an alleged accident and injury of August

19, 1974, or his employment and his subsequent treatment, hospitalization, and disability. The Village of Winnebago appeals from the determination of the three-judge court.

In appeals from the Workmen's Compensation Court, findings of fact in the Workmen's Compensation Court 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." § 48-185, R. S. Supp., 1976. See, also, Salinas v. Cyprus Industrial Minerals Co., 197 Neb. 198, 247 N. W. 2d 451 (1976).

The village assigns as error and argues (1) that plaintiff in the lower court failed to sustain his burden of showing a compensable claim, and (2) that the court erred in granting plaintiff a specific percentage of permanent partial disability.

In determining the sufficiency of evidence to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from it. See Salinas v. Cyprus Industrial Minerals Co., *supra*. In a workmen's compensation case the burden is on the claimant to establish that the accident which allegedly caused the injury arose in the course of his employment as well as out of his employment. See Reis v. Douglas County Hospital, 193 Neb. 542, 227 N. W. 2d 879. Within the scope of these rules, the three-judge compensation court could reasonably have found

that on August 19, 1974, the plaintiff was engaged in his duties as an employee for the defendant Village of Winnebago.

As part of his employment for the defendant, the plaintiff operated a bulldozer loader in pushing refuse over the edge and down the nearly vertical sides of a landfill. The bulldozer would stop abruptly when it struck the bottom of the pit. On the day of the alleged accident, the plaintiff had been working at this task for 2 to 3 hours when the bulldozer struck the bottom of the pit. The plaintiff then felt a sharp pain — a "snapping" in the lower part of his back. The pain was so intense that the plaintiff felt like vomiting. The plaintiff had no history of back injury and had not been treated for any type of injury of the back in the past. He continued in his work but did not again go down to the bottom of the pit, contenting himself with pushing dirt from the top of the pit over the edge into the pit. Plaintiff then abandoned the work on the bulldozer, went to his home, and rested. At a later time he took up another task for the village operating a road grader filling ruts and smoothing out the streets. He continued to operate the grader for about an hour when he suffered cramps in his legs and arms. The back pain had continued from the time of onset. The pain and cramps were so intense that the plaintiff was unable to pull the levers to raise the blade. The plaintiff stopped work when the motor stalled. The plaintiff's supervisor Mr. Leedom came on the scene, assisted plaintiff to the ground, and took him to the Public Health Service Indian Hospital at Winnebago. The plaintiff was examined by a physician. His treatment consisted of an injection for the pain and some pills. He thereupon returned to his home. Later that evening the pain became more intense. The plaintiff returned to the hospital and was admitted. He was placed in bed with a firm plywood board underneath him. After release from the Public Health Service Indian

Hospital, he was transferred to Creighton St. Joseph's Hospital in Omaha on an out-patient basis. Tests were administered and the plaintiff was then referred for hospitalization and further tests to the Veterans Administration Hospital in Omaha. He returned to light work on April 1, 1975. After his return to Winnebago, plaintiff was again treated at the Winnebago hospital under Drs. Mata and Lim who, in December 1974, made a diagnosis of thoraco-lumbar strain. The plaintiff was advised he should stay off heavy work, do only very light work, and not operate heavy equipment or drive semis. Further treatment was given in January 1976, by Dr. Horst G. Blume, a neurosurgeon in Sioux City, Iowa. After extended testing, Dr. Blume diagnosed the plaintiff's condition as a spinal cord contusion with permanent neurological deficit in the upper and lower extremities coupled with an irritation of the intervertebral joints of the lower lumbar spine. Dr. Blume concluded that the condition was related to an injury sustained on August 14, 1974.

The defendant asserts there is no expert medical evidence to justify the finding of a 10 percent permanent partial disability as found by the Workmen's Compensation Court.

Plaintiff is shown by the evidence to be a 56-year-old Indian male with a ninth grade education and no other skills save those of an operator of heavy equipment. He has been found by Dr. Blume, on an examination of January 5, 1976, to have an "impairment in the production of strength in both legs and it may have to be considered to be 80% of normal. * * * There is also some weakness in the right hand." In his report of March 26, 1976, Dr. Blume stated: "I do think the patient could do light work but not heavy equipment work." The evidence further discloses that the plaintiff's wages as a heavy-equipment operator for the Village of Winnebago were $2.60 an hour, later reduced to $2.40 an hour because of a decrease in funds

of the village. He is now being paid an amount of $2.10 an hour as a janitor and night watchman.

Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions. Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N. W. 2d 624. Here there is an actual loss of strength in the lower legs of 20 percent which Dr. Blume has related to the accident and a loss in actual earning capacity in excess of 10 percent. Attention is drawn by the defendants' counsel to the fact that in Dr. Blume's report he refers in his first letter to an accident of August 17, 1974, and to a second report of an accident on August 14, 1974. It is obvious from the contexts and from a description in those reports that he was referring to the accident of August 19, 1974. No evidence has been introduced to indicate that an accident other than the one claimed by the plaintiff to have happened on August 19, 1974, occurred. The doctor was obviously confused about the date of the accident, but the reports clearly relate to the accident complained of by plaintiff. As in this case where there is a determined loss of strength in the limbs of a significant amount, with a medical finding that the workman was unable to engage in heavy employment, a finding by the compensation court of a disability less than the actual percentage of loss of earnings is amply supported by the evidence and will not be disturbed on appeal. We hold that the evidence is sufficient to justify the finding of the compensation court of a 10 percent permanent partial disability of the body as a whole.

The plaintiff cross-appeals from the disallowance of the hospital bill of Dr. Blume of St. Vincent's Hospital, Sioux City, Nebraska. The evidence discloses that the plaintiff submitted himself to the care of Dr. Blume and to the hospital for treatment and not for preparation for trial. The amount of the bills have been stipulated to as fair and reasonable. We are unable to find

any reason for the compensation court to have disallowed those claims.

The award of the compensation court is affirmed. The plaintiff's cross-appeal is allowed and the cause is affirmed in part and in part reversed and remanded to the compensation court with directions to enter an order directing the payment of the bill to St. Vincent's Hospital and Dr. Horst G. Blume.

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

STATE OF NEBRASKA, APPELLEE, V. CALVIN TWEEDY, APPELLANT.
251 N. W. 2d 380

Filed March 9, 1977. No. 40886.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within the statutory limits, and the denial of probation, will not be disturbed on appeal in the absence of a showing of an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

James N. Norton, for appellant.

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

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

BRODKEY, J.

In an amended information filed in the District Court for Butler County on March 28, 1974, the defendant and appellant herein, Calvin Tweedy, was charged with aiding, abetting, and procuring another to commit the felony of cattle stealing under sections 28-201 and 28-510, R. R. S. 1943. The penalty for that

crime is imprisonment of not more than 10 years, nor less than 1 year. On March 29, 1974, the defendant pled nolo contendere to the charge, and was placed on probation for a period of 2 years. On March 19, 1976, upon motion filed February 24, 1976, by the county attorney of Butler County, and after a hearing, the defendant was found to be in violation of the conditions of probation, and was sentenced to imprisonment for a term of 1 to 2 years. The defendant has appealed from that sentence, contending that it is excessive, and that the District Court abused its discretion in imposing it. We affirm.

The defendant does not assign as error the finding of the District Court that he violated the conditions of probation, and the sole issue in this appeal is whether the defendant's sentence is excessive. The following facts are relevant. Subsequent to the original sentence of probation, a motion to revoke probation was filed on December 12, 1974. The defendant was found to have violated conditions of probation on December 20, 1974; and on January 14, 1975, was ordered to submit to the supervision of the Director of the Alcohol Safety Action Program in Fremont, Nebraska, for the reason that his conflicts with the law were alcohol related. The defendant was not sentenced to imprisonment, but the probation period was extended to January 14, 1977.

On August 27, 1975, a second motion to revoke probation was filed, and the defendant was again found to have violated the conditions of probation. This violation was also due to the defendant's use and abuse of alcohol. No sentence of imprisonment, however, was imposed on the defendant.

On February 24, 1976, the motion to revoke probation which gave rise to the present case was filed, and on March 19, 1976, the defendant was found to have violated the condition of probation that he abstain from the use of alcoholic beverages. On April 30, 1976, the

trial court imposed a term of imprisonment of 1 to 2 years, from which sentence the defendant appeals.

The defendant contends that the sentence was excessive for the following reasons: (1) The crime for which he was convicted involved no violence; (2) he was an aider and abettor rather than the principal participant in the crime; and (3) his rehabilitative needs will not be met by a term of imprisonment because his conflict with the law has been due to his alcoholism, and he has taken steps to rectify his drinking problem.

We find these contentions unpersuasive. As the trial court noted when sentencing the defendant, he had been given almost 2 years to demonstrate that he could abide by the conditions of his probation, yet had failed to make any substantial progress in that endeavor. The defendant had repeatedly violated the conditions of probation, and the last violation involved beating his wife while intoxicated. The defendant had been given ample opportunity to conform to the requirements of the law, yet had not taken advantage of that opportunity. The defendant's probation officer did not believe that he was suitable for continued probation, and recommended that he receive a sentence of imprisonment. It is well established that a sentence imposed within the statutory limits, and the denial of probation, will not be disturbed on appeal in the absence of a showing of an abuse of discretion. State v. Kolzow, 195 Neb. 93, 236 N. W. 2d 837 (1975). There was no abuse of discretion in this case, and the judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., not participating.

GENE E. PRUITT, APPELLANT, V. ROBERT F. PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

251 N. W. 2d 179

Filed March 9, 1977. No. 40945.

1. **Criminal Law: Habeas Corpus: Judgments.** In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void.
2. ———: ———: ———. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to a writ of habeas corpus.
3. **Criminal Law: Habeas Corpus: Sentences.** A writ of habeas corpus is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

CLINTON, J.

Petitioner, a prisoner in the Nebraska Penal and Correctional Complex pursuant to conviction and sentence, asked in the District Court that a writ of habeas corpus be issued and that he be discharged from confinement in the Adjustment Center of the complex. That court refused the writ, holding that it was not a remedy available to challenge the conditions of his confinement. The petitioner has appealed to this court. We affirm.

It was stipulated in the District Court that the sentence and imprisonment were lawful. The petitioner alleges that he was confined in the Adjustment Center

by virtue of an order of the Adjustment Committee of the Nebraska Penal and Correctional Complex, and that he appealed the action to the Institution Appeal Board which upheld the action of the Adjustment Committee. A copy of various documents attached to and incorporated in the petition include: (1) Order committing the petitioner to the Nebraska Penal and Correctional Complex; (2) judgment and sentence; (3) record of Adjustment Committee action; (4) the misconduct notification; and (5) the misconduct reports (two). These show that the infraction of which petitioner was found guilty by the Adjustment Committee was: (1) Forgery of a pass or other official document; and (2) possession of a knife. The order shows: (1) The prisoner waived representation and witnesses and elected to represent himself; (2) the report of the infraction was read to the prisoner and he stated that he understood it; (3) the prisoner stated that Captain Pease (the petition and attachments indicate that Captain Pease was the one who made the complaint of violation) was "full of it" and there was nothing he could say other than that; (4) the petitioner's attitude toward the committee was good; (5) the committee relied upon the written report submitted by the employee; and (6) the dispositive action was taken in accordance with an official memorandum (specifying section and offense). The punishment imposed was: (1) Major report; (2) loss of all good time; and (3) 1 year in the Adjustment Center. The misconduct notification indicates that the matter would be heard by the Adjustment Committee on a certain date and that the inmate refused to acknowledge receipt of the notice.

The petition makes various complaints about the action of the board, namely, that a request for a continuance was refused, that the charge by Captain Pease was fabricated, and that the order of the board is insufficient; it further alleges various legal conclusions

about the illegality of his confinement to the Adjustment Center, and also, by way of conclusion, that the memorandum of notification was insufficient and that the petitioner was denied an opportunity to see the contraband (presumably the knife and forged instrument).

It is apparent that by this action of habeas corpus the petitioner seeks a court review on the merits of the action by the Adjustment Board and the action of the Institution Appeal Board. The question is whether the writ of habeas corpus is a proper remedy for that purpose.

This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673; Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. § 29-2801, R. R. S. 1943; In re Application of Dunn, *supra*. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. In re Application of Dunn, *supra*.

Although some courts have extended the use of the writ to habeas corpus beyond its historical application, we find no cases which have extended the writ to provide a vehicle to review the merits of a prisoner's disciplinary proceedings which on their face appear to comply with due process requirements as the attachments to the petition indicate the proceedings before the Adjustment Committee do. See, Wolff v. McDonnell, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935; Baxter v. Palmigiano, 425 U. S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY C. LIBERATOR, APPELLANT.

251 N. W. 2d 709

Filed March 9, 1977. No. 40953.

1. **Constitutional Law: Statutes: Criminal Law: Venue: Juries.** Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed.
2. **Criminal Law: Venue: Evidence.** The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
3. **Criminal Law: Sentences: Probation and Parole.** The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Mac H. McConnell of Kirby, Duggan & McConnell, for appellant.

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

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

WHITE, C. J.

The defendant was charged with delivery of a controlled substance, to wit, marijuana. The defendant was tried by a jury and found guilty. The District Court sentenced the defendant to 2 years' imprisonment in the Nebraska Penal and Correctional Complex. The defendant appeals. We affirm the judgment and sentence of the District Court.

On appeal the defendant contends that there was in-

sufficient evidence to establish the element of venue. Venue is a jurisdictional fact and in this state the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. Robeen v. State, 144 Neb. 910, 15 N. W. 2d 69 (1944).

In Gates v. State, 160 Neb. 722, 71 N. W. 2d 460 (1955), we held: " 'The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.' Weinecke v. State, 34 Neb. 14, 51 N. W. 307. See, also, Medley v. State, 156 Neb. 25, 54 N. W. 2d 233."

Officer James A. Fosmer testified at the defendant's trial that the illegal drug transaction occurred in the east parking lot of the Holiday Inn in Norfolk, Nebraska. It is presumed that the trial court as well as the jury knew the boundaries of the county where the trial took place and knew that the town of Norfolk was located in such county. See Gates v. State, *supra*. There was sufficient evidence of venue. There is no merit to this contention.

The defendant next argues that his sentence is excessive. He contends that he should have received probation. The presentence report shows that the defendant has no prior criminal convictions, but does have a history of numerous traffic violations.

In State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974), we said: "The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion."

In State v. Swails, 195 Neb. 406, 238 N. W. 2d 246

(1976), we recognized that: "Inevitably there are cases in which the decision to grant or not to grant probation is one of delicate balance and in those cases the judicial discretion of the trial court should be accorded great weight."

Based upon our review of the record, we find no abuse of discretion by the trial court in not granting the defendant probation.

The defendant received a sentence of 2 years' imprisonment. The crime for which he was convicted carries a penalty of 1 to 5 years' imprisonment plus a possible fine. § 28-4,125 (2)(b), R. R. S. 1943. The sentence imposed by the District Court was within the statutory limits and as such will not be disturbed on appeal absent an abuse of discretion. State v. Holloman, *ante* p. 139, 248 N. W. 2d 15 (1976). We find no abuse of discretion in this sentence.

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

AFFIRMED.

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The party seeking an accounting has the burden of establishing both the contract upon which accounting is sought and his right to credit for disputed items. Alward v. United Mineral Products Co. 658

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A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. State v. Matzen 592

Actions.

1. Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest. Bury v. Action Enterprises, Inc. 38
2. When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort. City of Omaha v. Matthews 323
3. The right of a party to sue as representative of a class may be raised by a motion for summary judgment. Kosowski v. City Betterment Corp. 402
4. The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. Kosowski v. City Betterment Corp. 402
5. An action in replevin lies to recover possession of personal chattels that are unlawfully detained, regardless of whether the original taking was wrongful. It is founded solely on the claim that the defendant wrongfully withholds the property sought to be recovered. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
6. In an action to recover damages sustained on account of wrongful death, allegations of plaintiff's capacity to sue, death of a person caused by the wrongful act, neglect, or default of the defendant, and the identity of next of kin and that they sustained damage from such wrongful death sufficiently state a cause of action. Gilbert v. Vogler 454
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be based upon the strength of his own title and not upon any weakness in the title of his adversary. Bode v. Flobert Industries, Inc. 488

8. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Shepoka v. Knopik .. 651
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Administrative Law.

1. On appeal to the Supreme Court from an order of the Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority, and whether the order complained of is reasonable and not arbitrarily made. Mills v. Nebraska Motor Carriers Assn. 159
2. If there is evidence to sustain the findings of the Public Service Commission, this court may not intervene. It is only where the findings of the commission are against the evidence that this court may hold the commission's findings are arbitrary and capricious. Mills v. Nebraska Motor Carriers Assn. 159
3. On an appeal to the Supreme Court from an order of the Public Service Commission this court cannot disturb the findings of the commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved. Mills v. Nebraska Motor Carriers Assn. 159
4. The county assessor's responsibility after recommending either taxable or exempt status under section 77-202.01, R. R. S. 1943, is limited to an advisory rather than an adversary capacity. Bemis v. Board of Equalization of Douglas County 175
5. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska

Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Groenewold v. Building Movers, Inc. 187

6. Law violations are not necessarily a bar to an approval of an application, if the public interest will best be served by approval of the transaction presented. Groenewold v. Building Movers, Inc. 187

7. In the absence of a specific restricting statute, the extent to which past unauthorized service may be considered in determining public necessity for the issuance of new authority is properly for the Nebraska Public Service Commission to determine. Groenewold v. Building Movers, Inc. 187

8. In determining whether the proposed service is or will be required by the present or future public convenience and necessity, controlling questions are whether the operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the operations of existing carriers will be endangered or impaired contrary to the public interest. Hopken v. Building Movers, Inc. 195

9. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony. Salinas v. Cyprus Industrial Minerals Co. 198

10. The intent of sections 75-612 to 75-615, R. R. S. 1943, was to enable telephone users to petition the Public Service Commission for telephone service of exchanges other than the one in which they reside. Hartman v. Glenwood Tel. Membership Corp. 359

11. The provision in section 75-128, R. S. Supp., 1976, that the Public Service Commission shall file its decision within 30 days after the hearing is discretionary, not mandatory. Hartman v. Glenwood Tel. Membership Corp. 359

12. An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings. Hartman v. Glenwood Tel. Membership Corp. 359

13. Under section 75-311, R. S. Supp., 1976, an applicant for a certificate of public convenience and necessity has

the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Dilts Trucking, Inc. v. Peake, Inc. 459

14. Where the evidence is in conflict, the weight of the evidence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Dilts Trucking, Inc. v. Peake, Inc. 459

15. Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operation. Dilts Trucking, Inc. v. Peake, Inc. 459

16. A carrier who previously operated under a certificate of public convenience and necessity issued by the Interstate Commerce Commission, under the mistaken belief that he was performing services in interstate commerce and did not need a Nebraska certificate for his deliveries in Nebraska, was acting under "color of authority" where his previous operations were conducted openly, without defiance, and without knowledge that he was acting without proper authority. Dilts Trucking, Inc. v. Peake, Inc. 459

17. An applicant for a certificate of public convenience and necessity who has been operating under color of authority need not make the same showing under section 75-311, R. S. Supp., 1976, that an applicant for new or extended authority must make, and there is a presumption that the proposed service is or will be required by present or future public convenience and necessity. Dilts Trucking, Inc. v. Peake, Inc. 459

Adultery.

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 trial court in determining what is in the best interest of the child. This is particularly true when the parent cohabits out of wedlock in the home where the child lives. Bartley v. Bartley 246

Adverse Possession.

1. It is the established law of this state that, when a fence

is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Vetick v. Kula 209

2. The right to hunt and fish cannot be established by prescription where the use is not exclusive or its extent is too indefinite for a determinate description. Harvat v. Clear Creek Drainage Dist. 352

Agency.

1. It is a fundamental rule underlying the structure of agency law that the principal is bound by, and liable for, the acts which his agent does with or within the actual or apparent authority from the principal, and within the scope of the agent's employment. Bury v. Action Enterprises, Inc. 38
2. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. Bury v. Action Enterprises, Inc. 38
3. It is well settled that one who purports as agent to enter into a contract, upon which the principal is not bound because of the fact that the agent has contracted without authority or in excess of his authority, is personally liable for the damage thus occasioned to the other contracting party. Bury v. Action Enterprises, Inc. ... 38
4. A person who purports to make a contract, conveyance, or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized. Bury v. Action Enterprises, Inc. 38
5. The possession of an agent or subtenant of the lessee is the possession of the lessee. Moritz v. S & H Shopping Centers, Inc. 206
6. Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit, and charged with a strict execution of the duties assumed. Katleman v. U. S. Communities, Inc. 443
7. If an escrow agent violates instructions or acts negligently he is ordinarily liable for any loss occasioned

by his breach of duty. Katleman v. U. S. Communities, Inc. 443
8. From the time an escrow holder informs the seller that the buyer has put a payment in escrow, and the seller relies and acts on that information, the escrow holder is estopped to deny that the represented sum is on deposit. Katleman v. U. S. Communities, Inc. 443

Aggravating and Mitigating Circumstances.
1. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497
2. The facts on which the finding of an aggravating circumstance referred to in section 29-2523, R. R. S. 1943, is based, must be proved beyond a reasonable doubt. State v. Stewart 497
3. Subsection (1)(a) of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. State v. Stewart 497
4. Subsection (1)(b), section 29-2523, R. R. S. 1943, is applicable where the purpose of the murder was to conceal a theft, or to conceal the defendant's identity as a thief. State v. Stewart 497
5. Subsection (1)(c), section 29-2523, R. R. S. 1943, applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain, as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee. State v. Stewart 497
6. Subsections (1)(b) and (1)(c), section 29-2523, R. R. S. 1943, are separate and distinct circumstances, and will be construed so as not to overlap. State v. Stewart 497
7. The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523, R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of

morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life. State v. Stewart 497

8. Subsection (1)(e), section 29-2523, R. R. S. 1943, applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder. State v. Stewart 497

9. Subsection (1)(f), section 29-2523, R. R. S. 1943, applies to those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or other like situations. State v. Stewart 497

10. Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old defendant who has no criminal record nor significant history of prior criminal activity. State v. Stewart 497

11. Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required that the mitigating circumstances outweigh the aggravating circumstances. State v. Stewart 497

12. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528

13. The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Rust 528

14. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts. State v. Rust 528
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15. A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed. State v. Rust 528

16. A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Rust 528
17. The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept. State v. Rust .. 528
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20. Knowingly creating a risk of death to several persons includes the circumstance of shooting at several persons. State v. Rust 528
21. Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder the enforcement of laws within the meaning of aggravating circumstance subsection (1)(h) of section 29-2523, R. R. S. 1943. State v. Rust 528
22. When the act of killing is totally and senselessly bereft of any regard for human life, it is wanton, deliberate, cruel, and inexcusable. State v. Holtan 544
23. Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts. State v. Holtan 544
24. Extreme mental or emotional disturbance means such a disturbance in very great, intense, or severe degree. State v. Holtan 544
25. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather

to an important, notable, or meaningful history. State v. Holtan 544
26. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions. State v. Holtan 544
27. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. Holtan 544
28. In each case in which the sentencing court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination. State v. Simants 549
29. The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt. State v. Simants 549
30. Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549
31. The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Simants 549
32. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. State v. Simants 549
33. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549
34. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child

of tender age, a juvenile, or to a person of advanced years where senility may be a factor. State v. Simants 549
35. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Simants 549
36. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances. State v. Simants 549
37. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Simants ... 549

Aiders and Abettors.

1. Mere failure to report a known felony is not concealment sufficient to constitute a violation of section 28-202, R. R. S. 1943, and make the person failing to report the felony an accessory after the fact to the felony. State v. Brown 131
2. In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight. State v. Rust 528

Alimony.

1. The fixing of alimony rests in the sound discretion of the trial court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Jackson v. Jackson 27
2. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Jackson v. Jackson 27
3. The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. Mangum v. Mangum 350
4. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Gottschalk v. Gottschalk 437

5. The questions of alimony and division of property may be considered together when a marriage is dissolved; and in considering these questions the court shall have regard for such factors as the circumstances of the parties, the duration of the marriage, the history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Boroff v. Boroff 641
6. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Schmer v. Schmer 800

Animals.

1. Common law rules of negligence require horseback riders to exercise reasonable care to avoid injury from motor vehicles on the highway. Mays v. Siekman 77
2. In meeting and passing a horseback rider, or a horse-drawn vehicle, a motorist is ordinarily under no obligation to stop or to take special steps to avoid a collision therewith, unless the horse shows signs of fright or that its rider or driver has lost control of it. Mays v. Siekman 77

Appeal and Error.

1. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Blunt 82
2. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Blunt 82
3. Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice. Insurance Co. of North America v. Hawkins 126
4. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Insurance Co. of North America v. Hawkins 126
5. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered or adduced. State v. Holloman 139
6. There is a presumption the trial court, trying a case

without a jury, in arriving at a decision, would consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Stecker v. Stecker 164

7. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded by this court. Stecker v. Stecker 164

8. The discretion of the trial court with respect to awarding or changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Stecker v. Stecker 164
Schmer v. Schmer 800

9. 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 to not support the order or award. Inserra v. Village Inn Pancake House 168

10. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Groenewold v. Building Movers, Inc. 187

11. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Salinas v. Cyprus Industrial Minerals Co. 198

12. In an appeal in an equity action, it is the duty of this

court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Marfisi v. Spagnola 211

13. In an equity case, 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 facts rather than the opposite. Marfisi v. Spagnola 211

14. In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943. Kracman v. Nebraska P. P. Dist. 301

15. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Allgood v. Nebraska Humane Society 373

16. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Reinert 379

17. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper 398

18. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed unless clearly wrong. Naber v. City of Humboldt 433

19. This court is not inclined to disturb the division of property made by a trial court in marriage dissolution proceedings unless it is patently unfair on the record. Gottschalk v. Gottschalk 437

20. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Katleman v. U. S. Communities, Inc. 443

21. Where the evidence is in conflict, the weight of the evi-

dence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Dilts Trucking, Inc. v. Peake, Inc. 459

22. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Wells 584

23. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Overstreet 625
State v. Westerlund 644
State v. Sinsel 673
State v. Stahl 683
State v. Osterman 727

24. Under section 29-2308, R. R. S. 1943, this court may reduce a sentence when in its opinion that sentence is excessive. State v. Goodloe 632

25. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641

26. Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. Cinema 16, Inc. 675

27. An assignment of error with regard to failure to give an unrequested instruction may not be sustained unless it is shown that the instructions given were such as to cause a miscarriage of justice. State v. Cinema 16, Inc. 675

28. Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court. State v. Cinema 16, Inc. 675

29. 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. Stahl 683

30. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. McCready v. Al Eighmy Dodge 684

31. Where an appeal was not taken from an order of probation, the question of the voluntariness of the original guilty plea could not be considered. State v. Osterman 727

32. 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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical

facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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. Bonsall v. Sterrett 753

33. In criminal misdemeanor cases, appeals to the District Court are heard upon the record and the District Court is not permitted to receive additional evidence. State v. Horn 755
34. Where a defendant voluntarily chooses to represent himself at trial, his conviction will not be reversed by this court on the ground that the trial court did not take adequate precautions to protect his rights when the defendant received a fair trial and a fair opportunity to present his side of the case. State v. Horn 755
35. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Grady v. Denbeck 795
36. When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will not be considered de novo on appeal. James v. Rainchief Constr. Co. 818
37. A judgment of the Workmen's Compensation Court may be reversed, modified, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. § 48-185, R. S. Supp., 1976. Johnson v. Village of Winnebago 845
38. In determining the sufficiency of the evidence to support an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from it. Johnson v. Village of Winnebago ... 845
39. A sentence imposed within the statutory limits, and the denial of probation, will not be disturbed on appeal in the absence of a showing of an abuse of discretion on the part of the sentencing judge. State v. Tweedy 851

Apportionment.

1. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. Barnett v. Boyle 677
2. The formation of representative districts in state government is normally a legislative function. Barnett v. Boyle 677

Arrest.

Section 29-110, R. R. S. 1943, is a statute of limitations. The provision therein for issuance of an arrest warrant is not a condition precedent to a prosecution. State v. Eynon 734

Assault and Battery.

1. To constitute the offense of assault with intent to do great bodily harm there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur. State v. Lang 47
2. Assault with intent to inflict great bodily injury is included within a charge of stabbing with intent to wound or maim. State v. Johnsen 216

Assignments.

1. Where a seller assigns an installment contract to a finance company subject to a repurchase agreement or guaranty, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant to the repurchase agreement or guaranty. § 9-504(5), U. C. C. Reeves v. Associates Financial Services, Co., Inc. 107
2. Assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent. Moritz v. S & H Shopping Centers, Inc. 206

Attorney and Client.

1. A person convicted of a felony and represented by counsel cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motions for a new trial. State v. Wells 584
2. In fixing an attorney's fee allowed by statute to an insurance policy beneficiary, factors which may be considered by the court include the amount involved, responsiblity assumed, questions of law raised, time and labor necessarily required in performance of duty, result of service performed, and professional diligence and skill exhibited. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
3. The reasonable sum allowed as attorney's fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605

4. Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the amount offered. Wendt v. Cavalier Ins. Corp. 622
5. Where a defendant voluntarily chooses to represent himself at trial, his conviction will not be reversed by this court on the ground that the trial court did not take adequate precautions to protect his rights when the defendant received a fair trial and a fair opportunity to present his side of the case. State v. Horn 755

Attorneys at Law.

1. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
2. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
3. A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
4. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
5. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. McCready v. Al Eighmy Dodge 684

Automatic Review in Supreme Court.

1. The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a state-

ment of its findings which provides sufficient specificity to permit meaningful review by this court. State v. Stewart 497

2. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497
3. The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive. State v. Stewart 497
4. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Rust 528
5. The Supreme Court in every case under the new death penalty statute will perform its functions of death sentence review with a maximum of rationality and consistency. State v. Simants 549
6. The Supreme Court will compare each case under review with those previous cases in which the death penalty has or has not been imposed under the new death penalty statute. State v. Simants 549
7. Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549
8. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549
9. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of ad-

vanced years where senility may be a factor. State v. Simants 549

Banks and Banking.

1. A draft which says it is "payable through" a bank has the effect of designating the bank as a "collecting bank." § 3-120, U. C. C. Ordinarily whether a draft is a "payable through" draft is determinable by an examination of the face of the instrument. However, where the face of the instrument is ambiguous, it is sometimes permissible, depending upon the facts of the particular case, to look behind the instrument to determine whether the bank was in fact performing the functions of a "collecting bank" or those of a "payor bank." Berman v. United States Nat. Bank 268
2. A "payor bank" means a bank by which an item is payable as drawn or accepted, and "collecting bank" means any bank handling the item for collection except the payor bank. § 4-105, U. C. C. Berman v. United States Nat. Bank 268
3. A collecting bank has the duty of making presentment, but is not ordered or authorized to pay the instrument out of the drawer's account. It must exercise ordinary care in presenting an item, in sending notice of dishonor or nonpayment, and in returning an unpaid item. Berman v. United States Nat. Bank 268
4. A payor bank may charge its customer's account for any items which are properly payable even though the charge may create an overdraft. Berman v. United States Nat. Bank 268
5. A payor bank is required to settle for a demand item provisionally by midnight of the day of receipt, or become accountable for the amount unless it returns the item on that day. However, if it has made timely provisional settlement, it may revoke the provisional settlement up until its midnight deadline, that is, midnight on the day following. §§ 4-301, 4-302, U. C. C. Berman v. United States Nat. Bank 268
6. A payor bank which failed to return an item to its forwarder by the midnight deadline is accountable to its customer for the late return of the item. This means that it is liable for the amount of the item. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
7. A decision by the payor bank not to return a demand item by the midnight deadline makes provisional settlement final. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
8. Section 4-103, U. C. C., permits variation by agreement

of some of the provisions of the Uniform Commercial Code. Section 4-103(2), which reads as follows: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled," authorizes clearing agreements creating a deadline earlier than the "midnight deadline." Berman v. United States Nat. Bank 268

Bonds.

1. The words "due and to become due" express a clear legislative intent to impose liability for all sums due when the bond is filed. State Surety Co. v. Peters 472
2. A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute. Accordingly, in view of the fact that the public has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given and the ordinary rules of construction give way. State Surety Co. v. Peters 472

Boundaries.

It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Vetick v. Kula 209

Brokers.

When a written contract for the sale of real estate entered into between vendor and purchaser provides for the payment of a real estate broker's commission, the broker is a third-party beneficiary and the contract is not within the purview of section 36-107, R. R. S. 1943. Mid-Continent Properties, Inc. v. Pflug 429

Burden of Proof.

1. The burden is upon the party attacking an ordinance to show its invalidity by clear and unequivocal evidence unless it appears on its face to be so. Schaffer v. City of Omaha 328
2. In a will contest the burden of proof or the risk of nonpersuasion on the issue of undue influence is on the

contestant and remains there throughout the trial. McGowan v. McGowan 596
3. The party seeking an accounting has the burden of establishing both the contract upon which accounting is sought and his right to credit for disputed items. Alward v. United Mineral Products Co. 658
4. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence to overcome a presumption of undue influence shifts to the defendants. Golgert v. Smidt ... 667
5. The burden of proof in a workmen's compensation proceeding is on the claimant. James v. Rainchief Constr. Co. 818
6. In a workmen's compensation case, the burden is on the claimant to establish that the accidental injury arose in the course of his employment as well as out of his employment. Johnson v. Village of Winnebago 845

Burglary.

1. An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape. State v. Eynon 734
2. An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent. State v. Eynon 734

Canons.

1. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
2. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
3. A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
4. A duty rests on the courts to maintain the integrity of

the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. State ex rel. Nebraska State Bar Assn. v. Ledwith 572

Carriers.

1. "Premium rates" referred to in an order of the Public Service Commission authorizing transportation of "express" packages means rates higher than general freight rates. Mills v. Nebraska Motor Carriers Assn. 159
2. The rate-fixing power of the Public Service Commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject. Mills v. Nebraska Motor Carriers Assn. 159
3. Under section 75-311, R. S. Supp., 1976, an applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Dilts Trucking, Inc. v. Peake, Inc. 459
4. Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operation. Dilts Trucking, Inc. v. Peake, Inc. 459
5. A carrier who previously operated under a certificate of public convenience and necessity issued by the Interstate Commerce Commission, under the mistaken belief that he was performing services in interstate commerce and did not need a Nebraska certificate for his deliveries in Nebraska, was acting under "color of authority" where his previous operations were conducted openly, without defiance, and without knowledge that he was acting without proper authority. Dilts Trucking, Inc. v. Peake, Inc. 459
6. An applicant for a certificate of public convenience and necessity who has been operating under color of authority need not make the same showing under section 75-311, R. S. Supp., 1976, that an applicant for new or extended authority must make, and there is a presumption that the proposed service is or will be required by present or future public convenience and necessity. Dilts Trucking, Inc. v. Peake, Inc. 459

7. A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement. Bode v. Flobert Industries, Inc. 488

Chain of Title.

A right or interest in a duly recorded conveyance will be effective as against all who derive title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions. Bode v. Flobert Industries, Inc. 488

Confessions.

The confession of a minor to the police is admissible in evidence when, on the totality of circumstances, it is knowingly, intelligently, and voluntarily made. Ordinarily it is not required that the minor be warned that he could be prosecuted as an adult, nor that his parents be notified prior to taking his statement, for his confession to be deemed voluntary. State v. Stewart 497

Conservators.

When a person who has property deems himself or herself unable to manage it by reason of infirmities of age or physical disability, that person may apply to the county court to have a conservator appointed to manage the property. Winters v. Lange 157

Consideration.

1. Mere recitals of receipt of consideration are not terms of the agreement, but simply statements of facts, the truth or untruth of which may be established by extrinsic evidence. Traudt v. Nebraska P.P. Dist. 765
2. A "consideration" for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other; the benefit rendered need not be to the party contracting but may to any one else at his procurement or request. Grady v. Denbeck 795

Constitutional Law.

1. A show-up identification procedure is constitutionally invalid only when so unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, and admission of

evidence of a show-up without more does not violate due process. State v. Nance 95
2. The Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, held constitutional. State v. Swayze 149
3. The Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Buchholz v. Buchholz 180
4. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. Schaffer v. City of Omaha ... 328
5. A search by a person not a law officer does not violate the Fourth Amendment. State v. Edwards 354
6. A warrantless seizure under exigent circumstances is valid. State v. Edwards 354
7. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Walker 381
8. The right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. State v. Addison 482
9. The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska. State v. Stewart 497
10. The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 3 and 9 of the Bill of Rights of the Constitution of Nebraska. State v. Rust 528
11. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528
12. The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow appli-

cation, and as so construed and applied are constitutional. State v. Rust 528
13. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Simants .. 549
14. We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions. State v. Simants 549
15. The words and terms of a constitutional provision are to be interpreted and understood in their most natural meaning. State v. City Betterment Corp. 575
16. The words "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means net proceeds. Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds. State v. City Betterment Corp. 575
17. Under Article III, section 24, Constitution of Nebraska, the word "promoter" of a lottery means only the persons or organizations legally responsible for conducting the lottery. State v. City Betterment Corp. 575
18. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Goodloe 632
19. Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses. State v. Goodloe 632
20. The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy. State v. Goodloe 632
21. Procedural due process is required only when the officer to whom the power has been delegated is required to decide adjudicative facts. Barnett v. Boyle 677
22. There is no constitutional due process requirement of notice and hearing applicable to legislative matters. Barnett v. Boyle 677
23. In changing from an election-at-large to an election by

district system, the Legislature may provide for staggered terms and allow incumbent members of a board of education to serve until their terms expire. Such legislation does not create an invidious discrimination between classifications of voters and does not deny the equal protection of the laws to electors in odd-numbered districts who will be represented by hold-over members of the board of education during the transition period. Barnett v. Boyle 677

24. The 1975 amendments to section 79-1003, R. R. S. 1943, are constitutional. Barnett v. Boyle 677

25. Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. State v. Shiffbauer 805

26. The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Wise v. State 831

27. Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. State v. Liberator 857

Continuances.

1. A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute. Alexander v. School Dist. No. 17 251

2. The matter of granting a continuance in a criminal case is peculiarly within the discretionary judgment of the trial court. State v. Addison 482

3. The right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. State v. Addison 482

4. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. State v. Goodloe 632

Contractors.

1. A contractor is entitled to recover damages resulting from delay caused by a breach of contract by the other party. W. Wright, Inc. v. Korshoj Corp..... 692
2. Absent a contractual commitment to the contrary, a general contractor is not liable to its subcontractor for damages flowing from delays incurred by the subcontractor unless the delays were caused by the general contractor or some agency or circumstance under his direction or control. W. Wright, Inc. v. Korshoj Corp. 692
3. A subcontractor does not obtain any rights against a prime contractor simply because the prime contractor is entitled to certain rights under the prime contract, even though the prime contract is incorporated into the subcontract. W. Wright, Inc. v. Korshoj Corp..... 692

Contracts.

1. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. Bury v. Action Enterprises, Inc. 38
2. It is well established that one who purports as agent to enter into a contract, upon which the principal is not bound because of the fact that the agent has contracted without authority or in excess of his authority, is personally liable for the damage thus occasioned to the other contracting party. Bury v. Action Enterprises, Inc. 38
3. A person who purports to make a contract, conveyance, or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized. Bury v. Action Enterprises, Inc. 38
4. Where a seller assigns an installment contract to a finance company subject to a repurchase agreement or guaranty, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant

to the repurchase agreement or guaranty. § 9-504(5), U.C.C. Reeves v. Associates Financial Services, Co., Inc. 107
5. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute. Grace v. State Farm Mut. Auto. Ins. Co. 118
6. Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee. Insurance Co. of North America v. Hawkins 126
7. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact. Insurance Co. of North America v. Hawkins 126
8. Marriage is generally considered a civil contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion. Buchholz v. Buchholz 180
9. A state has plenary power to fix conditions under which the marital status may be created or terminated. Buchholz v. Buchholz 180
10. Vested rights may be impaired with due process of law under many circumstances. The state's inherent sovereign power includes the so-called police power right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well-being of the people. Buchholz v. Buchholz 180
11. Assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent. Moritz v. S & H Shopping Centers, Inc. 206
12. Assignees, and subtenants of the lessee not affected by a breach of the lease, are not necessary parties in an action of forcible entry and detention brought by the lessor against the lessee. Moritz v. S & H Shopping Centers, Inc. 206
13. In construing a written instrument, the court must look

to the agreement in its entirety. First Mid America, Inc. v. Palmer 224
14. Generally, in the absence of fraud, one who does not read a contract before signing it cannot later relieve himself of its burdens. First Mid America, Inc. v. Palmer 224
15. An employment contract with no fixed term may be terminated at any time by either the employer or the employee, at his own pleasure. Stewart v. North Side Produce Co. 245
16. When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. Nebraska Im-Pruv-All, Inc. v. Sass 261
17. Where on the trial of an issue of fact proof relating to the disputed issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. Nebraska Im-Pruv-All, Inc. v. Sass 261
18. Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods, despite any reservation of security interest. Nebraska Im-Pruv-All, Inc. v. Sass 261
19. Promissory estoppel will not lie against a plea of the statute of frauds, unless the alleged promise relates to the intended abandonment or waiver of a legal right then held or to be held by the promissor. Schott Grain Co. v. Rasmussen 267
20. Section 4-103, U. C. C., permits variation by agreement of some of the provisions of the Uniform Commercial Code. Section 4-103(2), which reads as follows: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled," authorizes clearing agreements creating a deadline earlier than the "midnight deadline." Berman v. United States Nat. Bank 268
21. The object of section 36-107, R. R. S. 1943, is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires. Mid-Continent Properties, Inc. v. Pflug 429

22. When a written contract for the sale of real estate entered into between vendor and purchaser provides for the payment of a real estate broker's commission, the broker is a third-party beneficiary and the contract is not within the purview of section 36-107, R. R. S. 1943. Mid-Continent Properties, Inc. v. Pflug 429
23. The principal parties to a third-party creditor-beneficiary contract can rescind the contract or release one another from their obligations thereunder to the creditor-beneficiary if the rescission or release precedes the creditor-beneficiary's acceptance of the contract or change of position in reliance thereon. Mid-Continent Properties, Inc. v. Pflug 429
24. Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit, and charged with a strict execution of the duties assumed. Katleman v. U. S. Communities, Inc. 443
25. The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement. State Surety Co. v. Peters 472
26. Courts construe the contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. State Surety Co. v. Peters 472
27. The words "due and to become due" express a clear legislative intent to impose liability for all sums due when the bond is filed. State Surety Co. v. Peters 472
28. The interpretation given a contract by the parties themselves while engaged in the performance of the contract is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced. Richards v. Bycroft 478
29. A policy of insurance cannot be altered or modified without consent of the insured. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
30. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. Alward v. United Mineral Products Co. 658
31. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. Alward v. United Mineral Products Co. 658
32. No implied contract may be found unless the evidence

shows mutuality of intent. Alward v. United Mineral Products Co. 658
33. The party seeking an accounting has the burden of establishing both the contract upon which accounting is sought and his right to credit for disputed items. Alward v. United Mineral Products Co. 658
34. A contractor is entitled to recover damages resulting from delay caused by a breach of contract by the other party. W. Wright, Inc. v. Korshoj Corp. 692
35. Absent a contractual commitment to the contrary, a general contractor is not liable to its subcontractor for damages flowing from delays incurred by the subcontractor unless the delays were caused by the general contractor or some agency or circumstance under his direction or control. W. Wright, Inc. v. Korshoj Corp. 692
36. A subcontractor does not obtain any rights against a prime contractor simply because the prime contractor is entitled to certain rights under the prime contract, even though the prime contract is incorporated into the subcontract. W. Wright, Inc. v. Korshoj Corp. 692
37. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. W. Wright, Inc. v. Korshoj Corp. 692
38. If a party to an existing contract proposes a modification thereto, the mere silence of the other party leaves the contract as before, without modification. W. Wright, Inc. v. Korshoj Corp. 692
39. In construing a contract, it is the expressed intention of the parties, which they manifest by their words and acts, which is controlling. Janssen v. Hamblet 705
40. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Neal v. St. Paul Fire & Marine Ins. Co. 718
41. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Neal v. St. Paul Fire & Marine Ins. Co. 718
42. Generally, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are construed together as one instrument. Bando v. Cole 722
43. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties. Bando v. Cole 722

44. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Bando v. Cole 722
45. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach. Bando v. Cole 722
46. The usual statement of the parol evidence rule is that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement. Traudt v. Nebraska P.P. Dist. 765
47. The parol evidence rule is designed to preserve the integrity and certainty of written documents against disputes arising from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing. It is in no sense a rule of evidence, but a rule of substantive law. Traudt v. Nebraska P.P. Dist. 765
48. Where the parties have embodied their transaction into a writing, the rule applies to exclude evidence dehors the writing or prior or contemporaneous negotiations or agreements in regard to the same subject matter. Traudt v. Nebraska P.P. Dist. 765
49. The applicability of the parol evidence rule depends in general upon whether the agreement has been integrated. There are various tests to determine whether the transaction is integrated. It is the duty of the court, in any given case, to ascertain which of the tests is appropriate in the determination of whether a transaction is integrated. Traudt v. Nebraska P.P. Dist. 765
50. Where an agreement has been only partially integrated, the rule against disputing the terms of the document will be applicable to as much of the transaction as is embodied. Traudt v. Nebraska P.P. Dist. 765
51. Mere recitals of receipt of consideration are not terms of the agreement, but simply statements of facts, the truth or untruth of which may be established by extrinsic evidence. Traudt v. Nebraska P.P. Dist. 765
52. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing, that is, the question of integration. Traudt v. Nebraska P.P. Dist. 765
53. A "consideration" for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other; the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request. Grady v. Denbeck 795

54. An agreement relative to payment of workmen's compensation benefits, entered into between the parties, is void and of no effect unless in writing, filed with the compensation court, and approved by the court. James v. Rainchief Constr. Co. 818

Contribution.

The Nebraska Workmen's Compensation Act bars an action by a third party tort-feasor against an employer for contribution or indemnity based on a claim arising from the injury. Vangreen v. Interstate Machinery & Supply Co. 29

Controlled Substances.

1. 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. Sotelo 334
2. 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. Sotelo 334
3. Where marijuana fell under the permanent dominion of law officers, a seizure then occurred. State v. Edwards 354
4. Proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Edwards 354

Conveyances.

1. A conveyance must be construed with a view to carrying into effect the true intent of the parties so far as it can be ascertained from the whole instrument and is consistent with the rules of law. Bode v. Flobert Industries, Inc. 488
2. A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement. Bode v. Flobert Industries, Inc. 488
3. A right or interest in a duly recorded conveyance will be effective as against all who derive title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abro-

gate or destroy such exceptions. Bode v. Flobert Industries, Inc. 488

4. An exception in a conveyance operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in esse at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted. Bode v. Flobert Industries, Inc. 488
5. The courts with practical unanimity agree that the use of the technical word exception or reservation will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and, when their intention is determined, it will be given effect, provided no settled rules of law are thereby violated. Bode v. Flobert Industries, Inc. 488

Costs.

1. When a county and a city unite in the construction and maintenance of a jail, as is true in this instance, the cost of maintenance shall be divided equally except for the cost of providing food for prisoners. State v. Towle 494
2. Section 47-404, R. R. S. 1943, provides that a prisoner having work-release privileges shall be liable for such costs incident to his confinement as the court deems appropriate and reasonable, if such are specifically set forth in the order granting work release. State v. Towle 494
3. The expense of lodging, including the outlay for guards, laundry, lights, etc., is not a cost incident to confinement. State v. Towle 494

Courts.

1. The District Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others and need bring in other parties only when a determination of the controversy cannot be had without their presence. Bury v. Action Enterprises, Inc. 38
2. Findings of fact made by a Juvenile Court are accorded great weight on appeal because of the trial court's opportunity to hear and observe the parties and witnesses. State v. Sperling 204
3. 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, although the findings of fact made by the trial court will be accorded great weight because

the trial court heard and observed the parties and the witnesses. State v. Tibbs 236
4. The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment. Schaffer v. City of Omaha 328
5. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper 398
6. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann 449
7. Section 47-406, R. R. S. 1943, permits the court by written order to disburse funds collected on work release. It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses. State v. Towle 494
8. The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. State v. Stewart 497
9. A criminal defendant has no absolute right to have his guilty plea accepted, and the trial court may reject such a plea in the exercise of sound discretion. State v. Stewart 497
10. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Stewart 497
11. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Stewart 497
12. The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court; and although the probative value of such evidence should be weighed against its prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide

case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Stewart 497
13. It is the duty of the court, in a homicide case, to instruct the jury only on those degrees of homicide as find support in the evidence. State v. Stewart 497
14. Although a penal statute is required to be strictly construed, it should be given a sensible construction, and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Holtan 544
15. While the court retains jurisdiction of the petitioner so long as he remains committed, that retention is not for the purpose of reexamination of the original commitment but rather for periodic reviews to determine if petitioner is still a sexual sociopath. State v. Wells 584
16. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. State v. Goodloe 632
17. A court of general jurisdiction has inherent power to protect itself, litigants, and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form. Scudder v. Haug 638
18. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641
19. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Webb 662
20. While this court has recognized that all participants in one crime, or series of related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances. State v. Westerlund 664
21. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. McCready v. Al Eighmy Dodge 684
22. Under section 27-608(1), R. R. S. 1943, whether a show-

ing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court. State v. King 729

23. In criminal misdemeanor cases, appeals to the District Court are heard upon the record and the District Court is not permitted to receive additional evidence. State v. Horn 755

24. The applicability of the parol evidence rule depends in general upon whether the agreement has been integrated. There are various tests to determine whether the transaction is integrated. It is the duty of the court, in any given case, to ascertain which of the tests is appropriate in the determination of whether a transaction is integrated. Traudt v. Nebraska P.P. Dist 765

25. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing, that is, the question of integration. Traudt v. Nebraska P.P. Dist 765

26. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer 805

27. An agreement relative to payment of workmen's compensation benefits, entered into between the parties, is void and of no effect unless in writing, filed with the compensation court, and approved by the court. James v. Rainchief Constr. Co. 818

28. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradiction as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state. Wise v. State 831

Covenants.

1. An outstanding leasehold interest is an encumbrance and is within a covenant against encumbrances. Schuler-Olsen Ranches, Inc. v. Garvin 746

2. A covenant in a deed that the premises are free from encumbrances, if untrue, is broken as soon as made, and the grantee's right of action against the grantor at once accrues thereon. Schuler-Olsen Ranches, Inc. v. Garvin 746

Criminal Law.

1. As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible. State v. Sims 1
2. A judgment will not be reversed for error in an evidentiary ruling if there was no prejudice to any substantial right of the defendant and the record as a whole shows the error was harmless beyond a reasonable doubt. State v. Sims 1
3. In a criminal action this court will not interfere on appeal with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Chapple 4
4. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Chapple 4
State v. Swayze 149
State v. Edwards 354
5. When two or more persons are killed, though it be by a single act, yet, since the consequences affect, separately, each person killed, there is a corresponding number of offenses. State v. Chapple 4
6. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. State v. Chapple 4
7. To constitute the offense of assault with intent to do great bodily harm there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur. State v. Lang 47
8. Properly verified photographs are not rendered inadmissible in evidence because of marks on them where the individual who made the marks explains them or testifies as to their correctness. State v. Lang 47
9. In Nebraska, both by statutory interpretation and by our adoption of the legal entity theory of partnerships,

a partner may be prosecuted for the embezzlement of partnership property. State v. Siers 51
10. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Siers 51
11. Proof of the existence of a legal entity capable of owning property is not required in an embezzlement prosecution. State v. Siers 51
12. The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Also it is to show it was not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. State v. Siers 51
13. This court on appeal will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Siers .. 51
State v. Stahl 683
14. In criminal cases, alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Siers 51
15. The right of an indigent defendant to counsel does not give him the unbridled right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Blunt 82
16. An indigent defendant who refuses to accept offered counsel without justifiable reason and elects to proceed pro se has not been deprived of his constitutional right to counsel. State v. Blunt 82
17. The determination of whether there has been an intelligent waiver of the constitutional right to counsel must depend in each case upon its particular facts and circumstances, including the background, experience, and conduct of the accused. State v. Blunt 82
18. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Blunt 82

19. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Blunt 82

20. A show-up identification procedure is constitutionally invalid only when so unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, and admission of evidence of a show-up without more does not violate due process. State v. Nance 95

21. A determination as to the likelihood of misidentification must be made on the totality of circumstances of each case. State v. Nance 95

22. A defendant is not entitled to the assistance of counsel at a pretrial identification procedure conducted before the filing of the information. State v. Nance 95

23. An in-court identification may properly be received in evidence if it is independent of, and untainted by, an illegal pretrial identification procedure. State v. Nance 95

24. Two or more offenses may be charged in the same information if both are of the same or similar character. State v. Nance 95

25. Severance of counts in a criminal case is a matter directed to the sound discretion of the trial court, and no ruling thereon will be disturbed on appeal in the absence of a showing of prejudice to the defendant. State v. Nance 95

26. Mere failure to report a known felony is not concealment sufficient to constitute a violation of section 28-202, R. R. S. 1943, and make the person failing to report the felony an accessory after the fact to the felony. State v. Brown 131

27. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information is not sufficient to charge an offense. State v. Abramson 135
State v. Blankenbaker 344

28. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. McFall 136
State v. Overstreet 625
State v. Westerlund 664
State v. Sinsel 673
State v. Stahl 683

State v. Osterman 727
State v. Kofoed 803
29. The slightest penetration of the sexual organs of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Holloman 139
30. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. State v. Holloman 139
31. It if satisfactorily appears from the evidence in a prosecution for rape that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to such facts. State v. Holloman 139
32. The action of the District Court in directing that a sentence be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holloman 139
33. The Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, held constitutional. State v. Swayze 149
34. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to the defendant's body, nor to the secretions therefrom, nor to the introduction of chemical analysis in evidence. State v. Swayze 149
35. The Identifying Physical Characteristics Act applies only to physical evidence and not to oral communications or testimony. State v. Swayze 149
36. Requiring defendant, under threat of contempt for noncompliance (pursuant to the Identifying Physical Characteristics Act), to submit to blood tests involved no violation of her privilege against self-incrimination. State v. Swayze 149
37. A lesser included offense is one which includes some of the elements of the crime charged in the information without the addition of any element irrelevant to the original charge. State v. Johnsen 216
38. Assault with intent to inflict great bodily injury is included within a charge of stabbing with intent to wound or maim. State v. Johnsen 216
39. The verdict of a jury must be sustained, if, taking the

view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen 216
40. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, R. R. S. 1943, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. § 27-608, R. R. S. 1943. State v. Fonville 220
41. An inquiry as to whether or not a witness has committed a simple assault and battery is generally not probative of untruthfulness. State v. Fonville 220
42. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Nance 257
43. It is not necessary that a penal statute be written so as to be beyond the possibility of more than one construction. State v. Nance 257
44. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. Nance 257
45. A penal statute must be given an interpretation which meets constitutional requirements if that can reasonably be done. State v. Nance 257
46. Under section 29-2221, R. R. S. 1943, any person who has been twice previously convicted of crime, sentenced, and committed to prison for terms of not less than 1 year each, is deemed to be an habitual criminal, without regard to the state or states in which the convictions occurred, and without regard to whether the convictions were for a state or federal offense. State v. Nance 257
47. It is a general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Moore 294
48. Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court. State v. Moore 294
49. Evidence of another crime is admissible to show motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404(2), R. R. S. 1943. State v. Moore 294
50. Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act. State v. Walker 314
51. It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence. State v. Walker 314
52. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Snider 317
53. The sexual assault law defined new crimes and was not merely amendatory of the rape statutes. State v. Evans 332
54. A defendant charged with rape or assault with intent to commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Evans 332
55. In the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate. State v. Sotelo 334
56. An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. State v. Sotelo 334
57. The purpose of an instruction conference is to give the parties a chance to request proper instructions and not to provide a trap for the court. State v. Sotelo 334
58. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Sotelo 334
59. 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. Sotelo 334
60. 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. Sotelo 334
61. It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is nec-

essary to correct a mainfest injustice. State v. Blankenbaker 344
62. A search by a person not a law officer does not violate the Fourth Amendment. State v. Edwards 354
63. When marijuana fell under the permanent dominion of law officers, a seizure then occurred. State v. Edwards 354
64. A warrantless seizure under exigent circumstances is valid. State v. Edwards 354
65. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion. State v. Edwards 354
66. When two defendants are tried together, each having separate counsel, the testimony of one against the other, subject to cross-examination, is not of such a prejudicial nature as to require a separate trial. State v. Edwards 354
67. Proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Edwards 354
68. 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. Edwards 354
69. A lesser included offense is one which is necessarily established by proof of the greater offense. State v. Colgrove 375
70. An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused. State v. Reinert 379
71. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Pratt 382
72. The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Pratt 382
73. The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses. State v. Pratt 382
74. In-court identification evidence is admissible where such identification is made on a basis independent of a tainted line-up. State v. Pratt 382
75. A primary factor in determining whether an independent basis for an in-court identification exists is the op-

portunity afforded the witness to observe the defendant under circumstances free from taint. State v. Pratt .. 382
76. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal absent an abuse of discretion. State v. Pratt ... 390
77. If an utterance is itself an operative fact, the utterance is not hearsay. State v. Pelton 412
78. An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943. State v. Pelton 412
79. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803(2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues. State v. Pelton 412
80. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence. State v. Pelton 412
81. The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial. State v. Pelton 412
82. The matter of granting a continuance in a criminal case is peculiarly within the discretionary judgment of the trial court. State v. Addison 482
83. The right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. State v. Addison 482
84. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Addison 482
85. It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute (§ 29-2401, R. R. S. 1943) were carried out by the public officers involved. State v. Addison 482
86. Section 47-406, R. R. S. 1943, permits the court by written order to disburse funds collected on work release.

It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses. State v. Towle 494
87. Lodging is a major, not an incidental expense. State v. Towle 494
88. The term "board" has many connotations and is frequently held to include "lodging." State v. Towle 494
89. The expense of lodging, including the outlay for guards, laundry, lights, etc., is not a cost incident to confinement. State v. Towle 494
90. The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska. State v. Stewart 497
91. The confession of a minor to the police is admissible in evidence when, on the totality of circumstances, it is knowingly, intelligently, and voluntarily made. Ordinarily it is not required that the minor be warned that he could be prosecuted as an adult, nor that his parents be notified prior to taking his statement, for his confession to be deemed voluntary. State v. Stewart 497
92. The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. State v. Stewart 497
93. A criminal defendant has no absolute right to have his guilty plea accepted, and the trial court may reject such a plea in the exercise of sound discretion. State v. Stewart 497
94. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Stewart 497
95. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Stewart 497
96. The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court; and although the probative value of such evidence should be weighed against its prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Stewart 497
97. It is the duty of the court, in a homicide case, to instruct

the jury only on those degrees of homicide as find support in the evidence. State v. Stewart 497

98. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497

99. The facts on which the finding of an aggravating circumstance referred to in section 29-2523, R. R. S. 1943, is based, must be proved beyond a reasonable doubt. State v. Stewart 497

100. Subsection (1)(a) of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. State v. Stewart 497

101. Subsection (1)(b), section 29-2523, R. R. S. 1943, is applicable where the purpose of the murder was to conceal a theft, or to conceal the defendant's identity as a thief. State v. Stewart 497

102. Subsection (1)(c), section 29-2523, R. R. S. 1943, applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain, as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee. State v. Stewart 497

103. Subsections (1)(b) and (1)(c), section 29-2523, R. R. S. 1943, are separate and distinct circumstances, and will be construed so as not to overlap. State v. Stewart 497

104. The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523, R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life. State v. Stewart 497

105. Subsection (1)(e), section 29-2523, R. R. S. 1943, applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder. State v. Stewart 497

106. Subsection (1)(f), section 29-2523, R. R. S. 1943, applies to those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or other like situations. State v. Stewart 497
107. Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old defendant who has no criminal record nor significant history of prior criminal activity. State v. Stewart 497
108. Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required that the mitigating circumstances outweigh the aggravating circumstances. State v. Stewart 497
109. The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive. State v. Stewart 497
110. The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 3 and 9 of the Bill of Rights of the Constitution of Nebraska. State v. Rust 528
111. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528
112. The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Rust 528
113. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts. State v. Rust 528
State v. Holtan 544

114. A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed. State v. Rust 528
115. A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Rust 528
116. The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept. State v. Rust 528
117. A murder is especially heinous, atrocious, cruel, or manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of aggravating circumstance subsection (1)(d), of section 29-2523, R. R. S. 1943, when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering. This circumstance applies only to the murder charged and not to collateral or subsequent circumstances. This circumstance is also satisfied where the killing is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Rust 528
118. A conviction for another murder within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R. R. S. 1943, does not include an attempt to commit murder. State v. Rust 528
119. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Rust 528
120. In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight. State v. Rust 528
121. Knowingly creating a risk of death to several persons includes the circumstance of shooting at several persons. State v. Rust 528
122. Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder the enforcement of laws within the meaning of aggravating circumstance subsection (1)(h) of section 29-2523, R. R. S. 1943. State v. Rust 528
123. When the act of killing is totally and senselessly bereft

of any regard for human life, it is wanton, deliberate, cruel, and inexcusable. State v. Holtan 544
124. Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts. State v. Holtan 544
125. Extreme mental or emotional disturbance means such a disturbance in very great, intense, or severe degree. State v. Holtan 544
126. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history. State v. Holtan 544
127. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions. State v. Holtan 544
128. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. Holtan 544
129. Although a penal statute is required to be strictly construed, it should be given a sensible construction, and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Holtan 544
130. In each case in which the sentencing court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceedings, and referring to the aggravating and mitigating circumstances involved in its determination. State v. Simants 549
131. Jury sentencing in a capital case is not constitutionally required. State v. Simants 549
132. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Simants .. 549
133. The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt. State v. Simants 549
134. The rule enunciated in Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), on the applicability of the doctrine of reasonable doubt is not applicable to our present death penalty law. State v. Simants 549

135. The Supreme Court in every case under the new death penalty statute will perform its functions of death sentence review with a maximum of rationality and consistency. State v. Simants 549
136. The Supreme Court will compare each case under review with those previous cases in which the death penalty has or has not been imposed under the new death penalty statute. State v. Simants 549
137. Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549
138. The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Simants 549
139. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. State v. Simants ... 549
140. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549
141. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of advanced years where senility may be a factor. State v. Simants 549
142. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Simants 549
143. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances. State v. Simants 549
144. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged

to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Simants 549
145. The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Simants 549
146. We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions. State v. Simants 549
147. While the court retains jurisdiction of the petitioner so long as he remains committed, that retention is not for the purpose of reexamination of the original commitment but rather for periodic reviews to determine if petitioner is still a sexual sociopath. State v. Wells ... 584
148. A person convicted of a felony and represented by counsel cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial. State v. Wells 584
149. Where a sentence is imposed within prescribed statutory limits, the validity of the sentence is not a matter of post conviction relief. State v. Rivera 629
150. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Goodloe 632
151. Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses. State v. Goodloe 632
152. The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy. State v. Goodloe 632
153. The habitual criminal statute represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than ordinarily would be considered. State v. Goodloe 632
154. Under section 29-2308, R. R. S. 1943, this court may re-

duce a sentence when in its opinion that sentence is excessive. State v. Goodloe 632
155. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Webb 662
156. While this court has recognized that all participants in one crime, or series of related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances. State v. Westerlund 664
157. Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. Cinema 16, Inc. 675
158. An assignment of error with regard to failure to give an unrequested instruction may not be sustained unless it is shown that the instructions given were such as to cause a miscarriage of justice. State v. Cinema 16, Inc. 675
159. Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court. State v. Cinema 16, Inc. 675
160. Where an appeal was not taken from an order of probation, the question of the voluntariness of the original guilty plea could not be considered. State v. Osterman 727
161. Section 29-110, R. R. S. 1943, is a statute of limitations. The provision therein for issuance of an arrest warrant is not a condition precedent to a prosecution. State v. Eynon 734
162. An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape. State v. Eynon 734
163. Evidence of other crimes is admissible where relevant and competent as proof of intent. State v. Eynon 734
164. An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent. State v. Eynon 734
165. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Eynon 734
166. A witness whose presence is shown by a party to be es-

sential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses. State v. Eynon 734

167. While there are in this state no common law crimes, the definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. Eynon 734

168. In criminal misdemeanor cases, appeals to the District Court are heard upon the record and the District Court is not permitted to receive additional evidence. State v. Horn 755

169. Where a defendant voluntarily chooses to represent himself at trial, his conviction will not be reversed by this court on the ground that the trial court did not take adequate precautions to protect his rights when the defendant received a fair trial and a fair opportunity to present his side of the case. State v. Horn 755

170. Errors in ruling on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Horn .. 755

171. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Shiffbauer 805

172. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which defendant is charged. State v. Shiffbauer 805

173. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. State v. Shiffbauer 805

174. Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. State v. Shiffbauer 805

175. It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request. State v. Shiffbauer ... 805

176. The court, as a condition of its sentence, may require the offender to be confined periodically in the county

jail or to return to custody after specified hours, but not to exceed 90 days. State v. Shiffbauer 805

177. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer 805

178. Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute. Wise v. State 831

179. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be. Wise v. State 831

180. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state. Wise v. State 831

181. The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Wise v. State 831

182. Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. Wise v. State 831

183. A sentence imposed within the statutory limits, and the denial of probation, will not be disturbed on appeal in the absence of a showing of an abuse of discretion on the part of the sentencing judge. State v. Tweedy 851

184. In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. Pruitt v. Parratt 854

185. Persons lawfully convicted of crime are excepted from

the benefits of the statutory right to a writ of habeas corpus. Pruitt v. Parratt 854
186. A writ of habeas corpus is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. Pruitt v. Parratt 854
187. Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. State v. Liberator 857
188. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. State v. Liberator 857
189. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Liberator 857

Crops.

Growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved. Schuler-Olsen Ranches, Inc. v. Garvin 746

Custody.

1. A mother and father have an equal and joint right to the custody of their children, and custody shall be determined on the basis of the best interests of the child. Boroff v. Boroff 641
2. Although the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling in regard to custody. Boroff v. Boroff 641
3. Although it is generally sound public policy to keep the children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is dissolved. Boroff v. Boroff 641
4. A court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976. Boroff v. Boroff 641

5. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641

Damages.

1. A verdict will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Abbott v. Northwestern Bell Tel. Co. 11
2. The jury should be instructed to reduce to present value damages for future pain and suffering. Abbott v. Northwestern Bell Tel. Co. 11
3. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact. Insurance Co. of North America v. Hawkins 126
4. Sanitary sewer connections running from private property to a city or district sewer main are privately owned and may not be appropriated or destroyed by the city without compensation to the owner. City of Omaha v. Matthews 323
5. When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort. City of Omaha v. Matthews 323
6. Subject to some qualifications, the party recovering possession of property by replevin is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
7. Where depreciation in the value of property is allowed as an element of damage in replevin, its measure is the difference between the value of the property at the date of commencement of wrongful detention and its value on the date on which it was delivered to the prevailing party. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
8. In an action to recover damages sustained on account of wrongful death, allegations of plaintiff's capacity to sue, death of a person caused by the wrongful act, neglect, or default of the defendant, and the identity of next of kin and that they sustained damage from such wrongful death sufficiently state a cause of action. Gilbert v. Vogler 454
9. A contractor is entitled to recover damages resulting from delay caused by a breach of contract by the other party. W. Wright, Inc. v. Korshoj Corp. 692
10. Absent a contractual commitment to the contrary, a

general contractor is not liable to its subcontractor for damages flowing from delays incurred by the subcontractor unless the delays were caused by the general contractor or some agency or circumstance under his direction or control. W. Wright, Inc. v. Korshoj Corp. . 692

11. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Bando v. Cole 722
12. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach. Bando v. Cole . 722
13. A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. Huskinson v. Vanderheiden 739
14. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. Huskinson v. Vanderheiden 739
15. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Evans v. Gear Drilling Co. 841

Death Penalty.

1. The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska. State v. Stewart 497
2. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497
3. Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required

that the mitigating circumstances outweigh the aggravating circumstances. State v. Stewart 497
4. The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive. State v. Stewart 497
5. The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 8 and 9 of the Bill of Rights of the Constitution of Nebraska. State v. Rust 528
6. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528
7. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Rust 528
8. In each case in which the sentencing court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination. State v. Simants 549
9. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Simants .. 549
10. The rule enunciated in Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), on the applicability of the doctrine of reasonable doubt is not applicable to our present death penalty law. State v. Simants 549
11. The Supreme Court in every case under the new death penalty statute will perform its functions of death sentence review with a maximum of rationality and consistency. State v. Simants 549
12. The Supreme Court will compare each case under review with those previous cases in which the death penalty has or has not been imposed under the new death penalty statute. State v. Simants 549
13. Because our statute requires the sentencing authority

to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549
14. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Simants 549
15. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances. State v. Simants 549
16. We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions. State v. Simants 549

Declaratory Judgments.

1. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. Shepoka v. Knopik 651
2. In declaratory judgment actions, the presence of necessary parties is a jurisdictional matter, and one which the parties cannot waive. Shepoka v. Knopik 651

Deeds.

1. A conveyance must be construed with a view to carrying into effect the true intent of the parties so far as it can be ascertained from the whole instrument and is consistent with the rules of law. Bode v. Flobert Industries, Inc. 488
2. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence to overcome a presumption of undue influence shifts to the defendants. Golgert v. Smidt ... 667
3. To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor. Golgert v. Smidt 667
4. The mere existence of a confidential relationship does not void a conveyance. As a general rule the convey-

ance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Golgert v. Smidt 667

5. A presumption of undue influence is not a presumption contemplated by section 27-301, R. R. S. 1943, and the burden of proof on the issue of undue influence remains on the plaintiff. Golgert v. Smidt 667
6. Growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved. Schuler-Olsen Ranches, Inc. v. Garvin 746
7. A covenant in a deed that the premises are free from encumbranches, if untrue, is broken as soon as made, and the grantee's right of action against the grantor at once accrues thereon. Schuler-Olsen Ranches, Inc. v. Garvin 746

Demurrer.

1. A general demurrer admits all the allegations of fact of the pleading to which it is addressed, which are issuable, relevant, material, and well-pleaded. Gilbert v. Vogler 454
2. The filing of a demurrer to a petition is a waiver of the right to insist that the allegations thereof be made more definite and certain. Gilbert v. Vogler 454
3. In a proper case, the application of the parol evidence rule may be decided upon a demurrer raising the question of whether a petition states a cause of action. Allegations of fact, which are legally ineffective, although admitted by the demurrer, must be disregarded. Traudt v. Nebraska P. P. Dist. 765

Disability.

Disability under the Workmen's Compensation Act is defined in terms of employabilty and earning capacity rather than in terms of loss of bodily functions. Johnson v. Village of Winnebago 845

Disciplinary Proceedings.

1. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
2. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his

professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
3. A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct. State ex rel. Nebraska State Bar Assn. v. Ledwith 572
4. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. State ex rel. Nebraska State Bar Assn. v. Ledwith 572

Dismissal and Nonsuit.

A court of general jurisdiction has inherent power to protect itself, litigants, and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form. Scudder v. Haug 638

Divorce.

1. The division of property made by the trial court in a marriage dissolution action will not be disturbed on appeal unless patently unfair on the record. Jackson v. Jackson 27
2. The fixing of alimony rests in the sound discretion of the trial court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Jackson v. Jackson 27
3. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Jackson v. Jackson 27
4. The discretion of the trial court with respect to awarding or changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Stecker v. Stecker 164
Schmer v. Schmer 800
5. The Nebraska divorce laws do not discriminate against either party to a marriage. Buchholz v. Buchholz 180
6. The Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the

United States and Nebraska Constitutions. Buchholz v. Buchholz 180
7. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Bartley v. Bartley 246
8. 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 trial court in determining what is in the best interest of the child. This is particularly true when the parent cohabits out of wedlock in the home where the child lives. Bartley v. Bartley 246
9. The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. Mangum v. Mangum 350
10. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. Mangum v. Mangum 350
11. The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Mangum v. Mangum . 350
12. This court is not inclined to disturb the division of property made by a trial court in marriage dissolution proceedings unless it is patently unfair on the record. Gottschalk v. Gottschalk 437
13. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Gottschalk v. Gottschalk 437
14. A mother and father have an equal and joint right to the custody of their children, and custody shall be determined on the basis of the best interests of the child. Boroff v. Boroff 641
15. Although the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling in regard to custody. Boroff v. Boroff 641
16. Although it is generally sound public policy to keep the children together when possible, considerations of public policy do not, in all cases, prevent the splitting of

the custody of children when a marriage is dissolved. Boroff v. Boroff 641
17. A court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976. Boroff v. Boroff 641
18. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641
19. The questions of alimony and division of property may be considered together when a marriage is dissolved; and in considering these questions the court shall have regard for such factors as the circumstances of the parties, the duration of the marriage, the history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Boroff v. Boroff 641
20. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1974. Brandl v. Brandl . 778
21. During the pendency of dissolution proceedings the court may enter ex parte orders determining temporary custody of minor children. Brandl v. Brandl 778
22. The doctrine of Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, which permits the court to act summarily in child custody matters in the best interests of the children, applies only where the court has previously placed the children in court custody. Brandl v. Brandl 778
23. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Schmer v. Schmer 800
24. In determining the question of who should have the care and custody of a child upon dissolution of marriage, the paramount consideration must be the best interests and welfare of the child. Schmer v. Schmer ... 800
25. In determining the amount which an obligor should be required to pay to discharge his duty of support under the Revised Uniform Reciprocal Enforcement of Support Act, the trial court must consider the ability of the obligor to contribute to the support of the dependent.

Chisholm v. Chisholm 828

Double Jeopardy.

1. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. State v. Chapple 4
2. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Goodloe 632
3. The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy. State v. Goodloe 632

Due Process.

1. Procedural due process is required only when the officer to whom the power has been delegated is required to decide adjudicative facts. Barnett v. Boyle 677
2. There is no constitutional due process requirement of notice and hearing applicable to legislative matters. Barnett v. Boyle 677
3. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Shiffbauer 805

Easements.

1. The right to hunt and fish cannot be established by prescription where the use is not exclusive or its extent is too indefinite for a determinate description. Harvat v. Clear Creek Drainage Dist. 352

2. A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement. Bode v. Flobert Industries, Inc. 488

Embezzlement.

1. In Nebraska, both by statutory interpretation and by our adoption of the legal entity theory of partnerships, a partner may be prosecuted for the embezzlement of partnership property. State v. Siers 51
2. Proof of the existence of a legal entity capable of owning property is not required in an embezzlement prosecution. State v. Siers 51
3. The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Also it is to show it was not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. State v. Siers 51

Eminent Domain.

1. "Attorneys of record" as used in section 76-715.01, R. R. S. 1943, can only mean the attorneys appearing in the specific action being appealed. Kracman v. Nebraska P.P. Dist. 301
2. In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943. Kracman v. Nebraska P. P. Dist. 301

Employer and Employee.

1. An employment contract with no fixed term may be terminated at any time by either the employer or the employee, at his own pleasure. Stewart v. North Side Produce Co. 245
2. There is no duty to warn of a known danger. Waegle v. Caterpillar Tractor Co. 824

Encumbrances.

1. An outstanding leasehold interest is an encumbrance and is within a covenant against encumbrances.

Schuler-Olsen Ranches, Inc. v. Garvin 746
2. A covenant in a deed that the premises are free from encumbrances, if untrue, is broken as soon as made, and the grantee's right of action against the grantor at once accrues thereon. Schuler-Olsen Ranches, Inc. v. Garvin 746

Equity.

1. The pendency of an equitable action in the District Court will not ordinarily preclude an action in forcible entry and detainer instituted by a landlord against a defaulting tenant. Moritz v. S & H Shopping Centers, Inc. 206
2. In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Marfisi v. Spagnola 211
3. In an equity case, 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 facts rather than the opposite. Marfisi v. Spagnola 211
4. A general demurrer admits all the allegations of fact of the pleading to which it is addressed, which are issuable, relevant, material, and well-pleaded. Gilbert v. Vogler 454
5. 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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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. Bonsall v. Sterrett 753

Escrows.

1. Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit, and charged with a strict execution of the duties assumed. Katleman v. U. S. Communities, Inc. 443

2. If an escrow agent violates instructions or acts negligently he is ordinarily liable for any loss occasioned by his breach of duty. Katleman v. U. S. Communities, Inc. 443
3. From the time an escrow holder informs the seller that the buyer has put a payment in escrow, and the seller relies and acts on that information, the escrow holder is estopped to deny that the represented sum is on deposit. Katleman v. U. S. Communities, Inc. 443

Estates.

1. A conveyance will not be construed to create an estate upon condition unless the language is so clear there can be no other construction. Miller v. Miller 171
2. Estates upon condition subsequent are not favored in law, and a condition will be liberally construed to avoid a forfeiture. Miller v. Miller 171
3. A devise of land under condition that the devisee pay $2,000 to each of four other persons within 1 year after the will is admitted to probate conveys the land in fee simple to the devisee subject to leins for the amounts due the four other persons, and a breach of the condition does not work a forfeiture of the estate of the devisee. Miller v. Miller 171
4. Where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman if a life estate were to terminate the remainder is contingent. Gade v. Descendants of Unitt 713
5. A devise of the remainder over after a life estate to children as a class vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate from the moment of their birth. Gade v. Descendants of Unitt 713
6. Such words as "at his death" or "at their death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. Gade v. Descendants of Unitt 713

Estoppel.

1. Promissory estoppel will not lie against a plea of the statute of frauds, unless the alleged promise relates to the intended abandonment or waiver of a legal right then held or to be held by the promissor. Schott Grain Co. v. Rasmussen 267
2. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there

must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Breslow v. City of Ralston ... 346

3. From the time an escrow holder informs the seller that the buyer has put a payment in escrow, and the seller relies and acts on that information, the escrow holder is estopped to deny that the represented sum is on deposit. Katleman v. U. S. Communities, Inc. 443

Evidence.

1. As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible. State v. Sims 1
2. A judgment will not be reversed for error in an evidentiary ruling if there was no prejudice to any substantial right of the defendant and the record as a whole shows the error was harmless beyond a reasonable doubt. State v. Sims 1
3. In a criminal action this court will not interfere on appeal with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Chapple 4
4. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Chapple 4
State v. Swayze 149
State v. Edwards 354
5. Where evidence conflicts on a question of proximate cause of alleged injuries, the question is ordinarily for the jury under proper instructions. Abbott v. Northwestern Bell Tel. Co. 11
6. In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. J. P. Theisen & Sons v. Aksarben Contracting Corp. 19

7. Where there is irreconcilable conflict on a material issue, this court on appeal will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Mickelson & Mickelson Hay Contractors v. Christensen 34
8. Properly verified photographs are not rendered inadmissible in evidence because of marks on them where the individual who made the marks explains them or testifies as to their correctness. State v. Lang 47
9. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Siers 51
10. A show-up identification procedure is constitutionally invalid only when so unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, and admission of evidence of a show-up without more does not violate due process. State v. Nance 95
11. A determination as to the likelihood of misidentification must be made on the totality of circumstances of each case. State v. Nance 95
12. A defendant is not entitled to the assistance of counsel at a pretrial identification procedure conducted before the filing of the information. State v. Nance 95
13. An in-court identification may properly be received in evidence if it is independent of, and untainted by, an illegal pretrial identification procedure. State v. Nance 95
14. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Insurance Co. of North America v. Hawkins 126
15. Objects falling in the plain view of an 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. Holloman 139
16. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered or adduced. State v. Holloman 139
17. The slightest penetration of the sexual organs of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.

State v. Holloman 139
18. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of no weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. State v. Holloman 139
19. If it satisfactorily appears from the evidence in a prosecution for rape that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to such facts. State v. Holloman 139
20. The Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, held constitutional. State v. Swayze 149
21. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to the defendant's body, nor to the secretions therefrom, nor to the introduction of chemical analysis in evidence. State v. Swayze 149
22. The Identifying Physical Characteristics Act applies only to physical evidence and not to oral communications or testimony. State v. Swayze 149
23. Requiring defendant, under threat of contempt for noncompliance (pursuant to the Identifying Physical Characteristics Act), to submit to blood tests involved no violation of her privilege against self-incrimination. State v. Swayze 149
24. There is a presumption the trial court, trying a case without a jury, in arriving at a decision, would consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Stecker v. Stecker 164
25. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded by this court. Stecker v. Stecker 164
26. In an equity case, 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 facts rather than the opposite. Marfisi v. Spagnola 211

27. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen 216
28. Where on objection a ruling excluding evidence is made, an offer of proof is generally a prerequisite to review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. State v. Fonville 220
29. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, R. R. S. 1943, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. § 27-608, R. R. S. 1943. State v. Fonville 220
30. An inquiry as to whether or not a witness has committed a simple assault and battery is generally not probative of untruthfulness. State v. Fonville 220
31. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. First Mid America, Inc. v. Palmer 224
32. Where on the trial of an issue of fact proof relating to the disputed issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. Nebraska Im-Pruv-All, Inc. v. Sass 261
33. Evidence of another crime is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Moore 294
34. It is a general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Moore 294
35. Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court. State v. Moore 294
36. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the con-

trary appears on the face of the ordinance or is established by clear and unequivocal evidence. Schaffer v. City of Omaha 328
37. The burden is upon the party attacking an ordinance to show its invalidity by clear and unequivocal evidence unless it appears on its face to be so. Schaffer v. City of Omaha 328
38. 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. Sotelo 334
39. 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. Sotelo 334
40. When two defendants are tried together, each having separate counsel, the testimony of one against the other, subject to cross-examination, is not of such a prejudicial nature as to require a separate trial. State v. Edwards 354
41. Proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Edwards 354
42. 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. Edwards 354
43. An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused. State v. Reinert 379
44. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Reinert 379
45. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Pratt 382
46. The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Pratt 382
47. In-court identification evidence is admissible where such identification is made on a basis independent of a tainted line-up. State v. Pratt 382

48. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint. State v. Pratt .. 382
49. If an utterance is itself an operative fact, the utterance is not hearsay. State v. Pelton 412
50. An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943. State v. Pelton 412
51. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803 (2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues. State v. Pelton 412
52. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence. State v. Pelton 412
53. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, and he is entitled to the benefit of any reasonable inferences derived from it. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
54. The object of section 36-107, R. R. S. 1943, is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires. Mid-Continent Properties, Inc. v. Pflug 429
55. Where the evidence is in conflict, the weight of the evidence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Dilts Trucking, Inc. v. Peake, Inc. 459
56. Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operation. Dilts

Trucking, Inc. v. Peake, Inc. 459
57. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Addison 482
58. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented this court will presume the common law or statutes of such other jurisdiction to be the same as ours. State v. Addison 482
59. The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court; and although the probative value of such evidence should be weighed against its prejudical effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Stewart 497
60. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the individual has personal knowledge of that matter. State v. Simants 549
61. The finding that petitioner was a sexual sociopath continues until such time as evidence is adduced to prove otherwise. State v. Wells 584
62. A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. State v. Matzen 592
63. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Webb 662
64. To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor. Golgert v. Smidt 667
65. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the trans-

action between the parties. Bando v. Cole 722
66. Under section 27-608(1), R. R. S. 1943, whether a showing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court. State v. King 729
67. Evidence of other crimes is admissible where relevant and competent as proof of intent. State v. Eynon 734
68. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Eynon 734
69. A witness whose presence is shown by a party to be essential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses. State v. Eynon 734
70. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. § 27-405, R. R. S. 1943. State v. Eynon 734
71. 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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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. Bonsall v. Sterrett 753
72. Errors in ruling on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Horn 755
73. The usual statement of the parol evidence rule is that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement. Traudt v. Nebraska P. P. Dist. 765
74. The parol evidence rule is designed to preserve the integrity and certainty of written documents against dis-

putes arising from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing. It is in no sense a rule of evidence, but a rule of substantive law. Traudt v. Nebraska P. P. Dist. 765

75. Where the parties have embodied their transaction into a writing, the rule applies to exclude evidence dehors the writing or prior or contemporaneous negotiations or agreements in regard to the same subject matter. Traudt v. Nebraska P. P. Dist 765

76. The applicability of the parol evidence rule depends in general upon whether the agreement has been integrated. There are various tests to determine whether the transaction is integrated. It is the duty of the court, in any given case, to ascertain which of the tests is appropriate in the determination of whether a transaction is integrated. Traudt v. Nebraska P. P. Dist ... 765

77. Where an agreement has been only partially integrated, the rule against disputing the terms of the document will be applicable to as much of the transaction as is embodied. Traudt v. Nebraska P.P. Dist. 765

78. Mere recitals of receipt of consideration are not terms of the agreement, but simply statements of facts, the truth or untruth of which may be established by extrinsic evidence. Traudt v. Nebraska P. P. Dist 765

79. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing, that is, the question of integration. Traudt v. Nebraska P. P. Dist. 765

80. In a proper case, the application of the parol evidence rule may be decided upon a demurrer raising the question of whether a petition states a cause of action. Allegations of fact, which are legally ineffective, although admitted by the demurrer, must be disregarded. Traudt v. Nebraska P. P. Dist. 765

81. It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request. State v. Shiffbauer ... 805

82. The burden of proof in a workmen's compensation proceeding is on the claimant. James v. Rainchief Constr. Co. 818

83. When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will not be considered de novo on appeal. James v. Rainchief Constr. Co. 818

84. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every in-

ference that can reasonably be deduced from the evidence. Waegle v. Caterpillar Tractor Co. 824
85. Proof of public convenience and necessity is required if the authority proposed to be transferred is dormant or the transfer will permit or result in a new or different service or operation as to territorial scope. Spector Freight System, Inc. v. Herman Bros., Inc. 835
86. Although the proposed transfer may tend to enlarge competition, proof of public convenience and necessity is required only if the transfer involves passenger motor carriers. Spector Freight System, Inc. v. Herman Bros., Inc. 835
87. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Evans v. Gear Drilling Co. 841
88. A judgment of the Workmen's Compensation Court may be reversed, modified, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. § 48-185, R. S. Supp., 1976. Johnson v. Village of Winnebago 845
89. In determining the sufficiency of the evidence to support an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from it. Johnson v. Village of Winnebago 845
90. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof if sufficient. State v. Liberator 857

Extradition.

1. Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute. Wise v. State 831
2. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. The term authenticate, as used in extradi-

tion statutes, simply means a statement that the documents are what they purport to be. Wise v. State 831
3. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state. Wise v. State 831
4. The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Wise v. State . 831
5. Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. Wise v. State 831

False Imprisonment.

A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. Huskinson v. Vanderheiden 739

Fees.

1. A witness, not a party to a suit, is entitled to receive witness fees. Nebraska Im-Pruv-All, Inc. v. Sass 261
2. In fixing an attorney's fee allowed by statute to an insurance policy beneficiary, factors which may be considered by the court include the amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duty, result of service performed, and professional diligence and skill exhibited. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
3. The reasonable sum allowed as attorney's fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
4. Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the

amount offered. Wendt v. Cavalier Ins. Corp. 622

Forcible Entry and Detainer.

1. The pendency of an equitable action in the District Court will not ordinarily preclude an action in forcible entry and detainer instituted by a landlord against a defaulting tenant. Moritz v. S & H Shopping Centers, Inc. 206
2. An action in forcible entry and detainer will lie against a lessee not in actual physical possession of the leased property. Moritz v. S & H Shopping Centers, Inc. 206
3. The possession of an agent or subtenant of the lessee is the possession of the lessee. Moritz v. S & H Shopping Centers, Inc. 206
4. Assignees, and subtenants of the lessee not affected by a breach of the lease, are not necessary parties in an action of forcible entry and detention brought by the lessor against the lessee. Moritz v. S & H Shopping Centers, Inc. 206

Foreclosure.

Under section 9-504(2), U. C. C., a debtor is entitled to any surplus arising from a repossession sale of collateral by a secured party. Reeves v. Associates Financial Services Co., Inc. 107

Forfeitures.

1. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Bando v. Cole 722
2. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach. Bando v. Cole . 722

Frauds, Statute of.

1. Promissory estoppel will not lie against a plea of the statute of frauds, unless the alleged promise relates to the intended abandonment or waiver of a legal right then held or to be held by the promissor. Schott Grain Co. v. Rasmussen 267
2. The object of section 36-107, R. R. S. 1943, is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable

for want of the evidence which the statute requires. Mid-Continent Properties, Inc. v. Pflug 429
3. When a written contract for the sale of real estate entered into between vendor and purchaser provides for the payment of a real estate broker's commission, the broker is a third-party beneficiary and the contract is not within the purview of section 36-107, R. R. S. 1943. Mid-Continent Properties, Inc. v. Pflug 429

Future Interests.

Contingent future interests are subject to the rule against perpetuities but vested interests are not. Gade v. Descendants of Unitt 713

Guilty Plea.

1. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information is not sufficient to charge an offense. State v. Abramson 135
State v. Blankenbaker 344
2. It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is necessary to correct a manifest injustice. State v. Blankenbaker 344
3. A criminal defendant has no absolute right to have his guilty plea accepted, and the trial court may reject such a plea in the exercise of sound discretion. State v. Stewart 497
4. Where an appeal was not taken from an order of probation, the question of the voluntariness of the original guilty plea could not be considered. State v. Osterman 727

Habeas Corpus.

1. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state. Wise v. State 831
2. In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. Pruitt v. Parratt 854
3. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to a writ of habeas corpus. Pruitt v. Parratt 854
4. A writ of habeas corpus is not available merely to challenge the conditions of confinement of a prisoner under

valid sentence. Pruitt v. Parratt 854

Habitual Criminals.

1. Under section 29-2221, R. R. S. 1943, any person who has been twice previously convicted of crime, sentenced, and committed to prison for terms of not less than 1 year each, is deemed to be an habitual criminal, without regard to the state or states in which the convictions occurred, and without regard to whether the convictions were for a state or federal offense. State v. Nance 257
2. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Addison 482
3. The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy. State v. Goodloe 632
4. The habitual criminal statute represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than ordinarily would be considered. State v. Goodloe 632

Hearings.

1. An issue concerning an alleged violation of the Public Meetings Act must be promptly and properly raised in the lower court or tribunal. Alexander v. School Dist. No. 17 251
2. Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute. Alexander v. School Dist. No. 17 251
3. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer 805

Hearsay.

1. If an utterance is itself an operative fact, the utterance is not hearsay. State v. Pelton 412
2. An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943. State v. Pelton 412
3. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803 (2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues. State v. Pelton 412

Highways.

It is not essential that a public road be laid out upon the the exact line prayed for in the petition, and slight variations in order to procure a more practicable route are permissible. Hotovy v. Town of Ulysses Township 16

Homicide.

1. As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible. State v. Sims 1
2. It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence. State v. Walker 314
3. The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska. State v. Stewart 497
4. The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court; and although the probative value of such evidence should be weighed against its prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Stewart 497
5. It is the duty of the court, in a homicide case, to instruct the jury only on those degrees of homicide as find support in the evidence. State v. Stewart 497
6. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S.

1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497

7. Subsection (1)(a) of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. State v. Stewart 497

8. Subsection (1)(b), section 29-2523, R. R. S. 1943, is applicable where the purpose of the murder was to conceal a theft, or to conceal the defendant's identity as a thief. State v. Stewart 497

9. Subsection (1)(c), section 29-2523, R. R. S. 1943, applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain, as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee. State v. Stewart 497

10. Subsections (1)(b) and (1)(c), section 29-2523, R. R. S. 1943, are separate and distinct circumstances, and will be construed so as not to overlap. State v. Stewart 497

11. The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523, R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life. State v. Stewart 497

12. Subsection (1)(e), section 29-2523, R. R. S. 1943, applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder. State v. Stewart 497

13. Subsection (1)(f), section 29-2523, R. R. S. 1943, applies to those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or other like situations. State v. Stewart 497

14. Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old

defendant who has no criminal record nor significant history of prior criminal activity. State v. Stewart 497
15. Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required that the mitigating circumstances outweigh the aggravating circumstances. State v. Stewart 497
16. The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive. State v. Stewart 497
17. The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 3 and 9 of the Bill of Rights of the Constitution of Nebraska. State v. Rust 528
18. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528
19. The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Rust 528
20. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts. State v. Rust 528
State v. Holtan 544
21. A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed. State v. Rust 528
22. A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Rust 528

23. The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept. State v. Rust .. 528

24. A murder is especially heinous, atrocious, cruel, or manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of aggravating circumstance subsection (1)(d), of section 29-2523, R. R. S. 1943, when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering. This circumstance applies only to the murder charged and not to collateral or subsequent circumstances. This circumstance is also satisfied where the killing is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Rust 528

25. A conviction for another murder within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R. R. S. 1943, does not include an attempt to commit murder. State v. Rust 528

26. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Rust 528

27. In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight. State v. Rust 528

28. Knowingly creating a risk of death to several persons includes the circumstance of shooting at several persons. State v. Rust 528

29. Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder the enforcement of laws within the meaning of aggravating circumstance subsection (1) (h) of section 29-2523, R. R. S. 1943. State v. Rust 528

30. When the act of killing is totally and senselessly bereft of any regard for human life, it is wanton, deliberate, cruel, and inexcusable. State v. Holtan 544

31. Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts. State v. Holtan 544

32. Extreme mental or emotional disturbance means such

a disturbance in very great, intense, or severe degree. State v. Holtan 544
33. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history. State v. Holtan 544
34. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions. State v. Holtan 544
35. In each case in which the sentencing court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination. State v. Simants 549
36. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Simants .. 549
37. The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt. State v. Simants 549
38. The rule enunciated in Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), on the applicability of the doctrine of reasonable doubt is not applicable to our present death penalty law. State v. Simants 549
39. The Supreme Court in every case under the new death penalty statute will perform its functions of death sentence review with a maximum of rationality and consistency. State v. Simants 549
40. The Supreme Court will compare each case under review with those previous cases in which the death penalty has or has not been imposed under the new death penalty statute. State v. Simants 549
41. Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549
42. The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Simants 549
43. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. State v. Simants ... 549

44. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devises, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549
45. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of advanced years where senility may be a factor. State v. Simants 549
46. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Simants 549
47. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances. State v. Simants 549
48. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Simants 549
49. The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Simants 549
50. We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions. State v. Simants 549

Husband and Wife.

1. A married person's interest in the marital status is not a property right. Buchholz v. Buchholz 180
2. The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. Mangum v. Mangum 350

Indictments and Informations.

1. Two or more offenses may be charged in the same in-

formation if both are of the same or similar character. State v. Nance 95
2. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information is not sufficient to charge an offense. State v. Abramson 135
State v. Blankenbaker 344
3. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion. State v. Edwards 354
4. The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses. State v. Pratt 382
5. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Stewart 497

Infants.

1. The discretion of the trial court with respect to awarding or changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Stecker v. Stecker 164
Schmer v. Schmer 800
2. Findings of fact made by a Juvenile Court are accorded great weight on appeal because of the trial court's opportunity to hear and observe the parties and witnesses. State v. Sperling 204
3. Parental rights may be terminated under section 43-209 (5), R. S. Supp., 1976, when the parent is found to be unable to discharge responsibilities because of mental illness or deficiency, and there are reasonable grounds to believe such condition will continue for a prolonged and indeterminate period. State v. Sperling 204
4. The right of a parent to maintain the custody of his children is a natural, but not an inalienable, right, and the public has a paramount interest in the protection of the rights of the children. State v. Tibbs 236
5. 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, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. Tibbs 236
6. A decree fixing custody of a minor child will not be

modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Bartley v. Bartley 246

7. 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 trial court in determining what is in the best interest of the child. This is particularly true when the parent cohabits out of wedlock in the home where the child lives. Bartley v. Bartley 246
8. A mother and father have an equal and joint right to the custody of their children, and custody shall be determined on the basis of the best interests of the child. Boroff v. Boroff 641
9. Although the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling in regard to custody. Boroff v. Boroff 641
10. Although it is generally sound public policy to keep the children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is dissolved. Boroff v. Boroff 641
11. A court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976. Boroff v. Boroff 641
12. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641
13. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1974. Brandl v. Brandl 778
14. During the pendency of dissolution proceedings the court may enter ex parte orders determining temporary custody of minor children. Brandl v. Brandl 778
15. The doctrine of Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, which permits the court to act summarily in child custody matters in the best interests of the chil-

dren, applies only where the court has previously placed the children in court custody. Brandl v. Brandl 778
16. In determining the question of who should have the care and custody of a child upon dissolution of marriage, the paramount consideration must be the best interests and welfare of the child. Schmer v. Schmer 800
17. Under our former statute, a child not living with his parent is not conclusively presumed to be dependent on his deceased parent but must prove such to be the fact. James v. Rainchief Constr. Co. 818
18. Our former statute provided that a partial dependent was entitled to compensation benefits only in the proportion which the amount contributed bore to the total wages of the deceased. James v. Rainchief Constr. Co. 818
19. Where a deceased father had partially contributed to the support of a child residing with a former wife, such child was a partial dependent. James v. Rainchief Constr. Co. 818

Instructions.

1. Jury instructions should be considered as a whole and the meaning of the instruction or instructions, when taken as a whole, must be considered and not just the phraseology of a particular part. Abbott v. Northwestern Bell Tel. Co. 11
2. The jury should be instructed to reduce to present value damages for future pain and suffering. Abbott v. Northwestern Bell Tel. Co. 11
3. To render a failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are thereby embodied. In addition, such propositions must be applicable to the facts. State v. Siers 51
4. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Siers 51
5. Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction. State v. Siers 51
6. Instructions to the jury should be considered as a whole, and if they fairly submit the case, they are not erroneous. First Mid America, Inc. v. Palmer 224
7. A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. First Mid America, Inc. v. Palmer 224

8. It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence. State v. Walker 314
State v. Stewart 497
9. The purpose of an instruction conference is to give the parties a chance to request proper instructions and not to provide a trap for the court. State v. Sotelo 334
10. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Sotelo 334
11. An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused. State v. Reinert 379
12. All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Pratt 390
13. An instruction which does not correctly state the law should not be given. State v. Pelton 412
14. An assignment of error with regard to failure to give an unrequested instruction may not be sustained unless it is shown that the instructions given were such as to cause a miscarriage of justice. State v. Cinema 16, Inc. 675
15. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. McCready v. Al Eighmy Dodge 684
16. It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request. State v. Shiffbauer ... 805

Insurance.

1. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute. Grace v. State Farm Mut. Auto. Ins. Co. 118

2. Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee. Insurance Co. of North America v. Hawkins 126
3. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact. Insurance Co. of North America v. Hawkins 126
4. A policy of insurance cannot be altered or modified without consent of the insured. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
5. In fixing an attorney's fee allowed by statute to an insurance policy beneficiary, factors which may be considered by the court include the amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duty, result of service performed, and professional diligence and skill exhibited. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
6. The reasonable sum allowed as attorney's fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
7. Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the amount offered. Wendt v. Cavalier Ins. Corp. 622
8. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Neal v. St. Paul Fire & Marine Ins. Co. 718
9. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Neal v. St. Paul Fire & Marine Ins. Co. 718

Intent.

1. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Siers 51
2. Evidence of similar offenses is admissible where an

element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Pratt 382
3. The courts with practical unanimity agree that the use of the technical word exception or reservation will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and, when their intention is determined, it will be given effect, provided no settled rules of law are thereby violated. Bode v. Flobert Industries, Inc. 488
4. No implied contract may be found unless the evidence shows mutuality of intent. Alward v. United Mineral Products Co. 658
5. In construing a contract, it is the expressed intention of the parties, which they manifest by their words and acts, which is controlling. Janssen v. Hamblet 705
6. Evidence of other crimes is admissible where relevant and competent as proof of intent. State v. Eynon 734
7. An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent. State v. Eynon 734

Jails and Jailors.

1. When a county and a city unite in the construction and maintenance of a jail, as is true in this instance, the cost of maintenance shall be divided equally except for the cost of providing food for prisoners. State v. Towle 494
2. The expense of lodging, including the outlay for guards, laundry, lights, etc., is not a cost incident to confinement. State v. Towle 494

Joinder.

1. Two or more offenses may be charged in the same information if both are of the same or similar character. State v. Nance 95
2. Severance of counts in a criminal case is a matter directed to the sound discretion of the trial court, and no ruling thereon will be disturbed on appeal in the absence of a showing of prejudice to the defendant. State v. Nance 95
3. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence. State v. Pelton 412

4. The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial. State v. Pelton 412

Judges.

1. It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is necessary to correct a manifest injustice. State v. Blankenbaker 344
2. While this court has recognized that all participants in one crime, or series or related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances. State v. Westerlund 664

Judgments.

1. A judgment will not be reversed for error in an evidentiary ruling if there was no prejudice to any substantial right of the defendant and the record as a whole shows the error was harmless beyond a reasonable doubt. State v. Sims 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. J. P. Theisen & Sons v. Aksarben Contracting Corp. 19
   Mickelson & Mickelson Hay Contractors v. Christensen 34
   Insurance Co. of North America v. Hawkins 126
   Schuler-Olsen Ranches, Inc. v. Garvin 746
3. Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest. Bury v. Action Enterprises, Inc. 38
4. A judgment must respond to the pleadings. Alexander v. School Dist. No. 17 251
5. The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Mangum v. Mangum . 350
6. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Walker . 381
7. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not

be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper 398
8. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, and he is entitled to the benefit of any reasonable inferences derived from it. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
9. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann 449
10. An order sustaining a motion to strike an allegation from a pleading, without further judicial action, is not a final order and is not appealable. Gilbert v. Vogler 454
11. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances. State v. Wells 584
12. A person convicted of a felony and represented by counsel cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial. State v. Wells 584
13. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Shepoka v. Knopik .. 651
14. In the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. Pruitt v. Parratt 854
15. Persons lawfully convicted of crime are excepted from the benefits of the statutory right to a writ of habeas corpus. Pruitt v. Parratt 854

Jurisdiction.

The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient speci-

ficity to permit meaningful review by this court. State v. Stewart 497

Jury.

1. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Edwards 354
2. 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. Edwards 354
3. Jury sentencing in a capital case is not constitutionally required. State v. Simants 549
4. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Grady v. Denbeck 795
5. Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. State v. Liberator 857

Labor and Labor Relations.

Supervisory or managerial personnel may not enter into a bargaining unit with rank and file employees and may not retain the same bargaining agent. Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission 178

Leases.

An outstanding leasehold interest is an encumbrance and is within a covenant against encumbrances. Schuler-Olsen Ranches, Inc. v. Garvin 746

Legislature.

1. The Legislature will be presumed to have known pre-existing law when it enacted an amendment to a statute. King v. School Dist. of Omaha 303
2. The provisions of section 55-160, R. R. S. 1943, providing a leave of absence for emergency National Guard duty, and for receipt by the guardsman of that portion of his public salary during such duty as will equal any loss suffered by him, is a separate and distinct provision from other leaves of absence provided in said statute

and has application and effect exclusive of such other leave provisions. King v. School Dist. of Omaha 303
3. The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept. State v. Rust .. 528
4. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. Holtan 544
5. The habitual criminal statute represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than ordinarily would be considered. State v. Goodloe 632
6. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. Barnett v. Boyle 677
7. The formation of representative districts in state government is normally a legislative function. Barnett v. Boyle 677
8. There is no constitutional due process requirement of notice and hearing applicable to legislative matters. Barnett v. Boyle 677
9. In changing from an election-at-large to an election by district system, the Legislature may provide for staggered terms and allow incumbent members of a board of education to serve until their terms expire. Such legislation does not create an invidious discrimination between classifications of voters and does not deny the equal protection of the laws to electors in odd-numbered districts who will be represented by hold-over members of the board of education during the transition period. Barnett v. Boyle 677

Lesser-Included Offenses.

1. A lesser included offense in one which includes some of the elements of the crime charged in the information without the addition of any element irrelevant to the original charge. State v. Johnsen 216
2. Assault with intent to inflict great bodily injury is included within a charge of stabbing with intent to wound or maim. State v. Johnsen 216
3. A lesser included offense is one which is necessarily

established by proof of the greater offense. State v. Colgrove 375
4. It is only where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, that an instruction on a lesser-included offense must be given on request. State v. Shiffbauer ... 805

Lessor and Lessee.

1. The possession of an agent or subtenant of the lessee is the possession of the lessee. Moritz v. S & H Shopping Centers, Inc. 206
2. Assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent. Moritz v. S & H Shopping Centers, Inc. 206
3. Assignees, and subtenants of the lessee not affected by a breach of the lease, are not necessary parties in an action of forcible entry and detention brought by the lessor against the lessee. Moritz v. S & H Shopping Centers, Inc. 206

Liens.

1. A devise of land under condition that the devisee pay $2,000 to each of four other persons within 1 year after the will is admitted to probate conveys the land in fee simple to the devisee subject to liens for the amounts due the four other persons, and a breach of the condition does not work a forfeiture of the estate of the devisee. Miller v. Miller 171
2. As a general rule the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien. Mr. U Inc. v. Mobile Oil Corp. 612
3. Where a discharge of the lien results in the discharge of the debt the court may refuse to discharge the lien. Mr. U Inc. v. Mobile Oil Corp. 612

Limitations, Statute of.

1. Section 29-110, R. R. S. 1943, is a statute of limitations. The provision therein for issuance of an arrest warrant is not a condition precedent to a prosecution. State v. Eynon 734
2. The limitation provided by section 48-137, R. R. S. 1943, starts to run from the time it becomes reasonaly apparent that a compensable claim exists. Novak v. Triangle Steel Co. 783

Lotteries.

1. The term "primary activities" in section 28-964.03, R. R. S. 1943, means only activities conducted for charitable and community betterment purposes other than the organization and operation of a lottery. State v. City Betterment Corp. 575
2. An organization whose only activities have been the organization and operation of a lottery is not an organization whose primary activities are conducted for charitable or community betterment purposes within the meaning of section 28-964.03, R. R. S. 1943. State v. City Betterment Corp. 575
3. The word "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means net proceeds. Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds. State v. City Betterment Corp. 575
4. Under Article III, section 24, Constitution of Nebraska, the word "promoter" of a lottery means only the persons or organizations legally responsible for conducting the lottery. State v. City Betterment Corp. 575

Manslaughter.

Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act. State v. Walker 314

Marriage.

1. Marriage is generally considered a civil contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion. Buchholz v. Buchholz 180
2. A married person's interest in the marital status is not a property right. Buchholz v. Buchholz 180
3. A state has plenary power to fix conditions under which the marital status may be created or terminated. Buchholz v. Buchholz 180
4. Vested rights may be impaired with due process of law under many circumstances. The state's inherent sovereign power includes the so-called police power right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well-being of the people. Buchholz v. Buchholz 180

5. The Nebraska divorce laws do not discriminate against either party to a marriage. Buchholz v. Buchholz 180
6. The Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Buchholz v. Buchholz 180

Mechanic's Liens.

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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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. Bonsall v. Sterrett 753

Mental Illness.

The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Simants 549

Minors.

1. The confession of a minor to the police is admissible in evidence when, on the totality of circumstances, it is knowingly, intelligently, and voluntarily made. Ordinarily it is not required that the minor be warned that he could be prosecuted as an adult, nor that his parents be notified prior to taking his statement, for his confession to be deemed voluntary. State v. Stewart 497
2. The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. State v. Stewart 497
3. Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old defendant who has no criminal record nor significant history of prior criminal activity. State v. Stewart 497

Misdemeanors.

In criminal misdemeanor cases, appeals to the District Court are heard upon the record and the District Court is not permitted to receive additional evidence. State v. Horn 755

Mortgages.

1. As a general rule the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien. Mr. U Inc. v. Mobile Oil Corp. 612
2. A tender is more than a mere offer to pay. It is an offer to perform coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied. Mr. U Inc. v. Mobile Oil Corp. 612
3. A mortgagor has no cause of action under section 76-255, R. R. S. 1943, until there has been full performance of the condition of the mortgage. Mr. U Inc. v. Mobile Oil Corp. 612
4. Where a discharge of the lien results in the discharge of the debt the court may refuse to discharge the lien. Mr. U Inc. v. Mobile Oil Corp. 612

Motions, Rules, and Orders.

1. When the tenth day for filing a motion for a new trial is is a Sunday or a holiday, filing on the next business day is within time. State v. Sotelo 334
2. Where the evidence offered at the hearing on a motion for summary judgment shows there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained. Gerdes v. Spetman 406
3. The purpose of a motion for summary judgment is to pierce the allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged. Gerdes v. Spetman 406
4. When the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment should be granted. Gerdes v. Spetman 406
5. An order sustaining a motion to strike an allegation from a pleading, without further judicial action, is not a final order and is not appealable. Gilbert v. Vogler 454
6. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a

continuance will not be disturbed on appeal. State v. Goodloe 632

Motor Carriers.

1. Although the proposed transfer may tend to enlarge competition, proof of public convenience and necessity is required only if the transfer involves passenger motor carriers. Spector Freight System, Inc. v. Herman Bros., Inc. 835
2. The purpose of regulation of motor carriers by the Public Service Commission is to permit regulated competition productive of efficient service at minimum cost. Spector Freight System, Inc. v. Herman Bros., Inc. ... 835

Motor Vehicles.

1. Where the vision of a driver is obscured, it is his duty to stop until visibility is restored or to reduce his speed and have his car under such control that he can stop immediately if necessary. Green v. Houseworth 23
2. Conditions which materially impair or wholly destroy visibility impose upon drivers a duty to exercise a degree of care commensurate with the surrounding circumstances. Green v. Houseworth 23
3. Common law rules of negligence require horseback riders to exercise reasonable care to avoid injury from motor vehicles on the highway. Mays v. Siekman 77
4. As a general rule it is negligence for the operator of a motor vehicle to drive so fast that he cannot stop within the range of his vision. Mays v. Siekman 77
5. In meeting and passing a horseback rider, or a horse-drawn vehicle, a motorist is ordinarily under no obligation to stop or to take special steps to avoid a collision therewith, unless the horse shows signs of fright or that its rider or driver has lost control of it. Mays v. Siekman 77
6. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute. Grace v. State Farm Mut. Auto. Ins. Co. 118
7. The driver of an automobile entering an intersection is obligated to look for approaching automobiles and see

any vehicle within the radius which denotes the limit of danger, and if he fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Bonnes v. Olson 309
8. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice or knowledge, he may govern his acts in accordance with such assumption. Bonnes v. Olson 309
9. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Bonnes v. Olson 309
10. An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. State v. Sotelo 334
11. Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving. § 39-669.01, R. R. S. 1943. State v. Kufeldt 377
12. A security agreement noted on the certificate of title shall be valid as against the creditors of the debtor whether armed with process or not. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

Municipal Corporations.

1. Sanitary sewer connections running from private property to a city or district sewer main are privately owned and may not be appropriated or destroyed by the city without compensation to the owner. City of Omaha v. Matthews 323
2. The right to use district or city sewers is one common to all property owners and it cannot be denied unreasonably, arbitrarily, or discriminatorily. City of Omaha v. Matthews 323
3. When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort. City of Omaha v. Matthews 323
4. Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations. Schaffer v. City of Omaha 328
5. Generally speaking, any valid or constitutional exer-

cise of the police power must reasonably embody one of the purposes mentioned. Schaffer v. City of Omaha ... 328
6. The Omaha ordinances pertaining to signs appear to be reasonable in the light of the public welfare, health, safety, and security. Schaffer v. City of Omaha 328
7. The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment. Schaffer v. City of Omaha 328
8. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. Schaffer v. City of Omaha 328
9. The burden is upon the party attacking an ordinance to show its invalidity by clear and unequivocal evidence unless it appears on its face to be so. Schaffer v. City of Omaha 328
10. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Breslow v. City of Ralston 346
11. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed unless clearly wrong. Naber v. City of Humboldt 433
12. When a county and a city unite in the construction and maintenance of a jail, as is true in this instance, the cost of maintenance shall be divided equally except for the cost of providing food for prisoners. State v. Towle 494
13. The term "primary activities" in section 28-964.03, R. R. S. 1943, means only activities conducted for charitable and community betterment purposes other than the organization and operation of a lottery. State v. City Betterment Corp. 575
14. An organization whose only activities have been the organization and operation of a lottery is not an organization whose primary activities are conducted for charitable or community betterment purposes within the meaning of section 28-964.03, R. R. S. 1943. State v. City Betterment Corp. 575
15. In an action involving the disbursement of county funds,

the county has a great, if not an exclusive, interest, and is a necessary party. Shepoka v. Knopik 651
16. A statute is not to be read as if open to construction as a matter of course. Gaughen v. Sloup 762
17. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Gaughen v. Sloup 762

National Guard.

The provisions of section 55-160, R. R. S. 1943, providing a leave of absence for emergency National Guard duty, and for receipt by the guardsman of that portion of his public salary during such duty as will equal any loss suffered by him, is a separate and distinct provision from other leaves of absence provided in said statute and has application and effect exclusive of such other leave provisions. King v. School Dist. of Omaha 303

Negligence.

1. Where the vision of a driver is obscured, it is his duty to stop until visibility is restored or to reduce his speed and have his car under such control that he can stop immediately if necessary. Green v. Houseworth 23
2. Conditions which materially impair or wholly destroy visibility impose upon drivers a duty to exercise a degree of care commensurate with the surrounding circumstances. Green v. Houseworth 23
3. Common law rules of negligence require horseback riders to exercise reasonable care to avoid injury from motor vehicles on the highway. Mays v. Siekman 77
4. As a general rule it is negligence for the operator of a motor vehicle to drive so fast that he cannot stop within the range of his vision. Mays v. Siekman 77
5. In meeting and passing a horseback rider, or a horse-drawn vehicle, a motorist is ordinarily under no obligation to stop or to take special steps to avoid a collision therewith, unless the horse shows signs of fright or that its rider or driver has lost control of it. Mays v. Siekman 77
6. The driver of an automobile entering an intersection is obligated to look for approaching automobiles and see any vehicle within the radius which denotes the limit of danger, and if he fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Bonnes v. Olson 309

7. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice or knowledge, he may govern his acts in accordance with such assumption. Bonnes v. Olson 309
8. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Bonnes v. Olson 309
9. Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving. § 39-669.01, R. R. S. 1943. State v. Kufeldt 377
10. If an escrow agent violates instructions or acts negligently he is ordinarily liable for any loss occasioned by his breach of duty. Katleman v. U. S. Communities, Inc. 443
11. There is no duty to warn of a known danger. Waegle v. Caterpillar Tractor Co. 824
12. Where the existence of a defect in a product is known to the claimant prior to an accident and injury, no basis for recovery under the doctrine of strict liability in tort exists. Waegle v. Caterpillar Tractor Co. 824

New Trial.

1. In criminal cases, alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Siers 51
2. When the tenth day for filing a motion for a new trial is a Sunday or a holiday, filing on the next business day is within time. State v. Sotelo 334
3. Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court. State v. Cinema 16, Inc. 675

Notice.

1. Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee. Insurance Co. of North America v. Hawkins 126
2. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact. Insurance Co. of North America v. Hawkins 126
3. The notice required by section 79-1254, R. S. Supp., 1975,

may be remedied by amendment if defective and where there is no prejudice to the parties involved an objection based on the original notice is without merit. Alexander v. School Dist. No. 17 251

4. Participation in the hearing required under section 79-1254, R. S. Supp., 1975, is ordinarily a waiver of any defect in the notice of the hearing. Alexander v. School Dist. No. 17 251

5. Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute. Alexander v. School Dist. No. 17 251

6. A collecting bank has the duty of making presentment, but is not ordered or authorized to pay the instrument out of the drawer's account. It must exercise ordinary care in presenting an item, in sending notice of dishonor or nonpayment, and in returning an unpaid item. Berman v. United States Nat. Bank 268

7. In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943. Kracman v. Nebraska P. P. Dist. 301

8. A secured party has a duty to provide the debtor with reasonable notice of the intended disposition. First Nat. Bank of Bellevue v. Rose 392

9. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. First Nat. Bank of Bellevue v. Rose 392

10. A debtor must be given reasonable notice of an intended disposition of collateral which will provide him with sufficient time to take appropriate steps to protect his interest in the collateral, and ordinarily a minimum of 3 business days is required. First Nat. Bank of Bellevue v. Rose 392

11. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which defendant is charged. State v. Shiffbauer 805

Offer of Proof.

Where on objection of ruling excluding evidence is made, an offer of proof is generally a prerequisite to review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. State v. Fonville 220

Ordinances.

1. The Omaha ordinances pertaining to signs appear to be reasonable in the light of the public welfare, health, safety, and security. Schaffer v. City of Omaha 328
2. The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment. Schaffer v. City of Omaha 328
3. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. Schaffer v. City of Omaha 328
4. The burden is upon the party attacking an ordinance to show its invalidity by clear and unequivocal evidence unless it appears on its face to be so. Schaffer v. City of Omaha 328

Parent and Child.

1. The discretion of the trial court with respect to awarding or changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Stecker v. Stecker 164
   Schmer v. Schmer 800
2. Findings of fact made by a Juvenile Court are accorded great weight on appeal because of the trial court's opportunity to hear and observe the parties and witnesses. State v. Sperling 204
3. Parental rights may be terminated under section 43-209(5), R. S. Supp., 1976, when the parent is found to be unable to discharge responsibilities because of mental illness or deficiency, and there are reasonable grounds to believe such condition will continue for a prolonged and indeterminate period. State v. Sperling 204
4. The right of a parent to maintain the custody of his children is a natural, but not an inalienable, right, and

the public has a paramount interest in the protection of the rights of the children. State v. Tibbs 236
5. 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, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. Tibbs 236
6. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Bartley v. Bartley 246
7. 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 trial court in determining what is in the best interest of the child. This is particularly true when the parent cohabits out of wedlock in the home where the child lives. Bartley v. Bartley 246
8. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. Mangum v. Mangum 350
9. The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Mangum v. Mangum 350
10. The confession of a minor to the police is admissible in evidence when, on the totality of circumstances, it is knowingly, intelligently, and voluntarily made. Ordinarily it is not required that the minor be warned that he could be prosecuted as an adult, nor that his parents be notified prior to taking his statement, for his confession to be deemed voluntary. State v. Stewart 497
11. A mother and father have an equal and joint right to the custody of their children, and custody shall be determined on the basis of the best interests of the child. Boroff v. Boroff 641
12. Although the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling in regard to custody. Boroff v. Boroff 641
13. Although it is generally sound public policy to keep the children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is dissolved. Boroff v. Boroff 641

14. A court shall not give performance to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976. Boroff v. Boroff 641
15. This court has the power to modify awards granting custody of children to a parent, as divorce actions are tried de novo by this court on appeal. Boroff v. Boroff 641
16. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1974. Brandl v. Brandl 778
17. During the pendency of dissolution proceedings the court may enter ex parte orders determining temporary custody of minor children. Brandl v. Brandl 778
18. The doctrine of Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51, which permits the court to act summarily in child custody matters in the best interests of the children, applies only where the court has previously placed the children in court custody. Brandl v. Brandl 778
19. In determining the question of who should have the care and custody of a child upon dissolution of marriage, the paramount consideration must be the best interests and welfare of the child. Schmer v. Schmer 800
20. Under our former statute, a child not living with his parent is not conclusively presumed to be dependent on his deceased parent but must prove such to be the fact. James v. Rainchief Constr. Co. 818
21. Our former statute provided that a partial dependent was entitled to compensation benefits only in the proportion which the amount contributed bore to the total wages of the deceased. James v. Rainchief Constr. Co. 818
22. Where a deceased father had partially contributed to the support of a child residing with a former wife, such child was a partial dependent. James v. Rainchief Constr. Co. 818
23. In determining the amount which an obligor should be required to pay to discharge his duty of support under the Revised Uniform Reciprocal Enforcement of Support Act, the trial court must consider the ability of the obligor to contribute to the support of the dependent. Chisholm v. Chisholm 828

Parol Agreements.

A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. W. Wright, Inc. v. Korshoj Corp. 692

Parties.

1. The Nebraska Workmen's Compensation Act bars an action by a third party tort-feasor against an employer for contribution or indemnity based on a claim arising from the injury. Vangreen v. Interstate Machinery & Supply Co. 29
2. Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest. Bury v. Action Enterprises, Inc. 38
3. The District Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others and need bring in other parties only when a determination of the controversy cannot be had without their presence. Bury v. Action Enterprises, Inc. 38
4. An action in forcible entry and detainer will lie against a lessee not in actual physical possession of the leased property. Moritz v. S & H Shopping Centers, Inc. 206
5. Assignees, and subtenants of the lessee not affected by a breach of the lease, are not necessary parties in an action of forcible entry and detention brought by the lessor against the lessee. Moritz v. S & H Shopping Centers, Inc. 206
6. A witness, not a party to a suit, is entitled to receive witness fees. Nebraska Im-Pruv-All, Inc. v. Sass 261
7. The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. Kosowski v. City Betterment Corp. 402
8. The principal parties to a third-party creditor-beneficiary contract can rescind the contract or release one another from their obligations thereunder to the creditor-beneficiary if the rescission or release precedes the creditor-beneficiary's acceptance of the contract or

change of position in reliance thereon. Mid-Continent Properties, Inc. v. Pflug 429
9. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. Shepoka v. Knopik 651
10. In declaratory judgment actions, the presence of necessary parties is a jurisdictional matter, and one which the parties cannot waive. Shepoka v. Knopik 651
11. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Shepoka v. Knopik 651
12. In an action involving the disbursement of county funds, the county has a great, if not an exclusive, interest, and is a necessary party. Shepoka v. Knopik 651

Partnership.

1. Under both statutory and case law in Nebraska, a partnership has long been considered as an entity separate and apart from the individual partners. State v. Siers 51
2. In Nebraska, both by statutory interpretation and by our adoption of the legal entity theory of partnerships, a partner may be prosecuted for the embezzlement of partnership property. State v. Siers 51

Penalties.

1. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Bando v. Cole 722
2. A liquidated damages provision is enforceable if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach. Bando v. Cole 722

Perpetuities.

1. No future interest or estate is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Gade v. Descendants of Unitt 713
2. Future interests created by will are measured by lives in being at the testator's death, rather than at the time the will was executed. Gade v. Descendants of Unitt .. 713

3. Contingent future interests are subject to the rule against perpetuities but vested interests are not. Gade v. Descendents of Unitt 713

Plea Bargaining.

1. It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is necessary to correct a manifest injustice. State v. Blankenbaker 344
2. A criminal defendant has no absolute right to have his guilty plea accepted, and the trial court may reject such a plea in the exercise of sound discretion. State v. Stewart 497
3. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Stewart 497

Pleadings.

1. A judgment must respond to the pleadings. Alexander v. School Dist. No. 17 251
2. Where the evidence offered at the hearing on a motion for summary judgment shows there is no genuine issue as to any material facts, and the movant is entitled to judgment as a matter of law, the motion should be sustained. Gerdes v. Spetman 406
3. The purpose of a motion for summary judgment is to pierce the allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged. Gerdes v. Spetman 406
4. When the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment should be granted. Gerdes v. Spetman 406
5. When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the bringing of the action is unnecessary. The general rule is that demand is not required where it would be futile. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
6. An order sustaining a motion to strike an allegation from a pleading, without further judicial action, is not a final order and is not appealable. Gilbert v. Vogler ... 454
7. A general demurrer admits all the allegations of fact of the pleading to which it is addressed, which are issuable, relevant, material, and well-pleaded. Gilbert v. Vogler 454
8. In actions not involving a prayer for extraordinary

remedies, pleadings are to be construed liberally in favor of the pleader. Gilbert v. Vogler 454
9. The filing of a demurrer to a petition is a waiver of the right to insist that the allegations thereof be made more definite and certain. Gilbert v. Vogler 454
10. In an action to recover damages sustained on account of wrongful death, allegations of plaintiff's capacity to sue, death of a person caused by the wrongful act, neglect, or default of the defendant, and the identity of next of kin and that they sustained damage from such wrongful death sufficiently state a cause of action. Gilbert v. Vogler 454
11. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented this court will presume the common law or statutes of such other jurisdiction to be the same as ours. State v. Addison 482
12. In a proper case, the application of the parol evidence rule may be decided upon a demurrer raising the question of whether a petition states a cause of action. Allegations of fact, which are legally ineffective, although admitted by the demurrer, must be disregarded. Traudt v. Nebraska P. P. Dist. 765
13. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation. Novak v. Triangle Steel Co. 783
14. A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute. Novak v. Triangle Steel Co. 783
15. The limitation provided by section 48-137, R. R. S. 1943, starts to run from the time it becomes reasonably apparent that a compensable claim exists. Novak v. Triangle Steel Co. 783

Police Officers and Sheriffs.

In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight. State v. Rust 528

Political Subdivisions.

1. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial

court will not be disturbed unless clearly wrong. Naber v. City of Humboldt 433
2. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. Barnett v. Boyle 677
3. The formation of representative districts in state government is normally a legislative function. Barnett v. Boyle 677

Post Conviction.

1. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Blunt 82
2. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Walker 381
3. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Walker 381
4. Where a sentence is imposed within prescribed statutory limits, the validity of the sentence is not a matter of post conviction relief. State v. Rivera 629

Presentence Reports.

Section 29-2261, R. R. S. 1943, does not require a second, or successive, presentence investigation before an order revoking probation is entered where a presentence investigation was made and considered following the original conviction and before the order of probation was entered. Whether a second, or successive, investigation and report are required rests in the sound discretion of the sentencing judge. State v. Snider 317

Principal and Agent.

1. It is a fundamental rule underlying the structure of agency law that the principal is bound by, and liable for, the acts which his agent does with or within the actual or apparent authority from the principal, and within the scope of the agent's employment. Bury v. Action Enterprises, Inc. 38
2. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the

contract is that of the principal alone and the agent cannot be held liable thereon. Bury v. Action Enterprises, Inc. 38

3. It is well established that one who purports as agent to enter into a contract, upon which the principal is not bound because of the fact that the agent has contracted without authority or in excess of his authority, is personally liable for the damage thus occasioned to the other contracting party. Bury v. Action Enterprises, Inc. 38
4. A person who purports to make a contract, conveyance, or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized. Bury v. Action Enterprises, Inc. 38
5. Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Reeves v. Associates Financial Services Co., Inc. 107
6. One who receives goods from another for resale to a third person is not thereby the other's agent unless his duty is to act primarily for the benefit of the one delivering the goods to him. Reeves v. Associates Financial Services Co., Inc. 107

Principal and Surety.

1. The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement. State Surety Co. v. Peters 472
2. Courts construe the contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. State Surety Co. v. Peters 472

Probable Cause.

In the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable

caution to believe the action taken was appropriate. State v. Sotelo 334

Probation and Parole.

1. Under section 29-2268, R. R. S. 1943, a violation of a single condition of probation can support revocation of that probation where such violation is established by clear and convincing evidence. State v. Clark 42
2. This court on appeal will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Siers .. 51 State v. Stahl 683
3. Section 29-2261, R. R. S. 1943, does not require a second, or successive, presentence investigation before an order revoking probation is entered where a presentence investigation was made and considered following the original conviction and before the order of probation was entered. Whether a second, or successive, investigation and report are required rests in the sound discretion of the sentencing judge. State v. Snider 317
4. Where an appeal was not taken from an order of probation, the question of the voluntariness of the original guilty plea could not be considered. State v. Osterman 727
5. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Liberator 857

Process.

A security agreement noted on the certificate of title shall be valid as against the creditors of the debtor whether armed with process or not. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

Proof.

1. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. First Nat. Bank of Bellevue v. Rose 392
2. When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the bringing of the action is unnecessary. The general rule is that demand is not required where it would be futile. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
3. The facts on which the finding of an aggravating circumstance referred to in section 29-2523, R. R. S. 1943,

is based, must be proved beyond a reasonable doubt. State v. Stewart 497
4. The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt. State v. Simants 549

Property.
1. The division of property made by the trial court in a marriage dissolution action will not be disturbed on appeal unless patently unfair on the record. Jackson v. Jackson 27
2. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Jackson v. Jackson 27
3. A married person's interest in the marital status is not a property right. Buchholz v. Buchholz 180
4. Sanitary sewer connections running from private property to a city or district sewer main are privately owned and may not be appropriated or destroyed by the city without compensation to the owner. City of Omaha v. Matthews 323
5. The right to use district or city sewers is one common to all property owners and it cannot be denied unreasonably, arbitrarily, or discriminatorily. City of Omaha v. Matthews 323
6. When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort. City of Omaha v. Matthews 323
7. The right to hunt and fish cannot be established by prescription where the use is not exclusive or its extent is too indefinite for a determinate description. Harvat v. Clear Creek Drainage Dist. 352
8. An action in replevin lies to recover possession of personal chattels that are unlawfully detained, regardless of whether the original taking was wrongful. It is founded solely on the claim that the defendant wrongfully withholds the property sought to be recovered. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
9. Subject to some qualifications, the party recovering possession of property by replevin is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
10. Where depreciation in the value of property is allowed as an element of damage in replevin, its measure is the

difference between the value of the property at the date of commencement of wrongful detention and its value on the date on which it was delivered to the prevailing party. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

11. When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the bringing of the action is unnecessary. The general rule is that demand is not required where it would be futile. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

12. This court is not inclined to disturb the division of property made by a trial court in marriage dissolution proceedings unless it is patently unfair on the record. Gottschalk v. Gottschalk 437

13. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Gottschalk v. Gottschalk 437

14. A conveyance must be construed with a view to carrying into effect the true intent of the parties so far as it can be ascertained from the whole instrument and is consistent with the rules of law. Bode v. Flobert Industries, Inc. 488

15. A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement. Bode v. Flobert Industries, Inc. 488

16. A right or interest in a duly recorded conveyance will be effective as against all who derive title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions. Bode v. Flobert Industries, Inc. 488

17. An exception in a conveyance operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in esse at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted. Bode v. Flobert Industries, Inc. 488

18. The courts with practical unanimity agree that the use of the technical word exception or reservation will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and, when their intention is determined, it will be given effect, provided no settled rules of law are thereby violated. Bode v. Flobert Industries, Inc. 488
19. A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. State v. Matzen 592
20. As a general rule the tender of the exact sum due upon a mortgage debt upon the "law day" in accordance with the terms of the instrument operates to discharge the mortgage lien. Mr. U Inc. v. Mobile Oil Corp. 612
21. A tender is more than a mere offer to pay. It is an offer to perform coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied. Mr. U Inc. v. Mobile Oil Corp. 612
22. The questions of alimony and division of property may be considered together when a marriage is dissolved; and in considering these questions the court shall have regard for such factors as the circumstances of the parties, the duration of the marriage, the history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Boroff v. Boroff 641
23. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence to overcome a presumption of undue influence shifts to the defendants. Golgert v. Smidt ... 667
24. To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor. Golgert v. Smidt 667
25. The mere existence of a confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, de-

liberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Golgert v. Smidt 667
26. Growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved. Schuler-Olsen Ranches, Inc. v. Garvin 746
27. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Schmer v. Schmer 800

Proximate Cause.
1. Where evidence conflicts on a question of proximate cause of alleged injuries, the question is ordinarily for the jury under proper instructions. Abbott v. Northwestern Bell Tel. Co. 11
2. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Bonnes v. Olson 309

Public Meetings Act.
1. An issue concerning an alleged violation of the Public Meetings Act must be promptly and properly raised in the lower court or tribunal. Alexander v. School Dist. No. 17 251
2. Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute. Alexander v. School Dist. No. 17 251

Public Officers and Employees.
1. It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute (§ 29-2401, R. R. S. 1943) were carried out by the public officers involved. State v. Addison 482
2. Procedural due process is required only when the officer to whom the power has been delegated is required to decide adjudicative facts. Barnett v. Boyle 677

Public Service Commission.
1. The rate-fixing power of the Public Service Commission, if properly exercised, is legislative in character and

has the force and effect of a statute on the subject. Mills v. Nebraska Motor Carriers Assn. 159
2. On appeal to the Supreme Court from an order of the Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority, and whether the order complained of is reasonable and not arbitrarily made. Mills v. Nebraska Motor Carriers Assn. 159
3. If there is evidence to sustain the findings of the Public Service Commission, this court may not intervene. It is only where the findings of the commission are against the evidence that this court may hold the commission's findings are arbitrary and capricious. Mills v. Nebraska Motor Carriers Assn. 159
4. On an appeal to the Supreme Court from an order of the Public Service Commission this court cannot disturb the findings of the commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved. Mills v. Nebraska Motor Carriers Assn. 159
5. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Groenewold v. Building Movers, Inc. 187
6. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Groenewold v. Building Movers, Inc. 187
7. Law violations are not necessarily a bar to an approval of an application, if the public interest will best be served by approval of the transaction presented. Groenewold v. Building Movers, Inc. 187
8. In the absence of a specific restricting statute, the extent to which past unauthorized service may be considered in determining public necessity for the issuance of new authority is properly for the Nebraska Public Service Commission to determine. Groenewold v. Building Movers, Inc. 187
9. In determining whether the proposed service is or will be required by the present or future public convenience and necessity, controlling questions are whether the

operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the operations of existing carriers will be endangered or impaired contrary to the public interest. Hopken v. Building Movers, Inc. 195

10. The intent of sections 75-612 to 75-615, R. R. S. 1943, was to enable telephone users to petition the Public Service Commission for telephone service of exchanges other than the one in which they reside. Hartman v. Glenwood Tel. Membership Corp. 359

11. The terminology set forth in section 75-613, R. R. S. 1943, acquires a new meaning limited to the context of that section, and definition of the statutory phrases must evolve, case-by-case. Hartman v. Glenwood Tel. Membership Corp. 359

12. An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings. Hartman v. Glenwood Tel. Membership Corp. 359

13. Under section 75-311, R. S. Supp., 1976, an applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Dilts Trucking, Inc. v. Peake, Inc. 459

14. Where the evidence is in conflict, the weight of the evidence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Dilts Trucking, Inc. v. Peake, Inc. 459

15. Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operation. Dilts Trucking, Inc. v. Peake, Inc. 459

16. A carrier who previously operated under a certificate of public convenience and necessity issued by the Interstate Commerce Commission, under the mistaken belief that he was performing services in intestate commerce and did not need a Nebraska certificate for his deliveries in Nebraska, was acting under "color of authority" where his previous operations were con-

ducted openly, without defiance, and without knowledge that he was acting without proper authority. Dilts Trucking, Inc. v. Peake, Inc. 459
17. An applicant for a certificate of public convenience and necessity who has been operating under color of authority need not make the same showing under section 75-311, R. S. Supp., 1976, that an applicant for new or extended authority must make, and there is a presumption that the proposed service is or will be required by present or future public convenience and necessity. Dilts Trucking, Inc. v. Peake, Inc. 459
18. The Public Service Commission may approve a transfer of intrastate operating authority if the proposed transfer is consistent with the public interest, does not unduly restrict competition, and the applicant is fit, willing, and able to properly perform the proposed service. Spector Freight System, Inc. v. Herman Bros., Inc. 835
19. Proof of public convenience and necessity is required if the authority proposed to be transferred is dormant or the transfer will permit or result in a new or different service or operation as to territorial scope. Spector Freight System, Inc. v. Herman Bros., Inc. 835
20. Although the proposed transfer may tend to enlarge competition, proof of public convenience and necessity is required only if the transfer involves passenger motor carriers. Spector Freight System, Inc. v. Herman Bros., Inc. 835
21. The purpose of regulation of motor carriers by the Public Service Commission is to permit regulated competition productive of efficient service at minimum cost. Spector Freight System, Inc. v. Herman Bros., Inc. ... 835

Public Utilities.

1. The Public Service Commission may approve a transfer of intrastate operating authority if the proposed transfer is consistent with the public interest, does not unduly restrict competition, and the applicant is fit, willing, and able to properly perform the proposed service. Spector Freight System, Inc. v. Herman Bros., Inc. 835
2. Proof of public convenience and necessity is required if the authority proposed to be transferred is dormant or the transfer will permit or result in a new or different service or operation as to territorial scope. Spector Freight System, Inc. v. Herman Bros., Inc. 835
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is required only if the transfer involves passenger motor carriers. Spector Freight System, Inc. v. Herman Bros., Inc. 835
4. The purpose of regulation of motor carriers by the Public Service Commission is to permit regulated competition productive of efficient service at minimum cost. Spector Freight System, Inc. v. Herman Bros., Inc. ... 835

Quiet Title.
1. In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary. Bode v. Flobert Industries, Inc. 488
2. A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. State v. Matzen 592

Railroads.
A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement. Bode v. Flobert Industries, Inc. 488

Rape.
1. The slightest penetration of the sexual organs of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Holloman 139
2. If it satisfactorily appears from the evidence in a prosecution for rape that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to such facts. State v. Holloman 139
3. The sexual assault law defined new crimes and was not merely amendatory of the rape statutes. State v. Evans 332
4. A defendant charged with rape or assault with intent to commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Evans 332
5. An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape. State v. Eynon 734

6. An assault with intent to commit rape is not an essential element of the crime of burglary with intent to commit rape. The crime of burglary with intent to commit rape is complete when the entry is made with the necessary intent. State v. Eynon 734

Rates.

1. "Premium rates" referred to in an order of the Public Service Commission authorizing transportation of "express" packages means rates higher than general freight rates. Mills v. Nebraska Motor Carriers Assn. 159
2. The rate-fixing power of the Public Service Commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject. Mills v. Nebraska Motor Carriers Assn. 159

Records.

1. Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice. Insurance Co. of North America v. Hawkins 126
2. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Insurance Co. of North America v. Hawkins 126
3. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Addison 482
4. A right or interest in a duly recorded conveyance will be effective as against all who derive title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions. Bode v. Flobert Industries, Inc. 488

Remainders.

1. Where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman if a life estate were to terminate the remainder is contingent. Gade v. Descendants of Unitt 713
2. A devise of the remainder over after a life estate to children as a class vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the con-

tinuance of the life estate from the moment of their birth. Gade v. Descendants of Unitt 713
3. Such words as "at his death" or "at their death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. Gade v. Descendants of Unitt 713

Replevin.
1. An action in replevin lies to recover possession of personal chattels that are unlawfully detained, regardless of whether the original taking was wrongful. It is founded solely on the claim that the defendant wrongfully withholds the property sought to be recovered. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
2. Subject to some qualifications, the party recovering possession of property by replevin is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
3. Where depreciation in the value of property is allowed as an element of damage in replevin, its measure is the difference between the value of the property at the date of commencement of wrongful detention and its value on the date on which it was delivered to the prevailing party. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
4. When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the bringing of the action is unnecessary. The general rule is that demand is not required where it would be futile. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

Rescission.
The principal parties to a third-party creditor-beneficiary contract can rescind the contract or release one another from their obligations thereunder to the creditor-beneficiary if the rescission or release precedes the creditor-beneficiary's acceptance of the contract or change of position in reliance thereon. Mid-Continent Properties, Inc. v. Pflug 429

Right to Counsel.
1. The right of an indigent defendant to counsel does not give him the unbridled right to be represented by coun-

sel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Blunt . 82
2. An indigent defendant who refuses to accept offered counsel without justifiable reason and elects to proceed pro se has not been deprived of his constitutional right to counsel. State v. Blunt 82
3. The determination of whether there has been an intelligent waiver of the constitutional right to counsel must depend in each case upon its particular facts and circumstances, including the background, experience, and conduct of the accused. State v. Blunt 82
4. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Blunt 82
5. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Blunt 82
6. A defendant is not entitled to the assistance of counsel at a pretrial identification procedure conducted before the filing of the information. State v. Nance 95
7. The right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. State v. Addison 482

Rules of Court.

1. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Allgood v. Nebraska Humane Society 373
2. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer 805

Salaries.

The provisions of section 55-160, R. R. S. 1943, providing a leave of absence for emergency National Guard duty, and for receipt by the guardsman of that portion of his public salary during such duty as will equal any loss suffered by him, is a separate and distinct provision from other leaves of absence provided in said statute and has application and effect exclusive of such other leave provisions. King v. School Dist. of Omaha 303

Sales.

1. Under section 9-504(2), U. C. C., a debtor is entitled to any surplus arising from a repossession sale of collateral by a secured party. Reeves v. Associates Financial Services Co., Inc. 107
2. One who receives goods from another for resale to a third person is not thereby the other's agent unless his duty is to act primarily for the benefit of the one delivering the goods to him. Reeves v. Associates Financial Services Co., Inc. 107
3. A secured party has a duty to sell repossessed collateral in a commercially reasonable manner, and price, as a term of sale, is a relevant consideration in determining whether a sale is commercially reasonable. Reeves v. Associates Financial Services Co., Inc. 107
4. Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods, despite any reservation of security interest. Nebraska Im-Pruv-All, Inc. v. Sass 261
5. A secured party has a duty to provide the debtor with reasonable notice of the intended disposition. First Nat. Bank of Bellevue v. Rose 392
6. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. First Nat. Bank of Bellevue v. Rose 392
7. A debtor must be given reasonable notice of an intended disposition of collateral which will provide him with sufficient time to take appropriate steps to protect his interest in the collateral, and ordinarily a minimum of 3 business days is required. First Nat. Bank of Bellevue v. Rose 392

Schools and School Districts.

1. Substantial compliance with section 79-1254, R. S. Supp., 1975, is all that is required of a school district. Alexander v. School Dist. No. 17 251

2. The notice required by section 79-1254, R. S. Supp., 1975, may be remedied by amendment if defective and where there is no prejudice to the parties involved an objection based on the original notice is without merit. Alexander v. School Dist. No. 17 251
3. Participation in the hearing required under section 79-1254, R. S. Supp., 1975, is ordinarily a waiver of any defect in the notice of the hearing. Alexander v. School Dist. No. 17 251
4. A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute. Alexander v. School Dist. No. 17 251
5. In changing from an election-at-large to an election by district system, the Legislature may provide for staggered terms and allow incumbent members of a board of education to serve until their terms expire. Such legislation does not create an invidious discrimination between classifications of voters and does not deny the equal protection of the laws to electors in odd-numbered districts who will be represented by hold-over members of the board of education during the transition period. Barnett v. Boyle 677

Searches and Seizures.

1. Objects falling in the plain view of an 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. Holloman 139
2. In the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate. State v. Sotelo 334
3. An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. State v. Sotelo 334
4. A search by a person not a law officer does not violate the Fourth Amendment. State v. Edwards 354
5. When marijuana fell under the permament dominion of law officers, a seizure then occurred. State v. Edwards 354
6. A warrantless seizure under exigent circumstances is valid. State v. Edwards 354

Security Agreements.

A security agreement noted on the certificate of title shall be valid as against the creditors of the debtor whether armed with process or not. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421

Self-Incrimination.

1. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to the defendant's body, nor to the secretions therefrom, nor to the introduction of chemical analysis in evidence. State v. Swayze 149
2. Requiring defendant, under threat of contempt for noncompliance (pursuant to the Identifying Physical Characteristics Act), to submit to blood tests involved no violation of her privilege against self-incrimination. State v. Swayze 149

Sentences.

1. When two or more persons are killed, though it be by a single act, yet, since the consequences affect, separately, each person killed, there is a corresponding number of offenses. State v. Chapple 4
2. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. State v. Chapple 4
3. This court on appeal will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Siers .. 51
State v. Stahl 683
4. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. McFall 136
State v. Overstreet 625
State v. Westerlund 664
State v. Sinsel 673
State v. Stahl 683
State v. Osterman 727
State v. Kofoed 803
5. The action of the District Court in directing that a sentence be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion.

State v. Holloman 139
6. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Snider 317
7. A defendant charged with rape or assault with intent to commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Evans 332
8. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Walker 381
9. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal absent an abuse of discretion. State v. Pratt ... 390
10. Where a sentence is imposed within prescribed statutory limits, the validity of the sentence is not a matter of post conviction relief. State v. Rivera 629
11. Jury sentencing in a capital case is not constitutionally required. State v. Simants 549
12. Under section 29-2308, R. R. S. 1943, this court may reduce a sentence when in its opinion that sentence is excessive. State v. Goodloe 632
13. While this court has recognized that all participants in one crime, or series of related crimes, should be sentenced, if possible, by the same judge, we have declined to make this a rule which is mandatory under all circumstances. State v. Westerlund 664
14. The court, as a condition of its sentence, may require the offender to be confined periodically in the county jail or to return to custody after specified hours, but not to exceed 90 days. State v. Shiffbauer 805
15. A sentence imposed within the statutory limits, and the denial of probation, will not be disturbed on appeal in the absence of a showing of an abuse of discretion on the part of the sentencing judge. State v. Tweedy 851
16. A writ of habeas corpus is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. Pruitt v. Parratt 854
17. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Liberator 857

Severance.

An exception in a conveyance operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in

esse at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted. Bode v. Flobert Industries, Inc. . 488

Sexual Assault.

1. The sexual assault law defined new crimes and was not merely amendatory of the rape statutes. State v. Evans 332
2. A defendant charged with rape or assault with intent to commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Evans 332

Sexual Sociopaths.

1. While the court retains jurisdiction of the petitioner so long as he remains committed, that retention is not for the purpose of reexamination of the original commitment but rather for periodic reviews to determine if petitioner is still a sexual sociopath. State v. Wells 584
2. While a petitioner's commitment under section 29-2909, R. R. S. 1943, was voluntary in the sense that he initiated the proceedings, when it proceeded to the determination that he was a sexual sociopath, his confinement and release are subject to the other provisions of the act. His only remedy is a determination thereafter that he is no longer a sexual sociopath. State v. Wells . 584
3. The finding that petitioner was a sexual sociopath continues until such time as evidence is adduced to prove otherwise. State v. Wells 584
4. A prior conviction of a sexual offense is not a condition precedent to a voluntary commitment. State v. Wells . 584

States.

1. A state has plenary power to fix conditions under which the marital status may be created or terminated. Buchholz v. Buchholz 180
2. Vested rights may be impaired with due process of law under many circumstances. The state's inherent sovereign power includes the so-called police power right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well-being of the people. Buchholz v. Buchholz 180
3. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented this court will presume the common law or statutes of such other jurisdiction to be the same as

ours. State v. Addison 482
4. Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute. Wise v. State 831
5. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state. Wise v. State 831
6. The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Wise v. State . 831
7. Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. Wise v. State 831

Statutes.

1. Under section 29-2268, R. R. S. 1943, a violation of a single condition of probation can support revocation of that probation where such violation is established by clear and convincing evidence. State v. Clark 42
2. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute. Grace v. State Farm Mut. Auto. Ins. Co. 118
3. Mere failure to report a known felony is not concealment sufficient to constitute a violation of section 28-202, R. R. S. 1943, and make the person failing to report the felony an accessory after the fact to the felony. State v. Brown 131
4. The Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, held constitutional.

State v. Swayze 149
5. The Nebraska divorce laws do not discriminate against either party to a marriage. Buchholz v. Buchholz 180
6. Parental rights may be terminated under section 43-209(5), R. S. Supp., 1976, when the parent is found to be unable to discharge responsibilities because of mental illness or deficiency, and there are reasonable grounds to believe such condition will continue for a prolonged and indeterminate period. State v. Sperling 204
7. Substantial compliance with section 79-1254, R. S. Supp., 1975, is all that is required of a school district. Alexander v. School Dist. No. 17 251
8. The notice required by section 79-1254, R. S. Supp., 1975, may be remedied by amendment if defective and where there is no prejudice to the parties involved an objection based on the original notice is without merit. Alexander v. School Dist. No. 17 251
9. Participation in the hearing required under section 79-1254, R. S. Supp., 1975, is ordinarily a waiver of any defect in the notice of the hearing. Alexander v. School Dist. No. 17 251
10. A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute. Alexander v. School Dist. No. 17 251
11. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Nance 257
12. It is not necessary that a penal statute be written so as to be beyond the possibility of more than one construction. State v. Nance 257
13. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. Nance 257
14. A penal statute must be given an interpretation which meets constitutional requirements if that can reasonably be done. State v. Nance 257
15. Under section 29-2221, R. R. S. 1943, any person who has been twice previously convicted of crime, sentenced, and committed to prison for terms of not less than 1 year each, is deemed to be an habitual criminal, without regard to the state or states in which the convictions occurred, and without regard to whether the convictions were for a state or federal offense. State v. Nance 257

16. Evidence of another crime is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Moore 294
17. "Attorneys of record" as used in section 76-715.01, R. R. S. 1943, can only mean the attorneys appearing in the specific action being appealed. Kracman v. Nebraska P. P. Dist. 301
18. In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943. Kracman v. Nebraska P. P. Dist. 301
19. Legislative intent is the cardinal rule in construction of statutes. To ascertain such intent, the court will not examine an operative provision without likewise examining the statute as a whole in the light of the object and purposes of the act. King v. School Dist. of Omaha 303
20. The Legislature will be presumed to have known preexisting law when it enacted an amendment to a statute. King v. School Dist. of Omaha 303
21. The provisions of section 55-160, R. R. S. 1943, providing a leave of absence for emergency National Guard duty, and for receipt by the guardsman of that portion of his public salary during such duty as will equal any loss suffered by him, is a separate and distinct provision from other leaves of absence provided in said statute and has application and effect exclusive of such other leave provisions. King v. School Dist. of Omaha 303
22. Section 29-2261, R. R. S. 1943, does not require a second, or successive, presentence investigation before an order revoking probation is entered where a presentence investigation was made and considered following the original conviction and before the order of probation was entered. Whether a second, or successive, investigation and report are required rests in the sound discretion of the sentencing judge. State v. Snider 317
23. Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations. Schaffer v. City of Omaha 328
24. The sexual assault law defined new crimes and was not merely amendatory of the rape statutes. State v. Evans 332
25. A defendant charged with rape or assault with intent to

commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Evans 332

26. The intent of sections 75-612 to 75-615, R. R. S. 1943, was to enable telephone users to petition the Public Service Commission for telephone service of exchanges other than the one in which they reside. Hartman v. Glenwood Tel. Membership Corp. 359

27. The terminology set forth in section 75-613, R. R. S. 1943, acquires a new meaning limited to the context of that section, and definition of the statutory phrases must evolve, case-by-case. Hartman v. Glenwood Tel. Membership Corp. 359

28. The provision in section 75-128, R. S. Supp., 1976, that the Public Service Commission shall file its decision within 30 days after the hearing is discretionary, not mandatory. Hartman v. Glenwood Tel. Membership Corp. 359

29. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Allgood v. Nebraska Humane Society 373

30. Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving. § 39-669.01, R. R. S. 1943. State v. Kufeldt 377

31. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper 398

32. An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943. State v. Pelton 412

33. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803 (2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues. State v. Pelton 412

34. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed unless clearly wrong. Naber v. City of Humboldt 433
35. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann 449
36. A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute. Accordingly, in view of the fact that the public has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given and the ordinary rules of construction give way. State Surety Co. v. Peters 472
37. It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute (§ 29-2401, R. R. S. 1943) were carried out by the public officers involved. State v. Addison 482
38. Section 47-406, R. R. S. 1943, permits the court by written order to disburse funds collected on work release. It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses. State v. Towle 494
39. Section 47-404, R. R. S. 1943, provides that a prisoner having work-release privileges shall be liable for such costs incident to his confinement as the court deems appropriate and reasonable, if such are specifically set forth in the order granting work release. State v. Towle 494
40. The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska. State v. Stewart 497
41. The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. State v. Stewart 497
42. The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual sit-

uations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. State v. Stewart 497

43. The facts on which the finding of an aggravating circumstance referred to in section 29-2523, R. R. S. 1943, is based, must be proved beyond a reasonable doubt. State v. Stewart 497

44. Subsection (1)(a) of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. State v. Stewart 497

45. Subsection (1)(b), section 29-2523, R. R. S. 1943, is applicable where the purpose of the murder was to conceal a theft, or to conceal the defendant's identity as a thief. State v. Stewart 497

46. Subsection (1)(c), section 29-2523, R. R. S. 1943, applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain, as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee. State v. Stewart 497

47. Subsections (1)(b) and (1)(c), section 29-2523, R. R. S. 1943, are separate and distinct circumstances, and will be construed so as not to overlap. State v. Stewart 497

48. The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523, R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life. State v. Stewart 497

49. Subsection (1)(e), section 29-2523, R. R. S. 1943, applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder. State v. Stewart 497

50. Subsection (1)(f), section 29-2523, R. R. S. 1943, applies to those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or other like situations. State v. Stewart 497

51. Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old defendant who has no criminal record nor significant history of prior criminal activity. State v. Stewart 497
52. Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required that the mitigating circumstances outweigh the aggravating circumstances. State v. Stewart 497
53. The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive. State v. Stewart 497
54. Neither the Constitution of the United States nor the Constituion of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Rust 528
55. The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Rust 528
56. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts. State v. Rust 528
State v. Holtan 544
57. A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed. State v. Rust 528
58. A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Rust 528
59. The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap,

that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept. State v. Rust .. 528

60. A murder is especially heinous, atrocious, cruel, or manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of aggravating circumstance subsection (1)(d), of section 29-2523, R. R. S. 1943, when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering. This circumstance applies only to the murder charged and not to collateral or subsequent circumstances. This circumstance is also satisfied where the killing is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Rust 528

61. A conviction for another murder within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R. R. S. 1943, does not include an attempt to commit murder. State v. Rust 528

62. Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts. State v. Holtan 544

63. Extreme mental or emotional disturbance means such a disturbance in very great, intense, or severe degree. State v. Holtan 544

64. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history. State v. Holtan 544

65. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions. State v. Holtan 544

66. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. Holtan 544

67. Although a penal statute is required to be strictly construed, it should be given a sensible construction, and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Holtan 544

68. In each case in which the sentencing court imposes the death sentence, the determination of the court shall be

in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination. State v. Simants 549

69. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Simants .. 549

70. The facts upon which aggravating circumstances are based must be proved beyond a reasonable doubt. State v. Simants 549

71. The rule enunciated in Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632 (1955), on the applicability of the doctrine of reasonable doubt is not applicable to our present death penalty law. State v. Simants 549

72. Because our statute requires the sentencing authority to specify the factors it relies upon in reaching its decision and provides a meaningful appellate review, death sentences are not imposed capriciously or in a freakish manner in this jurisdiction. State v. Simants 549

73. The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Simants 549

74. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. State v. Simants 549

75. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations were the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549

76. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of advanced years where senility may be a factor. State v. Simants 549

77. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in compari-

son outweigh the mitigating circumstances. State v. Simants 549
78. The death penalty is not to be imposed if sufficient mitigating circumstances shall approach or outweigh the weight to be given the aggravating circumstances. State v. Simants 549
79. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Simants ... 549
80. We find the Nebraska death penalty statute does not violate any of the provisions of the Nebraska or federal Constitutions. State v. Simants 549
81. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. City Betterment Corp. 575
82. The term "primary activities" in section 28-964.03, R. R. S. 1943, means only activities conducted for charitable and community betterment purposes other than the organization and operation of a lottery. State v. City Betterment Corp. 575
83. An organization whose only activities have been the organization and operation of a lottery is not an organization whose primary activities are conducted for charitable or community betterment purposes within the meaning of section 28-964.03, R. R. S. 1943. State v. City Betterment Corp. 575
84. The word "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means net proceeds. Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds. State v. City Betterment Corp. 575
85. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Wells 584
86. While a petitioner's commitment under section 29-2909, R. R. S. 1943, was voluntary in the sense that he initiated the proceedings, when it proceeded to the determination that he was a sexual sociopath, his confinement and release are subject to the other provisions of the act. His only remedy is a determination thereafter that he is no longer a sexual sociopath. State v. Wells . 584
87. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality. State v. Wells 584

88. Under Nebraska law a so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. McGowan v. McGowan 596
89. In fixing an attorney's fee allowed by statute to an insurance policy beneficiary, factors which may be considered by the court include the amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duty, result of service performed, and professional diligence and skill exhibited. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
90. The reasonable sum allowed as attorney's fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. § 44-359, R. R. S. 1943. Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co. 605
91. A mortgagor has no cause of action under section 76-255, R. R. S. 1943, until there has been full performance of the condition of the mortgage. Mr. U Inc. v. Mobil Oil Corp. 612
92. A statute is not to be read as if open to construction as a matter of course. Wendt v. Cavalier Ins. Corp. 622
93. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Wendt v. Cavalier Ins. Corp. 622
94. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Wendt v. Cavalier Ins. Corp. 622
95. Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the amount offered. Wendt v. Cavalier Ins. Corp. 622
96. The habitual criminal statute, section 29-2221, R. R. S. 1943, does not violate the constitutional prohibition against cruel and unusual punishment, nor does sentencing the defendant under the habitual criminal statute subject the defendant to double jeopardy. State v. Goodloe 632
97. The habitual criminal statute represents a legislative determination that the repetition of criminal conduct justifies and warrants greater punishment than ordinarily would be considered. State v. Goodloe 632
98. Under section 29-2308, R. R. S. 1943, this court may re-

duce a sentence when in its opinion that sentence is excessive. State v. Goodloe 632

99. A court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other. § 42-364(2), R. S. Supp., 1976. Boroff v. Boroff 641

100. A presumption of undue influence is not a presumption contemplated by section 27-301, R. R. S. 1943, and the burden of proof on the issue of undue influence remains on the plaintiff. Golgert v. Smidt 667

101. The 1975 amendments to section 79-1003, R. R. S. 1943, are constitutional. Barnett v. Boyle 677

102. Under section 27-608(1), R. R. S. 1943, whether a showing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court. State v. King 729

103. An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape. State v. Eynon 734

104. A witness whose presence is shown by a party to be essential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses. State v. Eynon 734

105. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. § 27-405, R. R. S. 1943. State v. Eynon 734

106. A statute is not to be read as if open to construction as a matter of course. Gaughen v. Sloup 762

107. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Gaughen v. Sloup 762

108. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may

be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1974. Brandl v. Brandl . 778

109. During the pendency of dissolution proceedings the court may enter ex parte orders determining temporary custody of minor children. Brandl v. Brandl 778

110. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Shiffbauer 805

111. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which defendant is charged. State v. Shiffbauer 805

112. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. State v. Shiffbauer 805

113. Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. State v. Shiffbauer 805

114. In determining the amount which an obligor should be required to pay to discharge his duty of support under the Revised Uniform Reciprocal Enforcement of Support Act, the trial court must consider the ability of the obligor to contribute to the support of the dependent. Chisholm v. Chisholm 828

115. Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute. Wise v. State 831

116. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be. Wise v. State 831

117. The right of one state to demand the return to it from another state of a fugitive from justice is founded upon the Constitution of the United States. Art. IV, § 2, Constitution of the United States. The implementation of

the constitutional provision is, by virtue of the Constitution and statutes, an administrative function to be carried out by the executives of the states involved. Art. IV, § 2, Constitution of the United States; Title 18 U.S.C.A., § 3182; § 29-730, R. R. S. 1943. Wise v. State . 831

118. A judgment of the Workmen's Compensation Court may be reversed, modified, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. § 48-185, R. S. Supp., 1976. Johnson v. Village of Winnebago 845

119. Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. State v. Liberator 857

Stipulations.

Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances. State v. Wells 584

Strict Liability.

Where the existence of a defect in a product is known to the claimant prior to an accident and injury, no basis for recovery under the doctrine of strict liability in tort exists. Waegle v. Caterpillar Tractor Co. 824

Summary Judgments.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. Reeves v. Associates Financial Services Co., Inc. 107
2. The right of a party to sue as representative of a class may be raised by a motion for summary judgment. Kosowski v. City Betterment Corp. 402
3. Where the evidence offered at the hearing on a motion for summary judgment shows there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained. Gerdes v. Spetman 406
4. The purpose of a motion for summary judgment is to pierce the allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged. Gerdes v. Spetman 406
5. When the allegations of the pleadings have been

pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment should be granted. Gerdes v. Spetman 406

6. Motion for summary judgment can be granted only where there is no genuine issue as to any material fact in the case and where, under the facts, movant is entitled to judgment as a matter of law. Janssen v. Hamblet 705

7. 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 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. Grady v. Denbeck ... 795

Taxation.

The county assessor's responsibility after recommending either taxable or exempt status under section 77-202.01, R. R. S. 1943, is limited to an advisory rather than an adversary capacity. Bemis v. Board of Equalization of Douglas County 175

Telecommunications.

1. The intent of sections 75-612 to 75-615, R. R. S. 1943, was to enable telephone users to petition the Public Service Commission for telephone service of exchanges other than the one in which they reside. Hartman v. Glenwood Tel. Membership Corp. 359

2. The terminology set forth in section 75-613, R. R. S. 1943, acquires a new meaning limited to the context of that section, and definition of the statutory phrases must evolve, case-by-case. Hartman v. Glenwood Tel. Membership Corp. 359

Tender.

1. Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee. Insurance Co. of North America v. Hawkins 126

2. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact. Insurance Co. of North America v. Hawkins 126

3. A tender is more than a mere offer to pay. It is an offer to perform coupled with the present ability of immediate performance, so that were it not for the refusal

of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied. Mr. U Inc. v. Mobil Oil Corp. 612
4. A tender is the offer of a sum of money in satisfaction of a debt and is made by producing and showing the amount to the creditor and expressing verbally a willingness to pay it. Mr. U Inc. v. Mobile Oil Corp. 612
5. Where an insurer, in an action against it on a policy of insurance, makes a tender of payment under the provisions of section 44-359, R. R. S. 1943, the plaintiff is not entitled to an attorney's fee under the provisions of that statute unless he obtains judgment for more than the amount offered. Wendt v. Cavalier Ins. Corp. 622

Time.

1. An employment contract with no fixed term may be terminated at any time by either the employer or the employee, at his own pleasure. Stewart v. North Side Produce Co. 245
2. A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute. Alexander v. School Dist. No. 17 251
3. An issue concerning an alleged violation of the Public Meetings Act must be promptly and properly raised in the lower court or tribunal. Alexander v. School Dist. No. 17 251
4. Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute. Alexander v. School Dist. No. 17 251
5. Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods, despite any reservation of security interest. Nebraska Im-Pruv-All, Inc. v. Sass 261
6. A payor bank is required to settle for a demand item provisionally by midnight of the day of receipt, or become accountable for the amount unless it returns the item on that day. However, if it has made timely provisional settlement, it may revoke the provisional settlement up until its midnight deadline, that is, midnight on the day following, §§ 4-301, 4-302, U. C. C.

Berman v. United States Nat. Bank 268
7. A payor bank which failed to return an item to its forwarder by the midnight deadline is accountable to its customer for the late return of the item. This means that it is liable for the amount of the item. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
8. A decision by the payor bank not to return a demand item by the midnight deadline makes provisional settlement final. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
9. Section 4-103, U. C. C., permits variation by agreement of some of the provisions of the Uniform Commercial Code. Section 4-103(2), which reads as follows: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled," authorizes clearing agreements creating a deadline earlier than the "midnight deadline." Berman v. United States Nat. Bank 268
10. In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943. Kracman v. Nebraska P. P. Dist. 301
11. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Snider 317
12. When the tenth day for filing a motion for a new trial is a Sunday or a holiday, filing on the next business day is within time. State v. Sotelo 334
13. The provision in section 75-128, R. S. Supp., 1976, that the Public Service Commission shall file its decision within 30 days after the hearing is discretionary, not mandatory. Hartman v. Glenwood Tel. Membership Corp. 359
14. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. First Nat. Bank of Bellevue v. Rose 392
15. A debtor must be given reasonable notice of an intended disposition of collateral which will provide him with sufficient time to take appropriate steps to protect his interest in the collateral, and ordinarily a minimum of 3 business days is required. First Nat. Bank of Bellevue v. Rose 392

16. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann 449
17. Subsection (1)(a) of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. State v. Stewart 497
18. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Wells 584
19. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. Alward v. United Mineral Products Co. 658
20. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. Alward v. United Mineral Products Co. .. 658
21. No future interest or estate is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Gade v. Descendants of Unitt 713
22. Future interests created by will are measured by lives in being at the testator's death, rather than at the time the will was executed. Gade v. Descendants of Unitt .. 713
23. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation. Novak v. Triangle Steel Co. 783
24. A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute. Novak v. Triangle Steel Co. 783
25. The limitation provided by section 48-137, R. R. S. 1943, starts to run from the time it becomes reasonably apparent that a compensable claim exists. Novak v. Triangle Steel Co. 783
26. The court, as a condition of its sentence, may require the offender to be confined periodically in the county jail or to return to custody after specified hours, but not to exceed 90 days. State v. Shiffbauer 805
27. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and pro-

cedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer 805

28. Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. Wise v. State 831

Torts.

1. When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort. City of Omaha v. Matthews 323
2. Where the existence of a defect in a product is known to the claimant prior to an accident and injury, no basis for recovery under the doctrine of strict liability in tort exists. Waegle v. Caterpillar Tractor Co. 824

Trial.

1. As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible. State v. Sims 1
2. A judgment will not be reversed for error in an evidentiary ruling if there was no prejudice to any substantial right of the defendant and the record as a whole shows the error was harmless beyond a reasonable doubt. State v. Sims 1
3. Where evidence conflicts on a question of proximate cause of alleged injuries, the question is ordinarily for the jury under proper instructions. Abbott v. Northwestern Bell Tel. Co. 11
4. A verdict will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Abbott v. Northwestern Bell Tel. Co. 11
5. Jury instructions should be considered as a whole and the meaning of the instruction or instructions, when taken as a whole, must be considered and not just the phraseology of a particular part. Abbott v. Northwestern Bell Tel. Co. 11
6. The jury should be instructed to reduce to present value damages for future pain and suffering. Abbott v. Northwestern Bell Tel. Co. 11
7. In determining whether the evidence supports the findings of the trial court in an action at law where the jury

has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. J. P. Theisen & Sons v. Aksarben Contracting Corp. 19

8. 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. J. P. Theisen & Sons v. Aksarben Contracting Corp. 19
Mickelson & Mickelson Hay Contractors v. Christensen 34
Insurance Co. of North America v. Hawkins 126
Schuler-Olsen Ranches, Inc. v. Garvin 746

9. Where there is irreconcilable conflict on a material issue, this court on appeal will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Mickelson & Mickelson Hay Contractors v. Christensen 34

10. The District Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others and need bring in other parties only when a determination of the controversy cannot be had without their presence. Bury v. Action Enterprises, Inc. 38

11. Properly verified photographs are not rendered inadmissible in evidence because of marks on them where the individual who made the marks explains them or testifies as to their correctness. State v. Lang 47

12. To render a failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are thereby embodied. In addition, such propositions must be applicable to the facts. State v. Siers 51

13. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Siers 51

14. Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction. State v. Siers 51

15. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the

crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Siers 51

16. Proof of the existence of a legal entity capable of owning property is not required in an embezzlement prosecution. State v. Siers 51

17. The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Also it is to show it was not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. State v. Siers 51

18. A show-up identification procedure is constitutionally invalid only when so unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, and admission of evidence of a show-up without more does not violate due process. State v. Nance 95

19. A determination as to the likelihood of misidentification must be made on the totality of circumstances of each case. State v. Nance 95

20. A defendant is not entitled to the assistance of counsel at a pretrial identification procedure conducted before the filing of the information. State v. Nance 95

21. An in-court identification may properly be received in evidence if it is independent of, and untainted by, an illegal pretrial identification procedure. State v. Nance 95

22. Severance of counts in a criminal case is a matter directed to the sound discretion of the trial court, and no ruling thereon will be disturbed on appeal in the absence of a showing of prejudice to the defendant. State v. Nance 95

23. Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice. Insurance Co. of North America v. Hawkins 126

24. Objects falling in the plain view of an 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. Holloman 139

25. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered or adduced. State v. Holloman 139

26. The slightest penetration of the sexual organs of the fe-

male is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Holloman 139

27. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. State v. Holloman 139

28. If it satisfactorily appears from the evidence in a prosecution for rape that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to such facts. State v. Holloman 139

29. There is a presumption the trial court, trying a case without a jury, in arriving at a decision, would consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Stecker v. Stecker 164

30. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded by this court. Stecker v. Stecker 164

31. Where on objection a ruling excluding evidence is made, an offer of proof is generally a prerequisite to review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. State v. Fonville 220

32. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, R. R. S. 1943, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. § 27-608, R. R. S. 1943. State v. Fonville 220

33. An inquiry as to whether or not a witness has committed a simple assault and battery is generally not probative of untruthfulness. State v. Fonville 220

34. A trial court is not required to give a proffered instruc-

tion which unduly emphasizes a part of the evidence in the case. First Mid America, Inc. v. Palmer 224
35. When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. Nebraska Im-Pruv-All, Inc. v. Sass 261
36. Where on the trial of an issue of fact proof relating to the disputed issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. Nebraska Im-Pruv-All, Inc. v. Sass 261
37. It is a general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Moore 294
38. Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court. State v. Moore 294
39. Evidence of another crime is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Moore 294
40. It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence. State v. Walker 314
41. The purpose of an instruction conference is to give the parties a chance to request proper instructions and not to provide a trap for the court. State v. Sotelo 334
42. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Sotelo 334
43. 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. Sotelo 334
44. 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. Sotelo 334
45. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment,

information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion. State v. Edwards 354

46. When two defendants are tried together, each having separate counsel, the testimony of one against the other, subject to cross-examination, is not of such a prejudicial nature as to require a separate trial. State v. Edwards 354

47. Proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Edwards 354

48. An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused. State v. Reinert 379

49. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Reinert 379

50. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Pratt 382

51. The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Pratt 382

52. All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Pratt 390

53. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal absent an abuse of discretion. State v. Pratt ... 390

54. An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943. State v. Pelton 412

55. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803(2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues. State v. Pelton 412

56. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence. State v. Pelton 412
57. The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial. State v. Pelton 412
58. An instruction which does not correctly state the law should not be given. State v. Pelton 412
59. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, and he is entitled to the benefit of any reasonable inferences derived from it. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc. 421
60. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Katleman v. U. S. Communities, Inc. 443
61. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Lienemann v. Lienemann 449
62. In actions not involving a prayer for extraordinary remedies, pleadings are to be construed liberally in favor of the pleader. Gilbert v. Vogler 454
63. The matter of granting a continuance in a criminal case is peculiarly within the discretionary judgment of the trial court. State v. Addison 482
64. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Addison 482
65. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the individual has personal knowledge of that matter. State v. Simants 549
66. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality. State v. Wells 584
67. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is war-

ranted only under exceptional circumstances. State v. Wells 584
68. In a will contest the burden of proof or the risk of nonpersuasion on the issue of undue influence is on the contestant and remains there throughout the trial. McGowan v. McGowan 596
69. A court of general jurisdiction has inherent power to protect itself, litigants, and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form. Scudder v. Haug 638
70. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. McCready v. Al Eighmy Dodge 684
71. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties. Bando v. Cole 722
72. An in camera hearing under the provisions of section 28-408.05, R. R. S. 1943, is not required in a prosecution for burglary with intent to commit rape. State v. Eynon 734
73. Evidence of other crimes is admissible where relevant and competent as proof of intent. State v. Eynon 734
74. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Eynon 734
75. A witness whose presence is shown by a party to be essential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses. State v. Eynon 734
76. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. § 27-405, R. R. S. 1943. State v. Eynon 734
77. A motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence on behalf of the party against whom the motion

is directed. Huskinson v. Vanderheiden 739
78. Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Huskinson v. Vanderheiden 739
79. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. Huskinson v. Vanderheiden 739
80. Errors in ruling on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Horn 755
81. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Waegle v. Caterpillar Tractor Co. 824
82. Whether or not the demanding state in extradition proceedings has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. Wise v. State 831

Undue Influence.

1. Under Nebraska law a so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. McGowan v. McGowan 596
2. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence to overcome a presumption of undue influence shifts to the defendants. Golgert v. Smidt ... 667
3. To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence. The undue influence must be such as controls the will of the grantor. Golgert v. Smidt 667
4. The mere existence of a confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confi-

dential relationship influenced her. Golgert v. Smidt . 667
5. A presumption of undue influence is not a presumption contemplated by section 27-301, R. R. S. 1943, and the burden of proof on the issue of undue influence remains on the plaintiff. Golgert v. Smidt 667

Uniform Commercial Code.
1. Under section 9-504(2), U. C. C., a debtor is entitled to any surplus arising from a repossession sale of collateral by a secured party. Reeves v. Associates Financial Services Co., Inc. 107
2. Where a seller assigns an installment contract to a finance company subject to a repurchase agreement or guaranty, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant to the repurchase agreement or guaranty. § 9-504(5), U. C. C. Reeves v. Associates Financial Services Co., Inc. 107
3. A secured party has a duty to sell repossessed collateral in a commercially reasonable manner, and price, as a term of sale, is a relevant consideration in determining whether a sale is commercially reasonable. Reeves v. Associates Financial Services Co., Inc. 107
4. A draft which says it is "payable through" a bank has the effect of designating the bank as a "collecting bank." § 3-120, U. C. C. Ordinarily whether a draft is a "payable through" draft is determinable by an examination of the face of the instrument. However, where the face of the instrument is ambiguous, it is sometimes permissible, depending upon the facts of the particular case, to look behind the instrument to determine whether the bank was in fact performing the functions of a "collecting bank" or those of a "payor bank." Berman v. United States Nat. Bank 268
5. A "payor bank" means a bank by which an item is payable as drawn or accepted, and "collecting bank" means any bank handling the item for collection except the payor bank. § 4-105, U. C. C. Berman v. United States Nat. Bank 268
6. A collecting bank has the duty of making presentment, but is not ordered or authorized to pay the instrument out of the drawer's account. It must exercise ordinary care in presenting an item, in sending notice of dishonor or nonpayment, and in returning an unpaid item. Berman v. United States Nat. Bank 268
7. A payor bank may charge its customer's account for any items which are properly payable even though the

charge may create an overdraft. Berman v. United States Nat. Bank 268
8. A payor bank is required to settle for a demand item provisionally by midnight of the day of receipt, or become accountable for the amount unless it returns the item on that day. However, if it has made timely provisional settlement, it may revoke the provisional settlement up until its midnight deadline, that is, midnight on the day following. §§ 4-301, 4-302, U. C. C. Berman v. United States Nat. Bank 268
9. A payor bank which failed to return an item to its forwarder by the midnight deadline is accountable to its customer for the late return of the item. This means that it is liable for the amount of the item. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
10. A decision by the payor bank not to return a demand item by the midnight deadline makes provisional settlement final. § 4-302, U. C. C. Berman v. United States Nat. Bank 268
11. Section 4-103, U. C. C., permits variation by agreement of some of the provisions of the Uniform Commercial Code. Section 4-103(2), which reads as follows: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled," authorizes clearing agreements creating a deadline earlier than the "midnight deadline." Berman v. United States Nat. Bank 268
12. A secured party has a duty to provide the debtor with reasonable notice of the intended disposition. First Nat. Bank of Bellevue v. Rose 392
13. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. First Nat. Bank of Bellevue v. Rose 392
14. A debtor must be given reasonable notice of an intended disposition of collateral which will provide him with sufficient time to take appropriate steps to protect his interest in the collateral, and ordinarily a minimum of 3 business days is required. First Nat. Bank of Bellevue v. Rose 392

Vendor and Purchaser.

Growing crops are a part of the real estate and pass to the grantee named in a deed of conveyance unless reserved. Schuler-Olsen Ranches, Inc. v. Garvin 746

Venue.

1. Venue is a jurisdictional fact and the Constitution of Nebraska, Article I, section 11, and statute, section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. State v. Liberator 857
2. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. State v. Liberator 857

Verdicts.

1. A verdict will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Abbott v. Northwestern Bell Tel. Co. 11
2. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen 216
3. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. First Mid America, Inc. v. Palmer 224
   Grady v. Denbeck 795
4. 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. Edwards 354
5. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Webb 662
6. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Eynon 734
7. A motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence on behalf of the party against whom the motion is directed. Huskinson v. Vanderheiden 739
8. Where the facts are conceded, undisputed, or are such

that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Huskinson v. Vanderheiden 739

9. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. Huskinson v. Vanderheiden 739

10. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Waegle v. Caterpillar Tractor Co. 824

Waiver.

1. The determination of whether there has been an intelligent waiver of the constitutional right to counsel must depend in each case upon its particular facts and circumstances, including the background, experience, and conduct of the accused. State v. Blunt 82

2. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information is not sufficient to charge an offense. State v. Abramson 135
State v. Blankenbaker 344

3. Participation in the hearing required under section 79-1254, R. S. Supp., 1975, is ordinarily a waiver of any defect in the notice of the hearing. Alexander v. School Dist. No. 17 251

4. A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute. Alexander v. School Dist. No. 17 251

5. Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute. Alexander v. School Dist. No. 17 251

6. Promissory estoppel will not lie against a plea of the statute of frauds, unless the alleged promise relates to the intended abandonment or waiver of a legal right then held or to be held by the promissor. Schott Grain Co. v. Rasmussen 267

7. The filing of a demurrer to a petition is a waiver of the right to insist that the allegations thereof be made more definite and certain. Gilbert v. Vogler 454

Wills.

1. A conveyance will not be construed to create an estate upon condition unless the language is so clear there can be no other construction. Miller v. Miller 171
2. Estates upon condition subsequent are not favored in law, and a condition will be liberally construed to avoid a forfeiture. Miller v. Miller 171
3. A devise of land under condition that the devisee pay $2,000 to each of four other persons within 1 year after the will is admitted to probate conveys the land in fee simple to the devisee subject to leins for the amounts due the four other persons, and a breach of the condition does not work a forfeiture of the estate of the devisee. Miller v. Miller 171
4. Under Nebraska law a so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. McGowan v. McGowan 596
5. In a will contest the burden of proof or the risk of nonpersuasion on the issue of undue influence is on the contestant and remains there throughout the trial. McGowan v. McGowan 596
6. No future interest or estate is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Gade v. Descendants of Unitt 713
7. Future interests created by will are measured by lives in being at the testator's death, rather than at the time the will was executed. Gade v. Descendants of Unitt .. 713
8. Contingent future interests are subject to the rule against perpetuities but vested interests are not. Gade v. Descendants of Unitt 713
9. Where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman if a life estate were to terminate the remainder is contingent. Gade v. Descendants of Unitt 713
10. A devise of the remainder over after a life estate to children as a class vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate from the moment of their birth. Gade v. Descendants of Unitt 713
11. Such words as "at his death" or "at their death" do not have the effect of postponing the vesting of an estate in

remainder to the time of the death of the life tenant. Gade v. Descendants of Unitt 713

Witnesses.

1. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausiblity of explanations, or weigh the evidence. Such matters are for the jury. State v. Chapple 4
   State v. Swayze 149
   State v. Edwards 354
2. In an equity case, 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 facts rather than the opposite. Marfisi v. Spagnola 211
3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, R. R. S. 1943, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. § 27-608, R. R. S. 1943. State v. Fonville 220
4. An inquiry as to whether or not a witness has committed a simple assault and battery is generally not probative of untruthfulness. State v. Fonville 220
5. A witness, not a party to a suit, is entitled to receive witness fees. Nebraska Im-Pruv-All, Inc. v. Sass 261
6. When two defendants are tried together, each having separate counsel, the testimony of one against the other, subject to cross-examination, is not of such a prejudicial nature as to require a separate trial. State v. Edwards 354
7. An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused. State v. Reinert 379
8. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Reinert 379

9. The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses. State v. Pratt 382
10. In-court identification evidence is admissible where such identification is made on a basis independent of a tainted line-up. State v. Pratt 382
11. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint. State v. Pratt .. 382
12. The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial. State v. Pelton 412
13. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the individual has personal knowledge of that matter. State v. Simants 549
14. Under section 27-608(1), R. R. S. 1943, whether a showing of inconsistent statements by the witness is an attack on the credibility of the witness, and whether or not, after such a showing, evidence of the witness' reputation for truth and veracity should be admitted, are matters for the sound discretion of the trial court. State v. King 729
15. A witness whose presence is shown by a party to be essential to the prosecution of the cause may not be excluded from the courtroom under the provisions of section 27-615, R. R. S. 1943, during the testimony of other witnesses. State v. Eynon 734
16. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. § 27-405, R. R. S. 1943. State v. Eynon 734
17. 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 without reference to the findings of the District Court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and 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. Bonsall v. Sterrett 753
18. In personal injury cases where the injuries are objec-

tive and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Evans v. Gear Drilling Co. 841

Words and Phrases.

1. "Premium rates" referred to in an order of the Public Service Commission authorizing transportation of "express" packages means rates higher than general freight rates. Mills v. Nebraska Motor Carriers Assn. 159
2. A lesser included offense is one which includes some of the elements of the crime charged in the information without the addition of any element irrelevant to the original charge. State v. Johnsen 216
3. A "payor bank" means a bank by which an item is payable as drawn or accepted, and "collecting bank" means any bank handling the item for collection except the payor bank. § 4-105, U. C. C. Berman v. United States Nat. Bank 268
4. "Attorneys of record" as used in section 76-715.01, R. R. S. 1943, can only mean the attorneys appearing in the specific action being appealed. Kracman v. Nebraska P. P. Dist. 301
5. Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act. State v. Walker 314
6. A lesser included offense is one which is necessarily established by proof of the greater offense. State v. Colgrove 375
7. The words "due and to become due" express a clear legislative intent to impose liability for all sums due when the bond is filed. State Surety Co. v. Peters 472
8. Lodging is a major, not an incidental expense. State v. Towle 494
9. The term "board" has many connotations and is frequently held to include "lodging." State v. Towle 494
10. The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523, R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life. State v. Stewart 497

11. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts. State v. Rust 528
State v. Holtan 544
12. When the act of killing is totally and senselessly bereft of any regard for human life, it is wanton, deliberate, cruel, and inexcusable. State v. Holtan 544
13. Acts under unusual pressures or influences or under the domination of another person contemplates only outside pressures, not those created by the defendant's own acts. State v. Holtan 544
14. Extreme mental or emotional disturbance means such a disturbance in very great, intense, or severe degree. State v. Holtan 544
15. "Significant history" does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history. State v. Holtan 544
16. Youth or extreme age are suggested for consideration as a mitigating circumstance but the term is necessarily relative as it must be considered in the light of varying conditions. State v. Holtan 544
17. The terms "heinous, atrocious, or cruel" are directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Simants .. 549
18. "Or manifested exceptional depravity by ordinary standards of morality and intelligence" confines this standard only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. State v. Simants 549
19. We interpret aggravating circumstance, subsection (f), section 29-2523, R. R. S. 1943, "The offender knowingly created a great risk of death to at least several persons," to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as by the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations. State v. Simants 549
20. We interpret subsection (d), section 29-2523, R. R. S. 1943, under mitigating circumstances, "The age of the defendant at the time of the crime," to refer to a child of tender age, a juvenile, or to a person of advanced

years where senility may be a factor. State v. Simants 549
21. The term "primary activities" in section 28-964.03, R. R. S. 1943, means only activities conducted for charitable and community betterment purposes other than the organization and operation of a lottery. State v. City Betterment Corp. 575
22. The word "proceeds" in Article III, section 24, Constitution of Nebraska, and in section 28-964.03, R. R. S. 1943, means net proceeds. Reasonable and necessary expenses incident to the organization and operation of a lottery may be paid from lottery proceeds. State v. City Betterment Corp. 575
23. A tender is the offer of a sum of money in satisfaction of a debt and is made by producing and showing the amount to the creditor and expressing verbally a willingness to pay it. Mr. U Inc. v. Mobil Oil Corp. 612
24. While there are in this state no common law crimes, the definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. Eynon 734
25. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient. The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be. Wise v. State 831
26. Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions. Johnson v. Village of Winnebago 845

Work Release.

1. Section 47-406, R. R. S. 1943, permits the court by written order to disburse funds collected on work release. It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses. State v. Towle 494
2. Section 47-404, R. R. S. 1943, provides that a prisoner having work-release privileges shall be liable for such costs incident to his confinement as the court deems appropriate and reasonable, if such are specifically set forth in the order granting work release. State v. Towle 494

Workmen's Compensation.

1. The Nebraska Workmen's Compensation Act bars an action by a third party tort-feasor against an employer for contribution or indemnity based on a claim arising

from the injury. Vangreen v. Interstate Machinery & Supply Co. 29

2. 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. Inserra v. Village Inn Pancake House 168

3. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony. Salinas v. Cyprus Industrial Minerals Co. 198

4. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Salinas v. Cyprus Industrial Minerals Co. 198

5. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation. Novak v. Triangle Steel Co. 783

6. A mistake of law is no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute. Novak v. Triangle Steel Co. 783

7. The limitation provided by section 48-137, R. R. S. 1943, starts to run from the time it becomes reasonably apparent that a compensable claim exists. Novak v. Triangle Steel Co. 783

8. Under our former statute, a child not living with his parent is not conclusively presumed to be dependent on

his deceased parent but must prove such to be the fact. James v. Rainchief Constr. Co. 818
9. Our former statute provided that a partial dependent was entitled to compensation benefits only in the proportion which the amount contributed bore to the total wages of the deceased. James v. Rainchief Constr. Co. 818
10. The burden of proof in a workmen's compensation proceeding is on the claimant. James v. Rainchief Constr. Co. 818
11. Where a deceased father had partially contributed to the support of a child residing with a former wife, such child was a partial dependent. James v. Rainchief Constr. Co. 818
12. When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will not be considered de novo on appeal. James v. Rainchief Constr. Co. 818
13. An agreement relative to payment of workmen's compensation benefits, entered into between the parties, is void and of no effect unless in writing, filed with the compensation court, and approved by the court. James v. Rainchief Constr. Co. 818
14. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge of science, the use of expert testimony is not legally necessary. Evans v. Gear Drilling Co. 841
15. A judgment of the Workmen's Compensation Court may be reversed, modified, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. § 48-185, R. S. Supp., 1976. Johnson v. Village of Winnebago 845
16. In determining the sufficiency of the evidence to support an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from it. Johnson v. Village of Winnebago 845
17. In a workmen's compensation case, the burden is on the claimant to establish that the accidental injury arose in the course of his employment as well as out of his employment. Johnson v. Village of Winnebago 845
18. Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions. Johnson v. Village of Winnebago 845

Wrongful Death.

In an action to recover damages sustained on account of wrongful death, allegations of plaintiff's capacity to sue, death of a person caused by the wrongful act, neglect, or default of the defendant, and the identity of next of kin and that they sustained damage from such wrongful death sufficiently state a cause of action. Gilbert v. Vogler 454

Zoning.

1. Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations. Schaffer v. City of Omaha 328
2. The Omaha ordinances pertaining to signs appear to be reasonable in the light of the public welfare, health, safety, and security. Schaffer v. City of Omaha 328