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STATE OF NEBRASKA, APPELLEE, V. LYNN M. MOORE, APPELLANT.
192 N. W. 2d 157

Filed December 3, 1971. No. 37994.

Post Conviction: Appeal and Error: Criminal Law. Where a defendant in a criminal case invokes our appellate jurisdiction, no post conviction remedy is then available to him. The post conviction remedy is cumulative, not concurrent.

Appeal from the district court for Lincoln County: JACK H. HENDRIX, Judge. Affirmed.

Frank E. Piccolo, for appellant.

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

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

SMITH, J.

The district court denied Lynn M. Moore relief in this post conviction proceeding. It decided that Moore had taken sufficient steps to lodge an appeal to this court in the criminal case. On appeal in this post conviction proceeding he assigns the decision for error.

On an affidavit of poverty Moore was represented by the public defender of Lincoln County in the district court, Judge Stuart presiding. Imposition of sentence and overruling of the motion for new trial occurred October 20, 1969. At the hearing Judge Stuart advised Moore that the latter without cost might lodge an appeal upon filing an affidavit of poverty. The judge also stated that in a noncapital case no provision existed for "an attorney to represent an indigent defendant upon a public appointment basis on an appeal . . . . to the Supreme Court."

In November 1969, Moore in a letter to Judge Stuart set out his intent to appeal, his indigency, and a request for counsel. The letter was filed with the clerk of the

district court on November 19. The transcript contains a reply from Judge Stuart to Moore. The reply again advised Moore that he was not entitled to an attorney at public expense. It continued: "In my opinion the letter you wrote me is not an affidavit since it is not sworn to before a Notary Public, and you do not state therein that you are unable by reason of poverty to pay the costs. Therefore, it is my opinion that you have not perfected an appeal." See, §§ 25-1912 and 29-2306, R. R. S. 1943.

The State impliedly concedes, as it must, that Moore lodged an appeal to this court in the criminal case. See State v. Williams, 181 Neb. 692, 150 N. W. 2d 260 (1967). We decide that appeal this date. See State v. Moore, *ante* p. 498, 192 N. W. 2d 155. Moore's contention is without merit.

Where a defendant in a criminal case invokes our appellate jurisdiction, no post conviction remedy is then available to him. The post conviction remedy is cumulative, not concurrent. See State v. Williams, *supra*.

AFFIRMED.

FRANCIS EVERETT BRANDER, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THOSE OTHER UNDERWRITERS AT LLOYD'S, LONDON, WHO ARE SIGNATORY TO THE COVERAGE REPRESENTED BY CERTIFICATE NO. 501629, ISSUED TO EAGLE RACEWAYS, INC., APPELLANT, V. EAGLE RACEWAYS, INC., A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH LOUIS QUATTROCCHI, APPELLANT.

192 N. W. 2d 142

Filed December 3, 1971. No. 37997.

1. **Trial: Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.
2. **Trial: Insurance.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they

are clear they will be applied according to their plain and ordinary meaning.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Cline, Williams, Wright, Johnson & Oldfather, for appellant Brander.

Joseph J. Cariotto, for appellant Quattrocchi.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Johnston, Grossman & Johnston, for appellees.

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

NEWTON, J.

This is a declaratory judgment action brought in behalf of the underwriters insuring, through Lloyd's, London, Eagle Raceway, Inc., of Eagle, Nebraska, to determine liability, if any, to defend and indemnify Louis S. Quattrocchi, a racing driver, against an action for injuries sustained by another racing participant Lynch Guy Hollamon. We affirm the judgment of the district court in favor of plaintiff.

Hollamon was coowner of an automobile participating in races at the Eagle Raceways, Inc., track. While in the pit area adjacent to the track, he was injured when Quattrocchi, then participating in a race, lost control of his car, catapulted into the pit area, and struck Hollamon. Hollamon brought action against Quattrocchi and Eagle Raceways, Inc. This action has been dismissed as to the latter and is a companion case to that of Hollamon v. Eagle Raceways, Inc., *ante* p. 221, 188 N. W. 2d 710.

Two questions are presented. Defendant Quattrocchi contends that plaintiff cannot be heard in Nebraska courts because it has not fulfilled statutory requirements pertaining to alien or foreign insurers doing business in Nebraska. He says that under such circumstances,

the policy issued is void. His position is inconsistent as he is seeking to recover under the same policy he asserts is void. Defendant Quattrocchi is estopped to assert the invalidity of the very contract upon which he seeks to recover. "A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party." Chicago, B. & Q. R.R. Co. v. State Board of Equalization & Assessment, 170 Neb. 77, 101 N. W. 2d 856. See, also, Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N. W. 2d 416.

Is defendant Quattrocchi, under the existing circumstances, insured as to the Hollamon claim? Plaintiff's policy insures Eagle Raceway, Inc., against damages for personal injuries and destruction of property caused by accident or arising out of the ownership, maintenance, or use of its premises for automobile racing events. It specifically excludes liability to *all participants* and to *all persons in the pit area.* In Endorsement No. 1, it is extended to cover liability of the *assured* for bodily injuries of *participants* provided that the participant executes a Waiver of Liability and Indemnity Agreement and, provided further, assured obtains personal accident insurance for all participants. This endorsement does not purport to insure one participant against damages for injuries sustained by another participant as is the case here. It simply protects Eagle Raceways, Inc., against claims by participants.

Endorsement No. 2 provides the coverage shall be: "* * * extended to include as additional assureds the Car Owners, Drivers, Sponsors and those officials employed by the Named Assured." This extension of coverage remains subject to the exclusions contained in the original policy. These provisions exclude liability *to* participants, to persons in the pit area during racing programs, and to persons on the track or racing surface. The endorsement is designed to protect participants

against claims made against them by persons who are not participants. In this connection, "participant" is defined as: "* * * any person granted permission for any purpose whatever by the Assured to enter the Restricted Area upon signing a Release and Waiver of Liability and Indemnity Agreement." "Restricted Area" is defined as: "* * * the area to which admission by the general public is prohibited, including but not limited to the pit areas, racing surface and infield, including walkways, concessions and other appurtenances thereon."

"A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning." Garrelts v. Department of Motor Vehicles, 176 Neb. 220, 125 N. W. 2d 678. We believe the meaning of the policy is clear and that plaintiff has no liability to the defendant Quattrocchi thereunder.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JACK SMITH, APPELLANT.
192 N. W. 2d 158
Filed December 3, 1971. No. 37999.

1. **Criminal Law: Entrapment.** Where a person has no previous intent or no previous purpose to violate the law but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction.
2. ———: ———. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

S. J. Albracht, for appellant.

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

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

SPENCER, J.

Defendant, Jack Smith, was convicted of having a narcotic drug, cannabis, in his possession with the intent to sell and distribute it. He alleges three assignments of error: (1) The failure of the State to prove its case; (2) the failure of the court to instruct the jury that the police officers must have had reasonable cause to believe he was predisposed to commit the act to legally entrap him; and (3) the failure of the court to admonish the jury that his acts of January 16, 1970, could not be considered as "prior conduct." We affirm.

Defendant, who had a previous felony conviction, testified in his own defense. He testified that he was entrapped by the sheriff. His partner, Daugherty, secreted marijuana in his filing cabinet as well as in the basement of his home which Daugherty used to store ceramics. Defendant adduced evidence that Yanovich, an associate of Daugherty, was an informer and tried to sell information to the Papillion police and to the federal authorities. He admitted that on January 16, 1970, at the request of Yanovich, he delivered a sealed package from a filing cabinet in his office to Yanovich at the Papillion airport. Yanovich on that occasion was sitting in the car with another individual later identified as Jerry Hannon. Defendant handed the package to Hannon and received nothing for it. He did not know what was in the package until the next day when Yanovich told him that it contained marijuana, and that Daugherty had marijuana stored in the defendant's

basement. Defendant then testified that he attempted to contact Daugherty and it was not until a couple of days later that he saw Daugherty and demanded that he remove the marijuana from his basement.

On the 20th of January defendant received a telephone call from someone wanting to get in touch with Yanovich. This individual identified himself as the one who had been with Yanovich at the airport, so defendant gave him Daugherty's telephone number. About 2 or 3 hours later, Daugherty and Yanovich came to his home. They had two bags with them. They wanted defendant to deliver one of the bags to Tara Plaza and leave the other in his shop, and they offered him $100 to deliver the bag to an individual at Tara Plaza. Defendant agreed to do so. He parked his car alongside the only one parked at the Tara Plaza and walked over to that car, which corresponded to the description given him. He recognized the individual in the car as the one who had been with Yanovich the evening of January 16th. Defendant delivered the package and received five $20 bills. Deputy sheriff Barrett then popped out of the trunk of the car and defendant was arrested.

The evidence of Jerry Hannon, who was an undercover agent for the sheriff, is in direct conflict with that of the defendant. It is Hannon's testimony that on the evening of January 16 he gave the defendant $100 supplied by the sheriff for the package he delivered, and asked him if he could get more, and the defendant replied: " 'Yeah.' " Hannon further testified that he called the defendant on the 20th and set up a buy. The testimony is as follows: "I said, 'This is Jerry and I would like to buy a pound.' And he said, 'I don't know if I can get to you.' He said it wouldn't be until about 8:30 that he could make it. And I told him I was at the Cabay Lounge; how about meeting me there at the lot? 'I'll meet you at 8:30.' " Hannon then notified the sheriff, carrying the marked money in his billfold

to make the buy, and went to the agreed location with deputy sheriff Barrett who hid in the trunk of the car. Hannon further testified: "I motioned for him to come over to my car; and he came over and got in. And I saw that he had more than a pound of marijuana. And I said, 'I ain't got enough to buy that, Jack. All I've got is a hundred dollars.' He said, 'I didn't have time to cut it down. I'll do you a favor, and you take it.' I gave him the money; and he put it in his billfold. And he said, 'I'll see you later.' And Mike jumped out of the trunk and arrested him."

Facts constituting entrapment, which is in the nature of an affirmative defense, are ordinarily to be determined by the jury or the trier of fact in each individual case, and its findings will be disturbed only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. State v. Ransburg, 181 Neb. 352, 148 N. W. 2d 324.

In the Ransburg case, we followed the majority holding in Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249, and held that where a person has no previous intent or no previous purpose to violate the law but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense.

The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment. There was a serious conflict in the evidence and the issue became one of credibility for the jury.

On the record, the jury could readily find there was no enticement herein; that the State did no more than present an opportunity which the defendant accepted.

We have reviewed the instructions of the court and find that they are proper under the evidence adduced herein. The court fully instructed on defendant's defense and put the burden on the State to prove beyond a reasonable doubt that defendant was not improperly induced to commit any unlawful conduct.

We find the evidence sufficient to sustain the conviction and affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE J. ORTIZ, APPELLANT.
192 N. W. 2d 151

Filed December 3, 1971. No. 38022.

1. **Criminal Law: Evidence.** In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged.
2. **Criminal Law: Evidence: Jury.** It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
3. **Criminal Law: Evidence.** A person of sound mind is conclusively presumed to intend the obvious and probable consequences of his voluntary act.
4. ———: ———. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Jeffrey L. Orr and Richard J. Bruckner, for appellant.

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

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

NEWTON, J.

The defendant, Lawrence J. Ortiz, appeals from a conviction of murder in the first degree. He challenges the sufficiency of the evidence to sustain the conviction and asserts there was error in the admission of evidence and in a denial of the right to introduce surrebuttal testimony. We affirm the judgment of the district court.

The defendant and one Charolette Elaine Whittington had traveled to Ohio and then back to Omaha, Nebraska, together. On the evening of Friday, August 28, 1970, they drove to Lincoln, Nebraska, and registered together in a motel. On the next evening, Saturday, they were out eating and drinking until about 1:30 a.m. Sunday morning. The defendant registered alone at a motel in Kearney, Nebraska, at about 9:30 a.m. on Sunday, August 30, 1970. He remained at least until evening but was gone at 7 a.m. Monday morning and in the early afternoon of Monday, August 31, 1970, sold his automobile to a Lincoln used-car dealer. He was taken by taxicab from a Lincoln hotel, together with his luggage, to a bus station that same afternoon and told the driver he was in a hurry to catch the bus. His automobile was subsequently found to have human blood spots on the rear floor mat and on the chrome strip under the right door.

On the afternoon of Monday, August 31, 1970, a grass or brush fire occurred in an area adjacent to the Platte River approximately 15 miles west of Kearney, 3 miles south and 1¼ miles east of Elm Creek, Nebraska. The body of Charolette Elaine Whittington was found on the edge of the burned patch. The clothing was pushed up

under the armpits and there were marks indicating it had been dragged from a lane referred to as a river trail.

The autopsy revealed that Charolette had been badly beaten around the face and head with several teeth being knocked out and her hands had been severed. These do not appear to have been found. The body was burned in certain areas and was practically bloodless. The doctor testified that the only blood he obtained, about a tablespoonful, had to be obtained directly from the heart. He further stated that after death occurs, there would be little bleeding, only a little seepage, that there were no major lacerations of the scalp, and death was unlikely to occur from bleeding at the lips which revealed the worst lacerations. The only large lacerations found resulted from the cutting off of the hands. Death resulted from trauma and he could not fix the time of death but said she may have been dead a day or two. Examination of the blood revealed very small quantities of alcohol and barbiturates. Not enough to cause death.

After defendant's arrest, while being fingerprinted by a deputy sheriff, he informed the deputy "that he and this other woman had an argument after a dinner," that she borrowed his car to get "a fix," and he went to sleep. The next morning his car was back at the motel, but she did not appear. He saw blood in the car and got scared but did not notify the police.

Defendant's evidence indicates Charolette was a narcotic addict, an informer who was in trouble with unspecified black people in Omaha, and afraid of reprisals. His own testimony indicates that on the return trip to the motel early Sunday morning, she called someone about getting "a fix"; two men called at the motel for her and she left with them, taking defendant's car; he arose about 8 a.m. that morning, found the car, but did not find Charolette, called her cousin in Omaha to learn if she were there and on being told she was not, thought she may have gone to Grand Island or Kearney as they

had been talking of visiting relatives of hers in that area. He did not know where the relatives lived, but drove to Grand Island, looked in the bars, and then went on to Kearney. Not finding her, he returned to Lincoln where he claims to have stayed for 4 days. Then on reading about Charolette's death, he became frightened, knowing of his own past record, and went to Wichita, Oklahoma City, Albuquerque, and Texas before returning to Omaha.

The evidence is circumstantial for the most part, but we believe it is sufficient to sustain the verdict. The evidence of the State indicates defendant was the last person to see Charolette alive. He was in the general vicinity of the place where the body was found as early as 9:30 a.m. on that Sunday morning, when her death had to have occurred, and there were human bloodstains in his automobile. Fibers similar in color and texture to those used in the rear floor mat of defendant's car were found on Charolette's clothing. In addition, he had volunteered to a deputy sheriff that: "* * * he and this other woman had an argument after a dinner." He failed to notify the police when she disappeared and fled to the southwest after disposing of the bloodstained car. The defendant's story of Charolette's leaving with strangers is completely uncorroborated. Had the strangers killed her, they would have had to transport her body to the spot where it was found. His own account of his actions is not conducive to belief. He told the deputy sheriff that he saw bloodstains in the car on Sunday morning, but omits this in his testimony. If he found bloodstains, he must have suspected something had happened to her. Notwithstanding, he failed to notify the police and instead now says he thought Charolette had gone to visit relatives in the area where her body was found. This conflicts with his theory that she was killed by the two strangers. He fails to explain how he expected her to get there or why she should leave without his knowledge. Also, he claims not to have left Lincoln until after 8 a.m. and to have looked through

the Grand Island bars on his way to Kearney yet he was in Kearney at about 9:30 a.m., checked into a motel, and, according to his statement, left the same day.

"In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged. * * *

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed." State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. We find that the evidence fails to reflect any reasonable hypothesis of innocence but on the contrary, sustains a rational theory of guilt.

Defendant contends that the essential elements of premeditation, deliberation, malice, and purpose or intent to kill have not been proved. These elements are mental processes which are conceived and hidden in the mind. They are rarely susceptible of proof by direct evidence but must be ascertained by reference to such outward manifestations as the acts of the person concerned and from all the facts and circumstances. In the present instance, the jury could reasonably find that Charolette bled to death from the severance of her hands. The undisputed medical evidence indicates that her body was drained of blood which could only have occurred while her heart was still beating and that her other injuries could not have resulted in such extensive bleeding. They could also find that defendant was aware, as a matter of common knowledge, that bleeding and death would ensue from such injuries. The severing of the hands was of necessity a deliberate and premeditated act and when performed while Charolette was still

alive, although probably unconscious, may well have been deemed by the jury as intended to bring about her death. If so, the elements of malice, intent to kill, deliberation, and premeditation were necessarily present. A person of sound mind is conclusively presumed to intend the obvious and probable consequences of his voluntary act. See, Baskins v. State, 138 Neb. 334, 293 N. W. 270; Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560.

It is asserted that exhibits consisting of pictures taken of the body at the location and in the condition found were erroneously admitted because not competent and relevant. These pictures served to show the nature of the area where the body was found, the conditions resulting from the brush fire, the condition of the body, the nature of the injuries, and the arrangement of the clothing which indicated it had been dragged. The foundation evidence is unchallenged and this evidence was relevant and material. Two exhibits consisting of pictures of portions of the body taken after its removal are likewise criticized. These pictures were introduced to show certain peculiarities found on the body which facilitated identification. They too were relevant and material for the purpose used. "A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily proper evidence of anything of which it is competent and relevant for a witness to give a verbal description." State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443. See, also, Davis v. State, 171 Neb. 333, 106 N. W. 2d 490.

The State produced one rebuttal witness, the taxicab driver who testified to taking defendant to the bus station. Defendant now asserts error on the ground he was denied the right to answer or rebut this testimony. At no time did defendant request this or indicate to the court that he desired to introduce evidence of this nature. The assignment is without merit.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. MOROSIN, APPELLANT.
192 N. W. 2d 165

Filed December 3, 1971. No. 38042.

Sentences: Appeal and Error: Statutes. Unless an abuse of discretion appears, we will not disturb a sentence within statutory limits.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

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

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

SMITH, J.

An information charged that defendant knowingly had concealed a stolen motorcycle with the intent to defraud the owner. Upon a plea of guilty the district court sentenced him to imprisonment for 2 to 3 years. On appeal defendant complains that the sentence was excessive. The governing statute, section 28-522, R. R. S. 1943, prescribed imprisonment for not less than 1 year nor more than 10 years.

We may reduce a sentence when in our opinion it is excessive, and we are under a duty to render such sentence as the evidence may warrant. See § 29-2308, R. R. S. 1943. Unless an abuse of discretion appears, we will not disturb a sentence within statutory limits. See State v. Escamilla, *ante* p. 457, 191 N. W. 2d 548 (1971).

The record persuades us not to reduce the sentence. The judgment is affirmed.

AFFIRMED.

THOMAS J. WINSTON, APPELLEE, V. CLOIS WAYMAN DAVIS, JR., AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANTS, METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, INTERVENER-APPELLEE.

192 N. W. 2d 413

Filed December 10, 1971. No. 37901.

1. **Verdict: Jury: Evidence: Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law.
2. **New Trial: Jury: Evidence: Appeal and Error.** When a new trial is sought on the ground of misconduct by the jury, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.
3. **New Trial: Motions, Rules, and Orders: Jury: Appeal and Error: Trial.** Where a motion for a new trial presents a question of fact concerning the regularity of the jury's deliberations, the trial court becomes the trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong.
4. **Automobiles: Statutes: Negligence.** A statute granting the right-of-way to the driver of an emergency vehicle, over other drivers using the highway, does not relieve him from the responsibility of driving with due regard for the safety of all persons on the highway, and does not protect him from the consequences of arbitrarily exercising such right-of-way.
5. ———: ———: ———: The driver of a vehicle upon a highway shall yield the right-of-way to law enforcement vehicles when operated on official business and the driver thereof sounds audible signal by bell, siren, or exhaust whistle. This provision shall not operate to relieve the driver of a law enforcement vehicle from the duty to drive with due regard for the safety of all persons using the highway nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of such right-of-way.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Herbert M. Fitle, James E. Fellows, and George S. Selders, Jr., for appellants.

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellee.

Cecil S. Brubaker, for intervener-appellee.

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

WHITE, C. J.

In this intersection automobile accident a police cruiser car of the defendant City of Omaha, while chasing a speeder known to be living in the vicinity, went through a stop sign and collided in an intersection with the plaintiff's motorcycle. From a jury verdict and judgment of $18,601, the defendant City of Omaha appeals claiming excessiveness in the verdict, misconduct of the jury in its deliberations, and error in the instructions.

Plaintiff sustained four fractured front teeth, cuts in his lower lip, one of which went completely through the skin, facial abrasions, an inch-long deep laceration of the tongue, and abrasions of his chest, shoulder, and back. The evidence as to his out-of-pocket expense and loss of earnings and medical, dental, and hospital expense sustains a finding of $3,601. The evidence shows a 10-day period of hospitalization and will sustain a finding that the plaintiff's speech has been impeded as the result of the deep scarring of his tongue and that he has permanent facial scars which will continue to be a source of embarrassment to him. The city's attempt to color match the cases of O'Brien v. J. I. Case Co., 140 Neb. 847, 2 N. W. 2d 107; James v. Hayden Bros., 97 Neb. 619, 150 N. W. 1013, and other cases is inapposite. The area of pecuniary allowances for pain and suffering is a highly subjective area. We find no analogy in the older cases.

Modern conditions allow a permissible different response to facial scars and disfigurement. Also, the impact of inflationary conditions renders the color of past decisions to this area less visible. In this case, inflationary considerations alone destroy the invitation to exercise the righteously passionate judicial response demanded as a requirement for setting aside a jury verdict. See, Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186; Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. We find no merit to this contention.

The city's attack upon the misconduct of the jury is two pronged. The first is an assertion of a coercively compelled verdict. This claim rests upon the hearsay testimony of two jurors concerning a speculative communication from the bailiff to the foreman or from the foreman alone allegedly used as pressure against three of the dissenting jurors, after 2 days of deliberation with the vote standing 8 to 4 or 9 to 3 in favor of the plaintiff. We need not explore any of the refinements of the historic reluctance of courts to invade from hindsight the absolute independence and integrity of jury deliberations. The hearsay testimony of the two jurors is directly refuted and denied by the bailiff and the foreman whose version was undoubtedly accepted by the trial judge in exercising his discretion in refusing to grant a new trial. The evidence of misconduct of the jury must be clear and convincing and the lower court's decision as to disputed facts and reference thereto will not be disturbed on appeal unless clearly wrong or constituting an abuse of discretion on the trial court's part. Haarberg v. Schneider, 174 Neb. 334, 117 N. W. 2d 796. There is no merit to this contention.

The other challenge is based upon a controversy arising in the heated discussion of taking the final votes in arriving at the 10 to 2 verdict in the case. It appears that the votes for the plaintiff in the 2 days of deliberation had increased from a majority of 8 to 4 to 9 to 3. The

most that we can gather from the rather vague testimony in this area is that the three dissenting jurors agreed that one of them would go over to the majority. This is not an agreement in advance to abide by a majority vote when and if taken. It is not a compromise verdict in the sense of a quotient verdict (agreeing in advance to an averaging of amounts). On the contrary once the continued and increasing majority was known to the jurors, the response in the case at bar was nothing more than the typical and legitimate pressure of a majority view upon the minority jurors. After continuous discussion the three dissenting jurors in the case at bar agreed that one of them would go over to the majority in order to reach a final verdict. We see no misconduct of the jury in this situation. Fortunately, this very distinction in an almost identical situation was passed on in Boddeker v. Olschewske, 127 Tex. 598, 94 S. W. 2d 730. The court in that case stated as follows: "The agreement * * * condemned was one made in advance when it was not known how the majority would vote. An agreement made after it became known on which side the majority had voted, the effect of which was that the minority would defer to the majority and make the vote unanimous, does not constitute misconduct." We find no merit to this contention.

A city policeman, driving a cruiser car, was chasing a known speeder who lived in the vicinity where the accident occurred. The evidence shows that he was traveling at a speed beyond the speed limit and went through a stop sign immediately prior to the time of the intersection accident involved in this case. The duties and responsibilities of a driver of an emergency vehicle are the critical issues in this case. The trial court fully instructed upon all of the applicable statutes to this situation. Then in instruction No. 15, following NJI No. 7.04, the trial court gave the following instruction: "Ordinarily, the driver of a vehicle about to enter a highway protected by a stop sign must stop his vehicle,

look for approaching traffic on the protected highway, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent or obviously dangerous for him to proceed into the intersection. If there is a vehicle approaching on the protected highway, the vehicle entering such highway must wait until the approaching vehicle has passed, unless a prudent person would have reasonable ground to believe that such vehicle is so far distant from the intersection and traveling at such a speed that he could safely enter in advance thereof.

"The duty, in such a situation, of the driver of a law enforcement vehicle, either to stop, or slow, or yield the right-of-way, as well as the duty of the driver of a vehicle on the protected street, depend upon all the circumstances, and your judgment upon those issues, as well as upon all the issues in this case, must be based upon all the circumstances as shown by the evidence."

It is asserted in the argument that the district court's instruction No. 15 failed to advise the jury of the rights of a driver of an emergency vehicle and advised it that the driver of a police department vehicle on official business, and sounding an audible signal by siren, should have the right-of-way and the drivers of other vehicles shall yield such right-of-way to such police department vehicle. It is difficult to follow the argument of the city in this respect. The trial court properly stated all of the applicable statutes and the governing case law. Hammon v. Pedigo, 173 Neb. 787, 115 N. W. 2d 222. It is obvious from reading instruction No. 15 along with instruction No. 13 that the trial court gave an appropriately comprehensive instruction which properly directed the jury to balance the acts of the driver of the emergency vehicle depending on all of the circumstances in the case. Far from error the instruction as applied to the case is a model of balance and clarity. Without detailed recital, a very pertinent part of the surrounding circumstances brought to the jury's attention in this case,

without objection, involved the fact that the driver of the police cruiser was acquainted with the speeder he was chasing, his identity was known to the policeman who was familiar with where he lived and was following him in the vicinity of his residence. In this context, the applicability of the instructions given by the trial court is obvious. There is no merit to this contention.

The assignments of error may not be sustained. The verdict and judgment of the district court are free from error and are affirmed.

AFFIRMED.

NEWTON, J., dissenting.

The statutes of Nebraska mentioned in the majority opinion render inapplicable to police vehicles engaged in the pursuit or apprehension of law violators the ordinary statutory rules regarding speed limits, stop signs, and right-of-way. Under such circumstances, the disregard or violation of such rules *cannot be considered evidence of negligence,* yet the court so instructed in instructions Nos. 12 and 15.

These ordinary traffic rules are completely irrelevant in cases such as this. The police vehicle, sounding its siren, may travel at any speed necessary, may disregard stop signs, and its driver may rely on his right to have the right-of-way, subject only to the provision that it be operated with due regard for the safety of others.

The sole issue in this case is whether or not the police vehicle was operated with due regard for the safety of others upon the highway. This proposition must be determined in the light of what a person of ordinary prudence would or would not have done under the same circumstances. It ordinarily presents an issue for the determination of the jury, but it is error to cloud the issue with an instruction that a violation of the inapplicable statutory rules of the road may be considered as evidence of negligence.

A high speed chase through city streets is always a hazardous project and the same rule of law should be

applied as is used in other types of cases. The police are entitled to assume that their right-of-way will be respected unless and until they have knowledge to the contrary.

The rules adopted in the majority opinion have the effect of making the drivers of emergency vehicles insurers of all other travelers on the highway. The instructions given and approved establish the rule that such drivers may be considered negligent *solely* because they exceed the speed limit, run a stop sign or red light, or avail themselves of their statutory right-of-way. It is tantamount to saying that under such circumstances the driver of an emergency vehicle *may always be found to be negligent.*

In my judgment, the judgment in this case should be reversed and the cause remanded for a new trial under proper instructions.

BOSLAUGH, J., joins in this dissent.

SPENCER, J., dissenting.

I agree fully with the dissent of Newton, J., but I also believe that there is an even more basic reason why the judgment herein cannot stand, and a new trial must be granted.

The majority handles the misconduct of jury issue in a very summary manner. Three of the jurors, after continuous discussion, could not agree with the majority vote. They were informed by the foreman, supposedly because he was so told by the bailiff, that the jury must arrive at a verdict. The three of them were unwilling to change their vote but because they had been told there could not be a hung jury, they agreed that they would draw straws and the loser would be required to change his vote even though he was not in agreement with the verdict. I cannot see how this can be other than a coerced verdict.

The law is very clear that any method of arriving at a verdict except through the exercise of judgment after weighing the evidence is improper. This cer-

tainly would preclude the method employed here of agreement to join in a verdict regardless of the juror's individual judgment. See, 89 C. J. S., Trial, § 472, p. 111; 53 Am. Jur., Trial, § 1079, p. 710; Annotation, 73 A. L. R. 93.

The majority opinion has the following language: "Fortunately, this very distinction in an almost identical situation was passed on in Boddeker v. Olschewske, 127 Tex. 598, 94 S. W. 2d 730." Unfortunately for the majority, the Boddeker case did not involve chance or a lottery as this one does. In a subsequent case, Kindy v. Willingham, 146 Tex. 548, 209 S. W. 2d 585 (1947), the Texas court held: "A verdict should not be the result of chance or lot but should be arrived at through the deliberate judgment, sound reflection and conscientious conviction of the jury."

Every verdict should be arrived at through deliberate judgment, sound reflection, and the conscientious conviction of the jury, and should never be the result of chance or lot. This case is not too different from the quotient verdict cases heretofore before this court. In Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516 (1951), this court held that if there is an agreement to be bound and the jurors vote accordingly, then the court must grant a new trial. As the court said, the vice of such a verdict is that it does not represent the deliberate judgment of the jurors and it is subject to manipulation and partakes of the nature of a lottery. See, also, Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757 (1931); Schrage v. Miller, 123 Neb. 266, 242 N. W. 649 (1932).

The following language quoted from Cooley, J., at 46 Mich. 628, in Gillaspie v. Nebraska Tractor & Equipment Co., 175 Neb. 401, 122 N. W. 2d 17, is very pertinent herein: " ' "The law contemplates that they (the jury) shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring

jury trial into discredit and to convert it into a lottery." See also Meyer v. Shamp, 51 Neb. 424, 430.' "

IN RE APPLICATION OF LANETA M. ABLER.
LANETA M. ABLER, APPELLEE, V. HERMAN BROS., INC., ET AL., APPELLANTS.
192 N. W. 2d 410

Filed December 10, 1971. No. 37949.

1. **Carriers: Public Service Commissions: Trial.** In a stock transfer proceeding under the Motor Carrier Act, the personal appearance of the applicant at the hearing is not necessarily a condition precedent to approval of the proposed transfer by the Nebraska State Railway Commission.
2. ———: ———: ———. Subject to the Motor Carrier Act, determination of the factors relevant to the public interest in a stock transfer proceeding is left primarily to the Nebraska State Railway Commission.
3. **Carriers: Public Service Commissions: Trial: Evidence.** In a stock transfer proceeding under the Motor Carrier Act, the Nebraska State Railway Commission in weighing the public interest possesses a discretion to decide whether evidence of an allied employment and noncompetition agreement is necessary.
4. **Appeal and Error: Public Service Commissions: Administrative Law.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission within commission jurisdiction, questions for determination are sufficiency of the evidence to support the findings, adequacy of the findings and conclusions to support the order, and the reasonableness or arbitrariness of the order.

Appeal from the Nebraska State Railway Commission. Affirmed.

James E. Ryan and Viren, Epstein & Leahy, for appellants.

Duane W. Acklie, Gailyn L. Larsen, and Acklie & Peterson, for appellee.

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

SMITH, J.

The Nebraska State Railway Commission approved an agreement for purchase of all issued and outstanding shares of capital stock in Canada Transport, Inc., a common carrier. Protestants appeal. They assert insufficiency of the evidence and arbitrariness of the approval order.

The application by the purchaser, LeNeta Abler, was also signed by her husband, Paul Abler, who was doing business as Central Transport Co. Central Transport, a common carrier, held authority in part to transport bulk products to destinations located in ten counties of Nebraska.

Testimony of Paul Abler is as follows. Central Transport and Canada were competing to some extent. Upon approval and transfer of the shares he would manage Canada, relinquishing a successful management of Central Transport to his assistant. The two companies would operate separately for family and financial reasons.

LaNeta Abler, who inferably was not knowledgeable in transportation business, neither testified nor personally appeared.

The record includes evidence of equipment of both companies, abstracts of shipments transported by Canada, the stock transfer agreement, and testimony to the financial position of LaNeta and to provisions for employees of Canada.

Testimony of Earl Canada, the proposed seller and sole stockholder of Canada, is as follows. He and LaNeta agreed in writing to noncompetition by him and to her employment of him in an advisory capacity for 15 years. The consideration was payable monthly. He did not recall the consideration, having left the agreement at his office in Lexington. This allied agreement was not offered in evidence.

Approval by the commission of an application for stock transfer under the Motor Carrier Act must rest

upon findings that: (1) The transaction will be consistent with the public interest; (2) it will not unduly restrict competition; and (3) the applicant is fit, willing, and able to perform the proposed service properly. § 75-320, R. R. S. 1943.

Protestants argue that LaNeta's absence constituted a failure of evidence of her fitness, willingness, and ability. The argument is not well taken. The personal appearance of the applicant at the hearing is not necessarily a condition precedent to the commission's approving the proposed transfer. Cf. Bridgeways, Inc. - Purchase - Consolidated Freight Co., 50 M.C.C. 175, 180 (1947). Paul Abler, the man with the requisite knowledge and experience, testified to her fitness, willingness, and ability. The testimony under the circumstances was sufficient.

Protestants argue that nonproduction of the allied agreement rendered the evidence insufficient to meet the remaining statutory requirements.

Subject to the Motor Carrier Act, determination of the factors relevant to the public interest in a stock transfer proceeding is left primarily to the commission. Courts generally have not explicated prohibitions against undue restriction of competition among carriers. Cf. Jeffries-Eaves, Inc. v. Gettel, Inc., 173 Neb. 337, 113 N. W. 2d 476 (1962); United States v. I.C.C., 396 U. S. 491, 90 S. Ct. 708, 24 L. Ed. 2d 700 (1970); Trieneus, "The Role of Competition in Transportation and Communications." 39 A.B.A. Antitrust L. J. 470 (1970-71).

No one denied protestants the right to inspect or offer the allied agreement in evidence. Their argument, for which they cite The Pittson Co. - Control - Brink's Inc., 75 I.C.C. (Fin. Rep.) 345 (1958), 80 I.C.C. (Fin. Rep.) 179 (1959). That Canada's testimony without the allied agreement constituted insufficient evidence might prevail elsewhere. See, Youngstown Cartage Co. - Control and Merger, 93 M.C.C. 318 (1963); McAllister Bros., Inc. - Control and Merger, 317 I.C.C. 459 (1962);

Ephraim, "Purchase Price Issues in Motor Carrier Section 5 Proceedings," Transportation Law Institute: Finance, Transfer and Security Cases 177, 188-189 (1969). The railway commission and this court may properly consider rulings by the Interstate Commerce Commission. Preisendorf Transport, Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865 (1960).

We decline to adopt the federal rules asserted by protestants. Some de-regulation may also be in the public interest. The railway commission in weighing the public interest possesses a discretion to decide whether evidence of an allied employment and noncompetition agreement is necessary. In the present case there was no abuse of discretion.

On appeal to the Supreme Court from an order of the Nebraska State Railway Commission within commission jurisdiction, questions for determination are sufficiency of the evidence to support the findings, adequacy of the findings and conclusions to support the order, and the reasonableness or arbitrariness of the order. Andrews Van Lines, Inc. v. Smith, 187 Neb. 533, 192 N. W. 2d 406.

Applying the foregoing rule, we affirm the order.

AFFIRMED.

IN RE APPLICATION OF MADELINE M. SMITH, DOING BUSINESS AS SMITTY'S VAN & STORAGE, OMAHA, NEBRASKA. ANDREWS VAN LINES, INC., APPELLANT, IMPLEADED WITH ACE MOVING & STORAGE CO., INC., ET AL., APPELLEES, V. CHARLES O. SMITH, DOING BUSINESS AS SMITTY'S VAN & STORAGE, OMAHA, NEBRASKA, APPELLEE.

192 N. W. 2d 406

Filed December 10, 1971. No. 37954.

1. **Public Service Commissions: Administrative Law: Motions, Rules, and Orders.** The Nebraska State Railway Commission has jurisdiction to reconsider and vacate an order on its own

motion within 30 days after the mailing of a copy of the order and before an appeal has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected, the power of the commission to reconsider an order on its own motion terminates.

2. **Case Overruled.** Strasheim v. Martin, 169 Neb. 787, 101 N. W. 2d 161, overruled, in part.
3. **Public Service Commissions: Administrative Law: Motions, Rules, and Orders.** A transfer of operating rights may be approved after notice and hearing if the Nebraska State Railway Commission finds that the transaction will be consistent with the public interest, does not unduly restrict competition, and the applicant is fit, willing, and able to perform the service.
4. ———: ———: ———. An order of the Nebraska State Railway Commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal.
5. **Public Service Commissions: Administrative Law.** The determination of what is consistent with the public interest is peculiarly for the determination of the Nebraska State Railway Commission.
6. **Public Service Commissions: Administrative Law: Evidence.** Evidence which would require a finding that a certificate authorizing the transportation of general commodities was dormant in part may not require a similar finding as to such certificate authorizing the transportation of household goods because of the differences between the two operations.

Appeal from the Nebraska State Railway Commission. Reversed.

Nelson, Harding, Marchetti, Leonard & Tate and Earl H. Scudder, for appellant.

Viren, Epstein & Leahy, for appellee Smith.

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

BOSLAUGH, J.

This is an appeal from a proceeding before the Nebraska State Railway Commission upon the application of Madeline M. Smith for authority to acquire the operating rights held by her husband, Charles O. Smith, who died on January 16, 1968. Charles O. Smith held a certificate of public convenience and necessity which

authorized the transportation of household goods and office furniture between all points and places in Nebraska over irregular routes. The business operated as Smitty's Van & Storage.

Protests were filed by eight other carriers and a complaint was filed by five carriers alleging that the certificate sought to be transferred was dormant. On June 16, 1969, the commission found that a limited operation had been conducted, that the authority should be restricted to points within a 250-mile radius of Omaha, Nebraska, and that all shipments must originate or terminate within a 60-mile radius of Omaha. The commission authorized the transfer of the authority as modified, and also authorized the lease of the certificate as requested by the applicant. The order was mailed June 23, 1969.

A motion for rehearing was filed by the applicant on June 27, 1969, and a supplemental motion for reconsideration was filed on December 4, 1969. On March 20, 1970, the motion for rehearing was overruled.

On April 13, 1970, the commission, on its own motion, reconsidered its order of March 20, 1970, and vacated and set it aside. On April 27, 1970, the commission authorized the transfer of the authority to the applicant without restriction. It is from this order that the protestant, Andrews Van Lines, Inc., appeals.

The protestant contends that the commission had no jurisdiction on April 13, 1970, to reconsider on its own motion its order of March 20, 1970, and that the order of April 13, 1970, vacating and setting aside the order of March 20, 1970, is void.

The protestant relies upon Strasheim v. Martin, 169 Neb. 787, 101 N. W. 2d 161, which held that the commission lost jurisdiction when it overruled a motion for rehearing in a proceeding upon an application for a certificate of public convenience and necessity. In the Strasheim case the commission had granted the application. Then, on the same day, the commission overruled

the motion for rehearing; reconsidered its previous order granting the application; and then denied the application. Upon appeal this court held that the commission lost jurisdiction of the proceeding when it overruled the protestant's motion for rehearing.

The applicant contends that the time for appeal from the order of March 20, 1970, did not begin to run until March 31, 1970, the date on which a copy of the order was mailed; and that until an appeal was perfected, the commission had control of its order and could vacate and set it aside. We have reconsidered our holding in the Strasheim case and have reached the conclusion that it is too restrictive.

The commission is a constitutionally created body that exercises judicial powers. This distinguishes it in certain respects from other agencies which exercise purely administrative powers. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N. W. 2d 922. The power to decide usually implies the power to reconsider. Albertson v. Federal Communications Comm., 182 F. 2d 397. The Legislature has recognized the power of the commission to reconsider an order upon the motion of a party. § 75-137, R. S. Supp., 1969. We think a similar power exists upon the motion of the commission itself. Such a power ordinarily expires at the end of the time within which an appeal may be taken. Anchor Casualty Co. v. Bongards Co-operative Creamery Assoc., 253 Minn. 101, 91 N. W. 2d 122, 73 A. L. R. 2d 933.

Section 75-137, R. S. Supp., 1969, provides that an appeal to this court may be taken within 30 days after the mailing of a copy of the order. An appeal is deemed perfected and this court has jurisdiction of the cause when a notice of appeal has been filed and the docket fee paid as required by law. We hold that the commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to this court has been taken. Upon the

expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to this court, the power of the commission to reconsider its order upon its own motion terminates.

In this case the order of March 20, 1970, which was mailed to the parties on March 31, 1970, was vacated and set aside by the commission on April 13, 1970. No appeal had been perfected and the 30-day period commencing March 31, 1970, had not expired. The order of April 13, 1970, was, therefore, within the jurisdiction and power of the commission.

The other assignments of error relate to the finding of the commission that the application for transfer of the operating rights should be granted without restriction. Section 75-318, R. S. Supp., 1969, provides that the commission may authorize a transfer of operating rights if, after notice and 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 * * *."

Section 75-134, R. S. Supp., 1969, requires that an order of the commission, entered after a hearing, contain a discussion of the basic facts, the ultimate facts, and the commission's reasoning or other authority. An order of the commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal. Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388. In the order of April 27, 1970, the commission made no finding other than that the application should be granted. The order is clearly irregular and must be set aside for this reason.

Section 75-321, R. R. S. 1943, which provides that the authority conferred by a certificate held by a deceased person shall continue temporarily with his legal representative is not applicable here. The order of April 27, 1970, authorizes a permanent transfer of the authority to the applicant.

The protestant further contends that the certificate involved in this case was dormant, at least in part, and that the transfer of the certificate would result in a new or different service or operation as to territorial scope, so that a transfer of the certificate could be approved only upon proof and a finding that the transfer is required by public convenience and necessity. § 75-318, R. S. Supp., 1969. In this regard the evidence showed that the operations under the certificate were not as extensive as those of some of the applicant's competitors, and that recent operations had been largely in Omaha and the surrounding area.

The certificate involved in this case authorized the transportation of household goods. In determining the issue of dormancy, consideration must be given to the differences between the transportation of household goods and the transportation of general commodities. This has been recognized by the Interstate Commerce Commission in a number of cases. In United States Van Lines, Inc. — Purchase — J. Norman Geipe Van Lines, Inc., 87 M.C.C. 467, 470, the commission stated: "The transportation of household goods is a highly specialized service involving the use of equipment, facilities, and specially trained employees not ordinarily used in general commodity transportation. Also, the service rendered is essentially a call and demand type of operation performed for individual shippers who may never again have need for the service. These factors have caused the rejection of the strict approach on the issue of dormancy, or limited or sporadic service involving transfer of such type of authority."

In Myers Transf. & Storage Co. — Purchase — Pioneer Storage Co., 85 M.C.C. 264, the commission said: "In a long line of cases, for example, Evanston Fireproof Whose. — Control — Allied Van Lines, 40 M.C.C. 577, 594 (1946), and Geitz Stor. & Moving Co., Inc. — Investigation of Control, 65 M.C.C. 257, 296 (1955), the specialized nature and problems of household-goods trans-

portation, applicable to large and small carriers thereof, have been discussed. Clearly, it has been recognized that the stricter approach justified for withholding approval of the proposed purchase of general-commodity, regular-route operating rights, would not be appropriate to household-goods proceedings."

The determination of what is consistent with the public interest is peculiarly for the determination of the commission. Upon the record presented the commission was not required to find that the certificate was dormant in part or that a new or different service or operation as to territorial scope would result from the transfer.

The order of the commission is reversed as irregular for failure to make adequate findings as required by law.

REVERSED.

GARY A. LUEDERS, APPELLANT, V. LEILANI LUEDERS, APPELLEE.

192 N. W. 2d 161

Filed December 10, 1971. No. 37981.

Divorce: Parent and Child: Appeal and Error. In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of the minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion.

Appeal from the district court for Douglas County: PAUL A. GARROTTO, Judge. Affirmed.

Thomas P. Kelley, for appellant.

Burbridge & Burbridge, for appellee.

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

SMITH, J.

After a divorce decree the district court, retaining

custody of the four minor children, granted the mother, Leilani Lueders, possession that was periodic. The father, Gary, appeals. He contends that the grant was contrary to the best interests of the children.

The district court in rendering the divorce decree in January 1970, found that (1) Leilani by reasons of adultery and instability was unfit for child custody, and (2) Gary should receive possession of the children. It granted Leilani reasonable visitation.

The order granting Leilani periodic possession sustained part of a motion that she had filed approximately 8 months after rendition of the divorce decree. The periods were (1) every other weekend from Saturday afternoon to Sunday evening, (2) every Christmas Eve, and (3) Easter Sunday and Thanksgiving Day of alternate years to commence in 1971. No child support was allowed.

Prior to the marriage in 1963 of Gary and Leilani, ages 29 and 31 in 1970, Leilani had been married to Wayne Moore. Two children, ages 11 and 10 in 1970, were born to the Moore marriage. The California court decreeing divorce of the Moores, retained custody of the children. It also withheld possession of them from Leilani for 2 years or until the approach of her marriage to Gary. Gary subsequently adopted them.

The adultery was an isolated, short-lived affair, Leilani engaging in no other extramarital romance. She conceived a child out of wedlock in April 1969. The child, born December 25, was placed with an agency for adoption. The Lueders children knew nothing of the affair. Leilani in June informed Gary, who was undisputedly sterile at the time of conception.

A history of Leilani's health was elicited from nonmedical witnesses. During the Moore marriage Leilani had suffered a "nervous breakdown" which caused her to be confined in a sanitarium 6 months. In June 1969, several days after Gary learned of the adultery, and in the presence of the two younger children, Leilani in-

gested an overdose of drugs with the intent to commit suicide. The overdose caused her to be hospitalized for 6 weeks. Because of her illness a psychiatrist advised Gary to postpone commencement of the divorce suit. Another disorder, of which Leilani had been a victim at least since her marriage to Gary, was epilepsy. Seizures occurred biennially and infrequently on other occasions marked by intense excitement. Medication was administered. The Lueders children have been aware of the disorder.

From October 1969 to April 1970, Leilani lived and worked at the home of Nels and Helen Rydberg. Her chief duties were housekeeping and care of Nels, an invalid. To improve her formal education Leilani during this period attended college classes 5 nights a week. Helen, assistant manager of a life insurance company, had faith in Leilani. Helen called her an adopted daughter, and at times left her grandchild in Leilani's care.

At trial time Leilani lived alone in a house with living room, dining room, kitchen, two bedrooms, and full basement at 3867 Franklin Street in Omaha. She was unemployed, subsisting on unemployment benefits and her small savings. She had been gainfully employed at a furniture store and the office of another company. Her unemployment was hopefully temporary. Helen Rydberg offered to transport the Lueders' children from Gary's home in Millard. She had already done so. A consequence of the trial court's order would be attendance by the children at two Presbyterian churches.

In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion. See, Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971); Fry v. Fry, 186 Neb. 521, 184 N. W. 2d 636 (1971).

The district court retaining custody of the Lueders'

children will facilitate judicial supervision and summary power to act swiftly in their best interests. See Hanson v. Hanson, *supra*. The order did not constitute abuse of discretion. It is affirmed. Leilani's request that she be allowed a sum for services of her counsel in this court is denied. See Wolpa v. Wolpa, 182 Neb. 178, 153 N. W. 2d 746 (1967).

AFFIRMED.

SAM R. CHUDOMELKA, APPELLANT, V. BOARD OF EQUALIZATION OF DODGE COUNTY, NEBRASKA, APPELLEE.
192 N. W. 2d 403

Filed December 10, 1971. No. 37987.

1. **Taxation: Property: Administrative Law: Appeal and Error.** Upon an appeal from a county board of equalization on the ground that property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property.
2. **Taxation: Property: Administrative Law: Statutes: Words and Phrases.** For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Actual value is to be determined by using the applicable elements including those specified in section 77-112, R. S. Supp., 1969.
3. **Taxation: Property: Witnesses: Evidence.** Either lay or expert witnesses may testify as to the value of property if it is shown that they have an acquaintance with the property and are informed as to the state of the market.
4. ———: ———: ———: ———. The competency of a witness to testify as to value is a matter within the discretion of the trial court.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Edward L. Robins, for appellant.

McGrath, North, Nelson, Shkolnick & Dwyer and John E. North, for appellee.

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

BOSLAUGH, J.

The plaintiff, Sam R. Chudomelka, is the owner of three tracts of farmland in Dodge County, Nebraska. The land is level bottomland lying several miles north and northwest of Ames, Nebraska. In 1969, the actual value of this land for tax purposes was increased from $69,025 to $148,000. Apparently, this was pursuant to a countywide reappraisal by Justin H. Haynes & Company.

The plaintiff filed protests with the Board of Equalization for Dodge County which fixed the value of the three tracts at $147,525 exclusive of improvements. The plaintiff then appealed to the district court where the value was again fixed at $147,525. The plaintiff has now appealed to this court. There is no cross-appeal.

The plaintiff alleged that the valuation made by the board of equalization was excessive and confiscatory and that the valuation previously determined was the true value of the land. There is no issue concerning the value of the improvements.

The only issue before the district court was the actual value of the land. Lancaster County v. Brown, 76 Neb. 286, 107 N. W. 576. For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56. Actual value is to be determined by using the applicable elements including those specified in section 77-112, R. S. Supp., 1969.

The plaintiff testified in detail concerning each tract. His testimony indicated a combined value of from $78,000 to $84,000 for the three tracts. Charles M. Dake, a farmer who was familiar with the plaintiff's land, testified as to the value of two of the tracts. His testimony

placed their value at a slightly higher amount than that of the plaintiff.

The plaintiff offered the testimony of four other witnesses on the issue of value. All were lay witnesses who were familiar with the plaintiff's land. Objections as to foundation for the testimony of these witnesses were sustained. The record shows that each of these witnesses had little or no information as to market conditions.

Either lay or expert witnesses may testify as to the value of property if it is shown that they have an acquaintance with the property and are informed as to the state of the market. Lansman v. State, 177 Neb. 119, 128 N. W. 2d 569. The competency of a witness to testify as to value is a matter within the discretion of the trial court. Aurora Hotel, Inc. v. Board of Equalization, 140 Neb. 511, 300 N. W. 419. The record does not show an abuse of discretion in this case.

The defendant produced the testimony of Josef A. Jackson, an expert appraiser, who fixed the value of the land at $149,600. Jackson is employed as a farm loan supervisor by the Kansas City Life Insurance Company. He was previously employed by the Doane Agricultural Service and the Justin Haynes Company. He has had 14 years of experience in appraising farmland.

In arriving at his opinion, Jackson used both a market data approach and an income capitalization approach. In the market data approach he used six sales of similar land for comparison. He analyzed each transaction and explained in detail the similarities and differences between the tracts involved. In the income capitalization approach he used a combination of information obtained from the plaintiff, the ASC office, and standard analysis or assumed data to obtain an income figure. He then capitalized the owner's share at 5.5 percent to arrive at a valuation.

In a third approach, referred to as summation or cost, he classified the farmland in each tract and assigned a

value per acre determined from an analysis of market data.

The only sale referred to by the plaintiff was a sale of a 40-acre tract known as the Finnegan Estate in the fall of 1968. The Finnegan land was located directly east of the 80-acre tract owned by the plaintiff. Jackson was familiar with this sale but disregarded it because he considered it a forced sale and not a sale at arm's length.

The evidence is that the Finnegan land sold for $385 per acre at public auction. This compares with the plaintiff's testimony that the value of his 80-acre tract was around $200 or $225 per acre. It is apparent that the values suggested by the plaintiff were unrealistic. The record fully sustains the valuation made by the county board of equalization and the district court.

The judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS COUNTY BANK, A CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING, STATE OF NEBRASKA, ET AL., APPELLEES.

192 N. W. 2d 401

Filed December 10, 1971. No. 37996.

1. **Administrative Law: Banks and Banking.** Findings of facts in the language of the statute are adequate in bank charter removal cases.
2. **Administrative Law: Public Officers and Employees.** It is a presumption of law that public officers will perform their public duties.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Acklie & Peterson and Donald H. Bowman, for appellant.

Clarence A. H. Meyer, Attorney General, Ralph H.

Gillan, Abrahams, Kaslow & Cassman, and Nelson, Harding, Marchetti, Leonard & Tate, for appellees.

Heard before SPENCER, BOSLAUGH, McCOWN, and NEWTON, JJ.

SPENCER, J.

This appeal by Douglas County Bank challenges an order of the Director of Banking of the State of Nebraska granting the application of Ames Plaza Bank to transfer its charter and to move its bank to a new location. We affirm.

Ames was granted a bank charter in 1962 and commenced business in rented quarters in the Ames Plaza Shopping Center, with 12 employees and 3,290 square feet of space. It subsequently added 935 square feet of space to these facilities. Under the evidence adduced by Douglas, Ames might have enlarged its facilities more than it did, although there is a serious question as to whether the possibility suggested would have been suitable. At the time of the hearing before the Director, Ames had 46 employees in its main facility. The evidence is conclusive that Ames' present facility is so cramped and overcrowded that it is severely handicapped in attempting to meet the needs of its banking customers.

We do not deem it necessary to a clear understanding of the questions presented to review the evidence in detail or even to set forth the substance thereof. The main issue as we see it is whether the evidence will sustain the action of the Director. We think it sufficient to here state that we have carefully examined the record and are of the opinion that the order entered is fully supported by the evidence. We concern ourselves with other issues raised by Douglas.

The first assignment of error we notice is that the order of the Director is void for failing to contain legally sufficient findings of fact and conclusions of law. The

order entered by the Director contains eight findings of fact, including the following:

"5. That said bank is now located in a building of inadequate size to properly serve its customers and that additional space is not available.

"6. That said bank has an option to acquire property at the S. W. Corner of the Intersection at 72nd Street, Ames Avenue and Military Avenue, Omaha, Douglas County, Nebraska, upon which to construct a modern new building with a new modern vault for security purposes.

"7. That construction of the proposed building and the moving to the proposed new location will be a credit to the community and will better serve the customers of said bank.

"8. That the public necessity, convenience and advantage will be promoted by permitting said bank to move from its inadequate present location to the location set out in its application."

These findings adequately set out the factual basis for the order. Section 84-915, R. R. S. 1943, provides: "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." The main contested fact issues were the adequacy of the present quarters, the unavailability of additional space, the suitability of the proposed site, and whether public necessity, convenience, and advantage would be promoted if the application were granted. These issues are clearly covered by the above findings.

While the conclusions of law set out in the Director's order may not be as fully enunciated as Douglas may wish, they are sufficient when considered with the findings of fact to support the order entered.

Douglas relies heavily upon Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211. That case involved the fixing of rates. This case involves the transfer of an existing bank charter to another location in the immediate vicinity. There

is a distinction. See First Nat. Bank & Trust Co. v. Ley, 182 Neb. 164, 153 N. W. 2d 743, which was a proceeding in error to review an order of the Department of Banking granting a new charter. There this court pointed out: "The appellants further complain that the findings of fact, which are in the language of the statute, are not sufficient. We have held that such findings of fact are not sufficient in rate cases. See Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211. But in this type of case, such findings are adequate. See Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752."

The second assignment of error we consider is the claim that Ames did not establish that the public necessity, convenience, and advantage would be promoted by the transfer of its charter. Douglas devotes a substantial portion of its brief to this point. It relies on Jackson v. Valley National Bank of Egan Township, 277 Minn. 293, 152 N. W. 2d 472, which it refers to as a recent landmark case. That case sets out 12 factors to be determined in answering the question preliminary to the issuance of a new bank charter, and has no relevancy herein. The instant case does not deal with the application for a new bank charter but rather the moving of an existing charter within the bank's present trade area. The proposed location is only 1 mile from the present one. The distance of Douglas from both the present and the proposed location is exactly the same, 1.3 miles. The record was sufficient to permit the Director to conclude that public necessity, convenience, and advantage would be promoted by the transfer of the charter.

The last assignment of error we consider is the contention that the Director failed to offer and include the results of any independent investigation made by the Department of Banking and Ames' application to the Federal Deposit Insurance Corporation as a part of the record herein.

Douglas first refers to section 8-122, R. S. Supp., 1969,

which has no application herein. That section involves the granting of a bank charter and not the removal of an existing one.

Douglas then refers to section 84-914 (3), R. S. Supp., 1969, which reads as follows: "All evidence including records and documents in the possession of the agency *of which it desires to avail itself* shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference." (Emphasis supplied.) We note the statute specifically provides that if the Department desires to avail itself of other evidence, it shall be offered and made a part of the record. There is no indication herein that the Director considered any evidence other than that adduced at the hearing. In fact, relative to the FDIC application, we note the following ruling of the Director when it was suggested the Director's copy be made a part of the record: "* * * the application to the FDIC is a confidential record as far as the FDIC is concerned, and we cannot disclose that as far as the Department here is concerned. As far as the Department is concerned, I feel that we have enough evidence before us at this time pertaining to the bank's intention as to what it is going to do with the site, and do not see at this point the need to go into—have the document submitted as part of the evidence in the matter."

Without some contrary showing, we presume that the Director complied with the statute. In Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, we said: " 'It is a presumption of law that public officers will perform their public duties.' "

The judgment is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JERALD C. LILJA, APPELLANT.
192 N. W. 2d 160

Filed December 10, 1971. No. 38072.

1. **Appeal and Error: Rules of Courts.** Ordinarily this court will take note only of those assigned errors which are discussed. Revised Rules of the Supreme Court, 1967, Rule 8a2(3).
2. **Criminal Law: Trial: Evidence: Intoxicating Liquors.** The foundation for admission into evidence of a body fluid test showing compliance with the provisions of section 39-727.02, R. R. S. 1943, is sufficient.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Douglas McArthur, for appellant.

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

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

CLINTON, J.

This is an appeal from a conviction for drunk driving. Several errors are assigned but only one is discussed. We therefore take note only of the error assigned and discussed. Revised Rules of the Supreme Court, 1967, Rule 8a2(3).

The appellant asserts that there was no foundation for the introduction into evidence of a body fluid test under section 39-727.02, R. R. S. 1943. There is no merit in this assignment. The foundation was clearly sufficient. The specific claim is that the witness did not testify the test he made was approved by the Department of Health. The witness testified he held the proper permit from the Department of Health and this permit approves his making the test by a specific method known as the Bonnischen test. He described in minute detail the steps included in the Bonnischen test and specifically testified it was a method approved by the

Department of Health. He described in similar detail what he did, referring back in at least three instances to his prior description of the Bonnischen test. The steps taken in the actual test coincide with the test previously described. The court instructed the jury that the results of the test to be valid must be done in accordance with tests approved by the Department of Health. No reasonable person could, without completely disregarding the witness' testimony, conclude other than that the test was one approved by the Department of Health.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOE KRUG, APPELLANT.
192 N. W. 2d 163

Filed December 10, 1971. No. 38086.

Criminal Law: Plea Bargaining: Guilty Plea. When a defendant seeks to withdraw a plea of guilty or nolo contendere alleged to have been made in reliance upon a promise of the prosecutor of a recommendation favorable to the defendant, which promise is not kept, the burden of proof is on the defendant to prove the unfulfilled promise and reliance thereon.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

David L. Herzog, for appellant.

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

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

CLINTON, J.

This is an appeal from a sentence to a term of 2 years' imprisonment on a charge of receiving stolen property over the value of $100. The questions at issue are whether there was an unkept plea bargain by the prosecuting attorney and whether the defendant should be

granted leave to withdraw his plea of nolo contendere.

The defendant appeared in court on December 22, 1970, with his own counsel at which time the record shows he was arraigned and fully advised of the nature of the charge against him; the effect of a plea of guilty and the possible penalty; the nature and extent of his constitutional rights, including the right not to testify against himself, the right to a jury trial, compulsory process to witnesses on his behalf, and the right to cross-examine the witnesses; and that a plea of guilty waived these rights. He was told that if he understood all this he could plead either guilty or not guilty.

The defendant's attorney stated because of certain civil implications of the case it was his client's intention to enter a plea of nolo contendere. The court inquired of the defendant if that was his pleasure. The defendant answered: "Yes, sir." The court explained the elements of the offense and that defendant should not enter such a plea unless he felt the State was able to prove its case. The defendant's attorney explained to the court in the presence of the defendant that the prosecution had made its file available to the defense and he felt the State would be able to prove a prima facie case justifying submission to the jury. The court accepted a plea of nolo contendere and added that for purposes of sentencing it was the same as a plea of guilty.

Defendant's counsel had earlier advised the court that he proposed to ask for probation and would request a presentence investigation. The court referred the matter to the probation officer for investigation.

On February 9, 1971, the defendant appeared with his counsel for sentencing. The court advised that he had the presentence report and stated: "I frankly will tell you that it looks to me that probation is out definitely." Defense counsel made a lengthy plea in favor of probation which was founded principally upon an assurance of the defendant's cooperation with the victim of the crime in efforts to secure reimbursement through civil action

from other individuals of a total claimed loss of $20,000 or more but for which the defendant was responsible for only $1,000, $2,000, or $3,000 worth of goods found in his possession. The plea included the statement: "We asked the County Attorney to at one juncture, to make a gesture to the Court that probation be afforded to this defendant because of what we feel would be the inconsistency of putting this man in an institution."

Prosecutor stated among other things: "We had quite a bit of discussion on restitution and probation although I wasn't completely aware of Mr. Krug's background. I guess Dave wasn't either." The prosecutor itemized by truckload values the goods found in the defendant's possession: "$989.86, $422.70, $59.84, $81.74, $187.64," and ended: "Because of my discussions with Dave Herzog on this, I'm not going to make any recommendation whether he get probation or not. I'm afraid I have to put it in your lap, Your Honor."

Right of allocution was afforded and the defendant spoke in his own behalf. The court stated he was taking into consideration that the defendant did not put the State to the expense of a trial and imposed sentence.

On March 12, 1971, the defendant's counsel made an oral motion for leave to withdraw the plea of nolo contendere for the reason the prosecution had agreed to recommend probation and had not done so. No evidence of any kind was presented or offered in support of the motion. The court overruled the motion, stating that he could not consider placing the defendant on probation because the last probation did not do any good. The court pointed out two prior felony convictions of the defendant.

If a defendant's plea of guilty or nolo contendere is made in reliance upon an unfulfilled promise of the prosecutor of a recommendation favorable to the defendant, the courts have generally permitted withdrawal of the plea even after sentencing. See 112 U. Pa. L. Rev. 877, Note 68. This court, in State v. Pitzel, 181 Neb.

176, 147 N. W. 2d 524, said: "Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake, or under a misconception of the nature of the charge through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; when made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury."

The burden of proof is upon the defendant to show the unfulfilled promise and reliance thereon. People v. Bauman, 131 Cal. App. 2d 595, 281 P. 2d 74; Watts v. United States, 278 F. 2d 247 (D. C. Cir., 1960). It is typically stated that this means the defendant must establish grounds for withdrawal by clear and convincing evidence. People v. Singh, 156 Cal. App. 2d 363, 319 P. 2d 697. There is no such evidence here. The most the record shows is that the matter was discussed.

The defendant makes no showing that he is innocent. This is required by some courts. See 112 U. Pa. L. Rev. 877, Note 74. The record here rather conclusively indicates otherwise. See especially United States v. Paglia, 190 F. 2d 445.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REUBEN MURRAY, APPELLANT.
192 N. W. 2d 734

Filed December 17, 1971. No. 37905.

1. **Criminal Law: Evidence: Trial.** The evidence of the commission of other crimes than the one for which defendant is being tried is incompetent, irrelevant, and immaterial, and ordinarily prejudicial to the rights of the defendant.
2. ———: ———: ———. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

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

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

SPENCER, J.

Defendant, Reuben Murray, appeals his conviction for shooting with intent to kill, wound, or maim. He alleges two assignments of error: (1) The insufficiency of the evidence to sustain the conviction; and (2) the overruling of his motion for a mistrial when the testimony of a witness suggested he was selling marijuana. We affirm.

The evidence is more than ample to sustain the conviction. The victim, Arthur Dean Lee, a black male, testified that the defendant, also a black male, in the company of a white man and two white women, entered a party at 4825 Sahler Street, between 3 and 3:30 a.m., November 22, 1969. The defendant and the other three individuals had been at the party previously and had been asked to leave, which they did. Lee, who had been invited, followed the four into the party. After he had been there a short time, he was approached by one of the hosts and asked if he knew the other black male. They were the only two black persons at the party. When he said he didn't, the host asked Lee if he would talk to him, which Lee did. Lee stated that when he approached the defendant he introduced himself and said: " 'Say, man, these people don't know you, so take it easy, you know. Just take it easy.' And he said, 'Okay, everything is cool.' And I turned and walked away."

Lee walked away from the defendant and started to visit with someone else, but heard something and turned

around and saw the defendant pull a gun from his coat which he pointed at him. Someone attempted to grab the gun but defendant pushed him aside and came toward Lee. He attempted to hit Lee with the gun. Lee grappled with him and they both fell over a couch and a shot was fired. They continued to struggle and five more shots were fired. At this time Lee did not know he was shot. Defendant ran out the door with Lee in pursuit, but Lee, who had been shot four times, could not follow. Several of the other witnesses testified to seeing defendant approach Lee with the gun, and to the shooting. When defendant pulled the gun, witnesses testified that he said, "Nobody move."

Defendant testified that Lee told him and his friend to leave, and pushed defendant toward the door. Someone told him Lee had a knife in his pocket. Lee had one hand on defendant's collar and was shaking him. Defendant took out his gun with the intention of hitting Lee, and Lee tried to throw him out the window. He fired no shots until Lee tried to push him out the window. However, the evidence is rather conclusive that Lee had no weapon and defendant was the aggressor.

Defendant's second assignment of error is premised on the overruling of his motion for a mistrial. During the examination of one of the witnesses, she was asked the question as to whether, when the defendant and Lee were talking, she had heard any conversation between the two of them. Her reply was as follows: "Just parts of sentences, like I heard, I think Art said something, 'We don't want any dope.' And they were talking very politely, Art was anyway, and he was asking Reuben to leave. He said that nobody wanted any. Well, he was trying to push some marijuana, he said, he politely told Reuben that no one wanted any." Defendant then made an objection, and a motion for a mistrial. The court overruled the motion for mistrial, but sustained the objection, ordered the answer stricken, and instructed the jury to disregard it. Defendant insists he was preju-

diced by this testimony because it inferred the commission of a totally unrelated crime.

It is a fundamental rule that the evidence of the commission of other crimes than the one for which a defendant is being tried is incompetent, irrelevant, and immaterial, and ordinarily prejudicial to the rights of the defendant. Here, however, the witness was merely reciting what she had heard immediately before the defendant drew a gun and shot the victim. It was a part of the transaction which culminated in the shooting and possibly the reason defendant was requested to leave. In this instance we do not find the evidence erroneous. It was admissible on the question of intent and to show the shooting was not accidental or in self defense. In any event, the court instructed the jury to disregard it. We said in State v. Riley, 182 Neb. 300, 154 N. W. 2d 741: "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes."

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE D. JURGENS, APPELLANT.
192 N. W. 2d 741

Filed December 17, 1971. No. 37915.

1. **Criminal Law: Sentences: Probation and Parole: Appeal and Error.** The suspension of sentence and the granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed.
2. **Criminal Law: Sentences: Appeal and Error.** A sentence within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion.

3. **Time: Common Law.** At common law, fractions of days are counted as full days.
4. **Criminal Law: Sentences.** A sentence of imprisonment for a stated period should be sufficiently certain so that the accused and those charged with administering the sentence may readily determine its duration.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Russell A. Strom, for appellant.

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

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

CLINTON, J.

Defendant appeals from a sentence following his plea of nolo contendere to a charge of motor vehicle homicide. Defendant had been charged under the misdemeanor portion of section 28-403.01, R. S. Supp., 1969. Six assignments of error are made, which blend into the following: (1) Abuse of discretion by the trial court in not placing the defendant on probation; (2) excessiveness of sentence; (3) invalidity of the sentence because it is ambiguous and the authorities charged with administering the sentence will be unable to determine accurately the termination point; and (4) invalidity of the sentence because it calls for intermittent incarceration. We determine that assignments (3) and (4) are well taken. We vacate the sentence and remand the cause for resentencing.

The record shows that the court imposed a sentence of a fine of $500 and imprisonment in the county jail for a period of 50 days, and as a part of the sentence ordered: ". . . that the Sheriff of Gage County, Nebraska, be permitted to let the defendant out of confinement of the County Jail commencing Friday of each week at

5:00 P.M. and defendant to return on Sundays of each week at 7:00 P.M., and that aforesaid time shall not be credited to this sentence, and that the defendant be required to serve as part of the sentence from Sunday night at 7:00 p.m. to the following Friday at 5:00 p.m., and that said 50-day sentence shall commence from this date."

At request of the defendant's counsel, after the judgment of conviction but before sentencing, a hearing was held in support of a request for probation. Both the State and defendant presented evidence. The State's evidence was confined to facts surrounding the accident. There were no eyewitnesses. The defendant, age 22 and married, testified on his own behalf, but because of amnesia resulting from the trauma of the accident he had no significant recollections covering the period from shortly before the collision until he was on his way to the hospital. The State's evidence tended to show that the defendant had driven through a stop sign at a substantial rate of speed and collided with the vehicle of the decedent who was on the favored road. The evidence presented by the defendant through numerous witnesses evidenced his good character, industry, acceptability as a probation risk, and, except for two traffic offenses, a record free of law violations. The two traffic violations were for speeding and careless driving and occurred about 4 and 5 years before the date of the charge of which he was convicted.

The penalty for the offense of which the defendant was convicted is (1) a fine not to exceed $500, or (2) imprisonment in the county jail not to exceed 6 months, or (3) both such fine and imprisonment. § 28-403.01, R. S. Supp., 1969.

Former section 29-2218, R. R. S. 1943, made the granting of probation discretionary with the trial court. In an absence of an abuse of discretion the determination of the trial court not to suspend sentence and grant probation will not be disturbed. State v. Steinhausen, 180

Neb. 778, 145 N. W. 2d 584. Likewise a sentence imposed within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion. State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808. It would appear to us that the court could in this case either grant probation or impose a sentence such as here imposed and, except for the intermittent nature of the incarceration and the ambiguous nature of the sentence, neither course would be an abuse of discretion.

The ambiguity in the sentence arises out of the provision, "that aforesaid time shall not be credited to this sentence," taken together with the rule that at common law fractional days are deemed whole days. Two interpretations are possible. The released time each weekend of 50 hours is to be served in 24-hour days and fractions thereof, or the defendant gets full credit for all fractional days of imprisonment and only the Saturday free is to be added. If the first alternative is used the defendant will be required to serve all or some part of 58 separate calendar days in jail extending over a calendar period of 68 days. In the second alternative he will be imprisoned all or part of 50 separate calendar days extending over a period of 61 days.

A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration. 24 C. J. S., Criminal Law, § 1581, p. 560. Judges in imposing sentences should use precise language. State v. Laden, 42 N. J. Super. 540, 127 A. 2d 404; Simunov v. United States, 162 F. 2d 314.

At common law, fractions of days are ordinarily counted as full days. 86 C. J. S., Time, § 16, p. 901, footnote 7; State ex rel. Greb v. Hurn, 102 Wash. 328, 172 P. 1147, 1 A. L. R. 274; Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955; Bussey v. Hager, 82 Ga. App. 23, 60 S. E. 2d 532; Oliason v. Girard, 57 Idaho 41, 61 P. 2d 288. Although the cited cases do not involve computation of the duration of a sentence of imprisonment,

it would seem that the same rule should apply afortiori in the case of a sentence of imprisonment. It is apparent that if a court chose to impose the maximum sentence and made provision for intermittent incarceration similar to that here, it could then impose a sentence which in practical effect exceeded the maximum authorized by statute. If we assume that an intermittent sentence may be imposed it seems clear that a full day's credit must be given for each of the fractional days served. Under the circumstances here a full day's credit would have to be given for Fridays and Sundays.

The next question to be answered is, can the court impose a sentence providing for intermittent incarceration in the absence of the consent of the defendant to the interrupted nature of the term of imprisonment. We hold that it cannot. State v. Bigelow, 76 Ariz. 13, 258 P. 2d 409, 39 A. L. R. 2d 979. In the cited case under statutes similar to ours the court held that a 90-day sentence for drunk driving could not be imposed and at the same time the defendant permitted to serve it on only certain days of the week. That case came before the Supreme Court of Arizona on questions of law certified to it and the defendant sought to uphold the validity of such a sentence.

The judgment of conviction is affirmed, but the part of the judgment imposing sentence is reversed and the cause is remanded to the district court for the purpose of resentencing.

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

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA ET AL., APPELLEES.
192 N. W. 2d 736

Filed December 17, 1971. No. 37932.

1. **Building and Loan Associations: Administrative Law: Statutes.** A reasonable interpretation of section 8-331, R. R. S. 1943, and other statutes dealing with regulation and control of savings and loan associations necessarily implies the power of the Department of Banking to approve or disapprove the establishment and operation of branch offices of savings and loan associations chartered and operating under the laws of this State.
2. ———: ———: ———. Legislative standards for the granting of an application for initial establishment of a savings and loan association operation under section 8-331, R. R. S. 1943, also apply to an application to establish a branch office.
3. ———: ———: ———. Approval by the Department of Banking is necessary before a savings and loan association, chartered and operating under the laws of Nebraska, may establish a branch office.
4. **Building and Loan Associations: Constitutional Law: Notice.** Properly conducted existing local savings and loan associations have interests and rights which are affected by the establishment of other local savings and loan associations or branches sufficient to make all such associations interested parties entitled to constitutional due process.
5. **Building and Loan Associations: Constitutional Law: Notice: Administrative Law.** Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute.
6. **Statutes: Constitutional Law: Notice: Administrative Law.** Compliance with the mandatory provisions of section 84-913, R. R. S. 1943, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing is necessary to give validity to its action when notice and hearing are essential to due process.

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

John W. Delehant, John E. Dean, and Robert J. Huck, for appellant.

Ralph H. Gillan, for appellee Department of Banking.

James J. Fitzgerald, Jr., Lyle E. Strom, and Douglas W. Reno, for appellee Commercial Sav. & Loan Assn.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

First Federal Savings and Loan Association, a federally chartered corporation, brought this action against the Department of Banking and Commercial Savings and Loan Association, a Nebraska chartered corporation. The action sought to enjoin the enforcement of an order issued by the Department of Banking allowing Commercial to establish a branch office in Omaha, Nebraska; to declare the order invalid and of no effect; and to require the Department of Banking to establish procedural rules and regulations governing the establishment of a branch office by a state chartered savings and loan association. The trial court found that the statutes of Nebraska neither prohibit nor require either notice or hearing for the establishment of savings and loan branch offices and that the Administrative Procedures Act did not apply. The district court denied the request for injunction and dismissed plaintiff's petition. First Federal has appealed.

Both savings and loan associations involved here were operating in Omaha, Nebraska, in 1968. In that year, each association began to consider a new branch location in northwest Omaha. On December 19, 1968, First Federal passed a resolution to build a branch office. On January 16, 1969, Commercial passed a resolution for its new branch facility. First Federal, following adoption of its resolution, made application to the Federal Home Loan Bank Board for approval of a branch at 90th and Maple Streets in Omaha. Notice of its ap-

plication was published on January 30, 1969, as required by law. Letters of notice were also sent to savings and loan associations in the area and to the Department of Banking. Commercial received notice by January 30, 1969, and the Department of Banking received written notice on January 28, 1969.

On February 10, 1969, Commercial requested a meeting with the Director of the Department of Banking and met with him on February 17, 1969. On February 18, 1969, without notice or hearing, the Department of Banking issued an order approving the application of Commercial for the establishment of a branch office at 90th and Maple Streets in Omaha.

Commercial completed the purchase of land at the location on March 21, 1969, and on the same date notified the Federal Home Loan Bank Board of its expansion. Commercial also informed the Federal Home Loan Bank Board that it would protest the application of First Federal. The Federal Home Loan Bank Board denied First Federal's application on August 13, 1969. On September 25, 1969, First Federal filed this action. Commercial's branch office was completed on January 9, 1970. The Federal Home Loan Bank Board, on April 7, 1970, reversed its former decision and granted permission for First Federal to locate its branch at 90th and Maple also. Both branches have now been completed and are in operation.

One other fact situation needs chronological reference. On February 1, 1962, the Director of the Department of Banking notified all state chartered savings and loan associations that it was the opinion of the department that the statutory criteria which applied to the initial approval of the establishment of savings and loan associations applied to the establishing of branches as well. That notice required that immediately thereafter applications for a branch office must be submitted to the Director of the Department of Banking for approval. On August 1, 1962, a statement of policy relating to applica-

tions for certificates of approval to organize savings and loan associations and for authority to establish branch offices was issued by the Department of Banking over the signature of the Director. It contained a paragraph stating: "As directed by a letter dated February 1, 1962, no building and loan association shall establish a branch office without prior approval from the Department of Banking. It is required that an application upon a form to be supplied by the department shall be filed with said department. After the filing of such application the Director of Banking will give due notice for a public hearing to be held at the place which he designates to hear all evidence in favor of the establishment of such branch and all evidence by those opposing the establishment of such branch office." The evidence is very indefinite as to how fully or for what periods of time the statement of policy was adhered to. In a letter to the Federal Home Loan Bank Board dated March 13, 1969, the deputy director of the Department of Banking stated that as to the establishment of branch offices, the statement of policy was "hereby rescinded."

It is the position of Commercial that a state chartered savings and loan association is not required to obtain permission from the Department of Banking before opening a branch office; that even if it were, First Federal has no standing to challenge the approval order; and that notice and hearing is not a statutory or constitutional requirement.

The statutes of Nebraska do not expressly prohibit nor require the approval of the Department of Banking before establishing a branch office by state chartered savings and loan associations. The Department of Banking by statute has general supervision and control over all savings and loan associations which are declared to be quasi-public in nature and subject to regulation and control by the State. See, §§ 8-102, R. R. S. 1943, and 8-301, R. R. S. 1943.

Section 8-331, R. R. S. 1943, specifically provides for

the issuance of a certificate of approval upon the initial establishment of a state chartered savings and loan association before it shall transact any business. Among other things, that section provides that no such certificate of approval shall be issued unless and until the Department of Banking shall have determined: "* * * (3) That in its judgment a need exists for such an institution in the community to be served; (4) That there is a reasonable probability of its usefulness and success; and (5) That the same can be established without undue injury to properly conducted existing local building and loan associations."

The issues here require an analysis of the legislative intent and purpose in adopting the statutes dealing with the quasi-public business of savings and loan associations. Section 8-331, R. R. S. 1943, clearly establishes that the function of the Department of Banking in determining whether or not a state chartered savings and loan association shall be issued a certificate of approval to transact business initially is clearly a quasi-judicial determination. The standards set in that statute require a determination of the public interest. The standards not only place emphasis on the locality in which the association is to be established, but specifically require a finding that initial establishment be done without undue injury to properly conducted existing local savings and loan associations. If the legislative purpose in regulating, supervising, and controlling the operation of savings and loan associations was to protect the public and guard against economically destructive competition between savings and loan associations in a given area, that purpose could be frustrated and the effectiveness of the legislation destroyed if existing institutions could open branch offices at any places they desired without the approval of anyone.

We hold that a reasonable interpretation of section 8-331, R. R. S. 1943, and other statutes dealing with regulation and control of savings and loan associations neces-

sarily implies the power of the Department of Banking to approve or disapprove the establishment and operation of branch offices of savings and loan associations chartered and operating under the laws of this State. We also hold that legislative standards for the granting of an application for initial establishment of a savings and loan association operation under section 8-331, R. R. S. 1943, also apply to an application to establish a branch office. The holding here is fully supported by the reasoning and policy considerations set forth in Southwestern Savings & Loan Assn. of Houston v. Falkner, 160 Tex. 417, 331 S. W. 2d 917 (1960).

Commercial insists that the statute does not expressly require approval before opening a branch office and therefore no such approval is necessary. At least two Directors of the Department of Banking obviously felt that the department had authority to require such approval or to waive it. Commercial had itself applied for such approval in at least one instance prior to the current one. It is illogical to assume that the Legislature intended to regulate and control the establishment of savings and loan associations but did not intend to extend that control over the establishment of branches. Neither is there any indication the Legislature intended the Department of Banking should have the right to exercise or not to exercise control over the establishment of branches without any standards limiting its discretion. We hold that approval by the Department of Banking is necessary before a savings and loan association, chartered and operating under the laws of Nebraska, may establish a branch office.

Commercial contends that First Federal is simply a competitor and has no interest sufficient to give it standing to question the order entered here. It is necessary to show that a party is in danger of sustaining a direct injury as a result of action and it is not sufficient that one has merely a general interest common to all members of the public. See Ex Parte Levitt, 302 U. S. 633,

58 S. Ct. 1, 82 L. Ed. 493. There should be little question that First Federal has standing to challenge the order entered here. If a competing savings and loan association does not have standing to challenge the validity of an administrative decision favorable to the applicant, such an order would almost never be subject to challenge, nor could anyone raise the issue of whether statutes were being complied with or not. See Elizabeth Federal Savings & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779.

We note that section 8-331, R. R. S. 1943, dealing with the initial establishment of savings and loan associations does not require any notice or hearing. It is apparent that statutes which grant quasi-judicial powers to an administrative agency but fail to provide for notice of hearing to those whose interests would necessarily be affected by the exercise of that power may be unconstitutional. It is also apparent that the provisions of the Administrative Procedures Act, sections 84-901, R. R. S. 1943, et seq., may breathe constitutionality into an otherwise deficient statute provided the provisions of that act are complied with. The provisions of section 8-331, R. R. S. 1943, make it clear that existing local savings and loan associations have interests and rights which are affected by the establishment of other local savings and loan associations or branches sufficient to make all such associations "interested parties" entitled to constitutional due process. See, also, § 84-901 (3), R. R. S. 1943. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. See, also, Allen v. Omaha Transit Co., Inc., *ante* p. 156, 187 N. W. 2d 760.

The final issue remaining for determination is whether

or not constitutional due process requires that the Department of Banking be directed to establish procedural rules and regulations, including provisions for reasonable notice and hearing and governing the establishment of a branch office by a state chartered savings and loan association. The provisions of the statutes dealing with the regulation and control of savings and loan associations and the provisions of the Administrative Procedures Act may properly be considered in para materia in determining whether or not due process of law has been afforded. Compliance with the mandatory provisions of section 84-913, R. R. S. 1943, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing is necessary to give validity to its action when notice and hearing are essential to due process. School Dist. No. 8 v. State Board of Education, *supra*.

The order of the Department of Banking of the State of Nebraska of February 18, 1969, was invalid. The Department of Banking should be required to establish procedural rules and regulations governing the establishment of branch offices by a state chartered savings and loan association in accordance with the provisions of the Administrative Procedures Act and in accord with this opinion. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED WITH DIRECTIONS.

EVE B. ORTEGA, APPELLANT, V. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, A CORPORATION, APPELLEE.
193 N. W. 2d 254

Filed December 17, 1971. No. 37964.

1. **Insurance: Trial: Evidence: Contracts.** The delivery of a life insurance policy and the acceptance of premiums raise a presumption that all conditions precedent such as continued insurability have been met and this presumption is sufficient to sustain the plaintiff's burden of proof unless the defendant introduces evidence to rebut it.

2. **Insurance: Fraud and Deceit: Contracts.** In the absence of fraud or misrepresentation, a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause.
3. ———: ———: ———. If a medical examination is made by the insurer, either with knowledge of an illness of the applicant thereby disclosed or without discovery of a pathological condition which in fact existed, and it thereupon issues a policy of insurance, it should not be allowed to repudiate liability by reason of the defective health of the insured at the time of the examination, in the absence of any fraud or misrepresentation.
4. **Insurance: Trial: Evidence.** Where the evidence introduced by the insurer is wholly insufficient to rebut the presumption that the plaintiff was in good health at the date of the issuance of the policy, it is error for the trial court to submit such issues to the jury.
5. **Insurance: Fraud and Deceit: Contracts.** Generally, an applicant for insurance has no duty to inform an insurer of new information about his health where the insurer fails to inquire into the existence of any new information after the medical examination.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Robert W. Green and Larry W. Myers, for appellant.

James W. Knowles and Edward A. Mullery, for appellee.

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

WHITE, C. J.

Plaintiff sues as a beneficiary of a $99,000 life insurance policy. The insured deceased Ortego died of lung cancer shortly after the issuance of the policy. The issues (which overlap) are: (1) Whether Ortega breached a condition precedent requiring continued insurability between the time of the application and the issuance and receipt of the policy; and (2) whether Ortega intentionally failed to disclose certain material facts concerning

the lung cancer arising between the medical examination and the issuance of the policy. The district court submitted these issues to the jury which found for the defendant insurance company. A motion for judgment notwithstanding the verdict was denied. Based on the undisputed facts, we reverse the judgment of the district court and remand the cause with directions to enter judgment for the plaintiff.

Issuance of the policy, payment of the premium, and delivery are admitted by the defendant. In August of 1968 Ortega was contacted by John Adair, an agent of the defendant, regarding the purchase of the life insurance policy from the defendant. After some preliminary discussion, Ortega signed an application for the policy on August 23, 1968, and delivered it, undated, to Adair. The application was forwarded by Adair, the agent of the defendant, to the home office on September 16, 1968, at which time he dated it. The signed application contained the following relevant clauses:

"C. The insurance policy hereby applied for shall not be considered in force until a policy shall have been issued by the Company * * * and said policy received and accepted by the Owner and the first premium paid thereon, *all during the continued insurability of the person to be insured;* * * *.

"D. The Company shall have sixty days from the date hereof within which to consider and act upon this application and if within such period a policy has not been received by the owner or notice of approval or rejection has not been given, then this application shall be deemed to have been declined by the Company." (Emphasis supplied.)

As mentioned, the application was signed and delivered to Adair on August 23, 1968. On August 30, 1968, Ortega was examined by Dr. Richard Barry, a doctor of the defendant's choice. The doctor approved him for insurance. No chest X-ray was taken. The application and the results of the examination were forwarded to

the home office of the defendant in Chicago. No contention is made that the statements or representations made by Ortega in the application were in any way false or constituted a misrepresentation that would void the policy. The defendant assembled all of the facts it deemed necessary for determining acceptance, finished the processing of the application in its own internal operating procedure, and approved Ortega's application on October 24, 1968. On October 31, 1968, Adair informed Ortega that the policy had been approved and that he should pay the premium. The following day Ortega met with Adair and paid the premium. On neither occasion, October 31st or November 1st, did Ortega mention any recent health developments or make any disclosure as to any change in his condition. The evidence is conflicting as to the date the policy was delivered, but the parties agree that it was not later than November 6, 1968.

On November 6, 1968, therefore, the policy had been approved by the defendant (October 24th), forwarded to Adair, the premium paid, and the policy delivered to Ortega.

The essential facts relied upon by the defendant are as follows: On October 26th and 27th, 2 or 3 days after the approval of the policy by the home office of the defendant in Chicago, Ortega, returning from a trip, experienced pain in his right shoulder and coughed up blood. These incidents led him to consult his personal doctor, Dr. Henry Lehnhoff, on October 29, 1968. For the first time, on October 29, 1968, X-rays were taken and analyzed by Ortega's own doctor, Dr. Lehnhoff, and they revealed a shadow on Ortega's right lung indicating a possible malignancy. No confirmed diagnosis was made at this time, only a communication to Ortega of a shadow on his lung and a possible malignancy. Dr. Lehnhoff referred Ortega to Dr. Delbert Neis, a specialist in thoracic surgery, for further examination and diagnosis. Dr. Neis, after examination, was very suspicious of lung cancer and recommended surgery. Although

Ortega's doctors were suspicious, the evidence conclusively shows no biopsy or confirmed diagnosis of lung cancer had been communicated to him as late as November 1st. On November 6th, Ortega entered the hospital and surgery was performed on November 8th. During the operation, the hospital pathologist confirmed the tentative diagnosis of lung cancer, and Dr. Neis removed Ortega's right lung. From complications resulting from this surgery Ortega died in the hospital on November 12, 1968. The defendant rejected the plaintiff widow's claim and offered to refund the premium.

We reach the issue of "continued insurability." The acuity and industry of counsel have produced for our consideration a veritable kaleidoscopic display of authorities and analyses covering every tangent and facet of the facts and the law. The function of the "continued insurability" clause is to protect the defendant against sudden changes in health arising in the interval between a medical examination and the consummation of the policy. The approval by the defendant on October 24, 1968, the subsequent delivery of the policy and the acceptance of the premium raise a presumption that all conditions precedent such as "continued insurability" have been met and this presumption is sufficient to sustain the plaintiff's burden of proof unless the defendant introduces evidence to rebut it. Gallentine v. World Ins. Co., 167 Neb. 429, 93 N. W. 2d 374.

There is no contention of fraud or misrepresentation in the application by Ortega. It was delivered to the agent of defendant on August 23, 1968. Independent of the application, the defendant itself set up the conditions and the requirements by which it would determine the insurability of Ortega. It required a medical examination. The nature, scope, and extent of the physical and medical examination were entirely within the power of the defendant. It had Ortega examined on August 30, 1968. The doctor did not see fit to take a chest X-ray of Ortega or otherwise explore and deter-

mine the condition of his lungs. The defendant's doctor approved Ortega as "insurable." It follows that by so doing it assumed the risk of any later detected health defects existing at that time. The defendant itself set up the conditions of reliance for the issuance of the policy. Ortega complied in every respect with the requirements and conditions that the defendant required. Under the facts in this case, it is clear that the defendant seeks to retroactively establish and take advantage of error in its own examination and processing procedures prior to the actual issuance of the policy and the receipt of the premium. The defendant has a legitimate interest to protect in the period of time between its medical examination and the final issuance of the policy. A sudden heart attack or a serious accident and other sudden health developments fall within the legitimate range and the protection of the continued insurability clause. On the other hand, literal enforcement of the condition is harsh because, by its terms, it is operative irrespective of fraud or misrepresentation or knowledge on the part of the insured. We hold, in the absence of fraud or misrepresentation, that a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause. Mathews v. Metropolitan Life Ins. Co., 89 So. 2d 641 (Fla., 1956); cf. Schodts v. American Hospital & Life Ins. Co., 313 S. W. 2d 946 (Tex. Civ. App., 1958); Adams v. Lasalle Life Ins. Co., 99 S. W. 2d 386 (Tex. Civ. App., 1936); Brubaker v. Beneficial Standard Life Ins. Co., 130 Cal. App. 2d 340, 278 P. 2d 966; Wargovich v. Metropolitan Life Ins. Co., 136 Pa. Super. 421, 7 A. 2d 568; National Life & Accident Ins. Co. v. Green, 191 Miss. 581, 2 So. 2d 838; Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 A. 793 (1936).

A succinct statement of the rule and the reason therefor appears in Prudential Ins. Co. of America v. Kudoba, *supra*. In that case the court made the following statements: "If an examination is made and the company,

either with knowledge of an illness of the applicant thereby disclosed or without discovery of a pathological condition which in fact existed, thereupon issues a policy, it should not be allowed to repudiate liability by reason of any defective status of the health of the insured at that time, * * * the sound-health clause has no application to such diseases as the insured may have had at the time of the medical examination." "While it is true that ordinarily a contract conditioned upon the existence of a certain fact is unenforceable if the condition is unfulfilled * * * this principle is not fairly applicable to life insurance policies, where regard must be had to the fundamental social and economic factors underlying the whole fabric of the business of life insurance as practically conducted. * * * For the company later to be allowed successfully to contend that the policy never became effective because the applicant breached the sound-health clause in that he suffered from disease or bodily impairment when the policy was delivered to him, in a case where the same condition existed when the company examined him, would be to give countenance to a practice that, while perhaps not fairly to be characterized as fraudulent, would be unreasonably destructive of the protection which life insurance is aimed to secure. It would result * * * that 'no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy.'"

We turn now to the period of time between the medical examination by the defendant's doctor on August 30, 1968, until the time of the consummation of the policy. Was the continued insurability clause breached during this period of time? As we have mentioned the function of the clause is to protect the defendant against sudden changes in health arising in the interval between the medical examination and the consummation of the policy. From what we have said, and giving full scope to the proper interpretation of the continued insurability clause, it was breached, under the circumstances in this case

only if the tumor was not present on August 30 but developed in the interim before the policy was consummated. For the defendant to prevail, it must prove that Ortega's tumor was not present on August 30, the time of the medical examination approval, but that it developed subsequent to that date. There is no evidence in the record of any nature whatsoever to sustain this contention. Further, it would appear that the defendant not only did not but could not do this. It failed to have any chest X-rays taken on August 30, 1968. Both Dr. Lehnhoff and Dr. Neis testified that they could not determine with reasonable medical certainty when the tumor developed. The record reveals the defendant had ample opportunity to discover the nature and degree of progression of the malignancy. Neither by way of cross-examination nor direct medical testimony, did the defendant present any medical testimony as to the type of malignancy and whether such type of malignancy could have or must have developed in the critical period of time between August 30, 1968, and the date of the issuance and receipt of the policy. This failure, we feel, is significant. The only other evidence on this issue is the death certificate, when Dr. Neis originally estimated the onset of the tumor as sometime in August 1968. Since the medical examination by defendant's doctor took place on August 30, 1968, at the very end of the month, this would tend to affirmatively suggest that the tumor was present at the time of that examination. There is no evidence to sustain a finding that the onset of the tumor was subsequent to August 30, 1968. It was therefore error for the court to submit these matters to the jury under proper instructions, because there is no evidence in the record from which a jury could reasonably conclude that the tumor was not present on the date of the medical examination on August 30, 1968. These facts bear direct relation to the operative legal principles applicable to this case. If the tumor had been present on August 30, 1968, the defendant's doctor

on proper examination could have discovered it by the means of a chest X-ray. Not only did the defendant's doctor fail to take a chest X-ray, but the defendant's own procedure did not mandatorily require a chest X-ray examination and left this to the discretion of the examining doctor. The defendant itself established the procedures to protect itself. It was free to examine Ortega as exhaustively as it liked. Its very purpose was to check upon the representations of application and to discover as comprehensively and as thoroughly as it wished, latent disease and health conditions that were material to its final judgment in accepting the risk on October 24, 1968. Its hindsight discovery, subsequent to Ortega's death, shall not be ripened into a retroactive curing of its original error or failure to take the steps that its own procedure permitted or should have required.

The defendant contends that Ortega breached the duty to it to disclose material information about his health which he learned after the medical examination and before the consummation of the contract. After experiencing pain in his right shoulder and coughing up blood on October 26 and 27, 1968, Ortega consulted his personal doctor, Dr. Henry Lehnhoff, on October 29, 1968. X-rays revealed a shadow on Ortega's right lung. This information was disclosed to Ortega; he was referred on November 1, 1968, to Dr. Delbert Neis, a thoracic surgeon. Dr. Neis recommended surgery, which was performed on November 8, 1968, at which time, on biopsy, diagnosis of lung cancer was confirmed for the first time. Despite the fact that the home office had already approved the policy, and on October 31st the defendant had informed Ortega that the policy had been approved, and that Ortega paid the premium on November 1, 1968, the very day that he first consulted Dr. Neis, the thoracic surgeon, the defendant contends that Ortega had an affirmative duty to seek it out and to disclose this information.

We reject this contention. In the first place, we ob-

serve that neither Ortega nor his doctors, including the thoracic surgeon, had any confirmed information as to malignancy until November 8, 1968, at least 2 days after the delivery of the policy. It is true, of course, that Ortega was advised by his personal doctor that the situation revealed by the X-rays of his chest was suspicious. At that time the policy had already been approved by the home office of the defendant and one day before he consulted the thoracic surgeon on October 31, 1968, the defendant's agent had informed Ortega that the policy had been approved. No inquiry was made by Adair, the agent, nor was Ortega asked to make any disclosures concerning the condition of his health. It is clear to us that the contention of the defendant herein would require a layman, after information that his policy had been approved and while consulting his doctor, to form a medical judgment as to the nature and extent and seriousness of his complaints and symptoms and to affirmatively advise the insurance company of such suspicions, even in the absence of no inquiry, examination, or request by the insurer. We reject such a harsh and impractical rule. Injustice of such a rule is apparent under the circumstances in this case when we reflect that the defendant's position, in effect, is to require Ortega, a layman, even without any firm diagnosis by his own doctors, to disclose and inform the agent of the defendant concerning a condition which the defendant's own doctor failed to examine into and to determine at the time of the medical examination. In only one case has our court specifically passed upon the question involved here. We adhere to the rule announced in Merriman v. Grand Lodge Degree of Honor, 77 Neb. 544, 110 N. W. 302, which holds generally that an applicant for life insurance has no duty to voluntarily inform the insurer of new information about his health which arises after a medical examination by the insurer. In that case the trial court erroneously instructed the jury as follows concerning the duty to inform the insurer: "In con-

sidering the question whether any statement made by the deceased, Katherine Merriman, was true or false, you should consider it as of the time she signed the application, *up to and including the time when the contract between her and the defendant company was completed*, being the time of the final approval of the application by the company * * *. This is true, for the reason that *up to the time of the final approval of the application it would be her duty to correct any statement, contained in her application made by her, which she subsequently learned was false.*" (Emphasis supplied.) Our court reversed on the basis that the above instruction was erroneous and for failure to grant the beneficiary's request for instruction confining the applicant's knowledge of her medical condition to the time the application was signed. The court in that case discussed the consideration underlying its announcement of the following rule: "Consequently when an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy, nor would the fact, if subsequently discovered, prevent her from certifying that she was in sound bodily health, if such certificate is otherwise true. The only representation here is as to her apparent state of health, and all of the evidence in the record shows that at the time (the time of the filing of the application) she was, to all appearances, a robust and healthy woman."

In an almost identical case, Ames v. New York Life Ins. Co., 154 Minn. 111, 191 N. W. 274, the Minnesota court said as follows: "Unlike most of the cases in which the doctrine has been asserted, the negotiations between the parties were no longer pending and no deception was practiced to get possession of the policy. Appellant (the company) and its agent were the actors. Uninfluenced by anything said or done by the applicant or his agents, without inquiry, and of its own motion, it delivered the policy and called for and received the premium. It is

difficult to spell out fraud from anything that was said or done, or left unsaid or undone."

Corollary to the above holding, and pertinent to our determination here is the general principle announced by the cases that an applicant for insurance has no duty to inform an insurer of new information about his health where the insurer fails to inquire into the existence of any new information after the medical examination. Metropolitan Life Ins. Co. v. Devore, 66 Cal. 2d 129, 56 Cal. Rptr. 881, 424 P. 2d 321; Harte v. United Benefit Life Ins. Co., 66 Cal. 2d 148, 56 Cal. Rptr. 889, 424 P. 2d 329; Commonwealth Life Ins. Co. v. Rider, 153 Ky. 130, 154 S. W. 906; American Bankers Life Assurance Co. of Florida v. Toth, 165 So. 2d 804 (Fla. App., 1964). It is true that the insurer has a right to know about any intervening conditions material to the risk it assumes, between the time of the application, the medical examination, and the final issuance of the policy. It may during this period of time completely reject the application and policy for any reason; it may make any inquiry or investigation concerning the health of the insured that it sees fit to inquire into. No issue is presented in this case that concerns this area, for the simple reason that no inquiry of any nature whatsoever was made by Adair, the agent, or any agent of the defendant prior to the time of the issuance of the policy and the receipt of the premium. Faced with the force of the Merriman holding and the equities of the situation, the defendant in this case asks us to overrule the Merriman case and follow the law of other jurisdictions. We think, however, that the Merriman case is sound and that the increasingly available opportunities and capacity for an insurance company to protect itself in this area indicate that it should be followed. Strong considerations of public policy indicate that where an insured has restructured his estate and financial situation, relying upon the availability of life insurance, a rule should not be adopted which permits a retroactive examination by an

insurance company, after death of the insured, and void the policy, absent fraud or misrepresentation or a positive violation of the conditions of the insured's contract material to the risk thereto. For this court to hold for the defendant, "* * * would be to give countenance to a practice that, while perhaps not fairly to be characterized as fraudulent, would be unreasonably destructive of the protection which life insurance is aimed to secure. It would result * * * that 'no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy.'" Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 A. 793 (1936).

The home office approved the policy. Adair was the agent of the defendant, he knew Ortega, could make any inquiry or request any information of Ortega that he desired, saw fit not to, and delivered the policy and received the premium, all prior to the operation on Ortega and the first confirmed disclosure of an uninsurable condition of lung cancer. Ortega was a good enough risk for the defendant to accept after a medical examination of scope and extent of its own choosing, and was a good enough risk for the defendant to accept his premium payment without further inquiry as to the condition of his health after the medical examination. This being true, he was a good enough risk for the defendant to pay this insurance now that he is dead. See Independent Life Ins. Co. v. Rider, 150 Ky. 505, 150 S. W. 649 (1912).

Under the material undisputed facts in this case the plaintiff was entitled to judgment as a matter of law, and the submission of the issues of continued insurability and the duty to disclose was error.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

DOROTHEA M. ROGERS ET AL., APPELLEES, IMPLEADED WITH RAY T. ROGERS, APPELLEE, V. JON L. NEIMAN, APPELLANT.
193 N. W. 2d 266

Filed December 17, 1971. No. 37988.

1. **Contracts: Words and Phrases: Courts.** In construing a writing the words used should be given their ordinary and popularly accepted meaning in the absence of explanation or qualification.
2. **Contracts: Words and Phrases.** A provision in a lease granting the lessee an option to purchase in the event "the lessors shall place the premises up for sale" does not apply to the sale of an undivided interest in the premises by one lessor to another lessor.

Appeal from the district court for Thomas County: WILLIAM F. MANASIL, Judge. Affirmed.

Murphy, Pedersen & Piccolo, for appellant.

Joseph J. Divis, Thomas O. David, and Jewell, Otte, Pollock & Gatz, for appellees.

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

BOSLAUGH, J.

This case arises out of a controversy concerning a ranch lease executed by Dorothea M. Rogers, Ethelle H. Wiese, Hazel M. Wiese, Evelyn Thompson, and A. Arlyne Werner as lessors and Jon L. Neiman as lessee. The lessors were tenants in common. The lease contained a provision that in the event "the lessors shall place the premises up for sale," the lessee shall have an option to purchase by meeting the highest responsible bid within 60 days after notice of the bid.

The lease expired on April 30, 1964. On November 16, 1963, Evelyn Thompson sold her undivided one-fifth interest in the property to Dorothea M. Rogers and her husband. On November 18, 1963, Hazel M. Wiese sold her undivided one-fifth interest in the property to Dorothea M. Rogers and her husband. Neiman contends that under the lease he had an option to purchase the undivided interest of a lessor in the event the lessor offered

her interest for sale; and that he is entitled to specific performance of the option provision of the lease as to the two undivided one-fifth interests which were sold.

The trial court refused specific performance. Neiman appeals. The only question presented is whether Neiman is entitled to specific performance of the option provision of the lease.

Neiman argues that the lease was, in effect, a separate lease of the undivided one-fifth interest of each of the lessors; and that the option provision was an agreement by each of the lessors that if her undivided one-fifth interest in the property was offered for sale, he had an option to purchase the interest by meeting the highest responsible bid.

The agreement was that if "the lessors shall place the premises up for sale," Neiman would have an option to purchase. We think the proper construction of the lease was that an option existed only if the entire property was offered for sale by all of the lessors. This is the ordinary and popularly accepted meaning of the words used. Peetz v. Masek Auto Supply Co., Inc., 161 Neb. 588, 74 N. W. 2d 474. See, also, James, Option Contracts, § 811, p. 314.

Neiman first asserted his claim under the option provision in an amended answer and cross-petition filed November 24, 1967. On August 24, 1963, Ethelle H. Wiese, as agent for the lessors, had written to Neiman stating: "As I explained to you, the purchase of two portions of the ranch by my sister, Mrs. Ray Rogers, is pending." The deeds from Evelyn Thompson and Hazel M. Wiese to Mr. and Mrs. Rogers were both recorded on April 30, 1964. Neiman's delay in asserting any claim under the option provision until more than 3 years after the lease had expired suggests that he understood it to mean that the option applied only to a sale of the entire property by all of the lessors.

The judgment of the district court is affirmed.

AFFIRMED.

CHARLES BESHALER, APPELLEE AND CROSS-APPELLANT, V. BEN J. HELBERG AND GLEN HELBERG, DOING BUSINESS AS WESTERN LIVESTOCK AUCTION COMPANY, ET AL., APPELLANTS AND CROSS-APPELLEES.

193 N. W. 2d 261

Filed December 23, 1971. No. 37982.

1. **Verdicts: Judgments: New Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. **Trial: Evidence.** If plaintiff without reasonable explanation testifies to facts materially different from his deposition concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is to be discredited and should be disregarded.
3. **Insurance: Attorneys at Law: Fees: Motions, Rules, and Orders.** A claim for an attorneys' fee after judgment in favor of plaintiff in his action on a fidelity policy or bond may be presented by motion at a subsequent term of court.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed in part, and in part reversed and remanded with directions.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellants.

Beatty, Morgan & Vyhnalek, for appellee.

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

SPENCER, J.

This is an action by Charles Beshaler against Ben J. Helberg and Glen Helberg, and National Surety Corporation of New York, their bonding company, on the bond required under the Packers and Stockyards Act of 1921, for the balance due on the sale of 238 steers which sold for $31,911.36. Defendants Helberg withheld $19,500 from the proceeds, contending this amount had been loaned to Paul Geiser, an alleged partner of Beshaler,

for feed and transportation costs for the cattle. The jury returned a verdict for Beshaler on which judgment was entered. Beshaler cross-appeals from the disallowance of an attorneys' fee. We affirm the judgment and reverse the disallowance of the attorneys' fee.

During October 1961, Beshaler purchased 1,916 head of calves from Kiewit Ranches and paid for them with his personal check in the amount of $215,644.33. Geiser, an order buyer licensed under the Packers and Stockyards Act, acted as the agent of Peter Kiewit in the sale of the calves to Beshaler. Most of these calves were resold by Beshaler. Of those not sold, 207 head were put on wheat pasture in Texas, and 240 head on wheat pasture at Plains, Kansas. The proceeds of the 240 head that were at Plains, Kansas, are involved in this litigation.

Beshaler made arrangements with Geiser to take care of handling the calves in Texas and Kansas, and agreed that his compensation would be one-half of whatever gain was made, but Geiser was to see to the transportation and feed, and to take care of the calves. In January of 1962, the wheat pasture in Kansas froze and it was necessary to move the calves. Beshaler decided they should be sold, and on January 17, 1962, had them brought to the Western Livestock Auction Company, operated by the Helbergs at North Platte, Nebraska. Geiser's only interest in the calves was a share in the profits, if any.

On November 19, 1961, Geiser purchased 208 cull cows from a Kiewit ranch in Montana. Subsequently, in November Geiser purchased 441 head of cull cows from another Kiewit ranch, Pawnee Springs Ranch, at Maxwell, Nebraska. Geiser sold 196 head of these cattle to Glen for $27,534.60. Geiser was to pay for the Pawnee Ranch cattle on or before December 15, 1961, and on that date he issued his personal check in the amount of $62,899.80. At that time the balance in his bank account was $9.90. Geiser testified he told Glen he was in trouble, that he needed money to pay for the Kiewit

cattle, and on December 12, 1961, Glen gave him a check for $10,000. On the same date Glen paid him the balance on the 196 cows. On December 28, 1961, Geiser went to Glen at the sale barn and told him he needed additional money to cover the check for the Pawnee Springs cows, and received $9,500. Geiser still did not have sufficient funds, and on December 30, 1961, sold Beshaler 320 head of the cattle for $45,300. He then arranged for payment of the check.

Glen testified that when Geiser contacted him in December, he advised him that he had 238 head of steers on feed in Kansas and would need money to take care of the feed bill and the transportation costs, and Glen gave him a check for $10,000, drawn on a special account designated "B & G Feed Yard," which was a special account maintained by Ben and Glen Helberg. On December 29, 1961, Glen advanced Geiser an additional $9,500 by a check on the same account, making a total advance of $19,500, which Glen testified he believed was being advanced to pay for feed and transportation of the Kansas cattle.

When the cattle were sold on January 23, 1962, they produced a gross amount of $32,677.80, and Glen deducted the $19,500 due from Geiser and issued a check payable to Bud Beshaler and Paul Geiser, drawn on the Western Livestock Auction Company account, in the amount of $12,411.36. Glen further testified that a copy of the invoice and the check were duly mailed to Beshaler and should have been received by him on January 24th or 25th, 1962. The petition herein was filed August 12, 1964. Glen testified that he did not hear anything from Beshaler relative to the deduction for at least 18 months. The check was cashed February 27, 1962.

Beshaler testified that he attended the sale on January 23, 1962, but left before the sale was over. He received the invoice and the check referred to above by mail. He then called Glen and asked why $19,500 was deducted. Glen told him of the money he had advanced

to Geiser. He also told him that Geiser was on a big buying trip in Texas and would be gone for about 30 days. Upon Geiser's return, Beshaler contacted him and arranged for a meeting with Glen about February 23rd. It is Beshaler's testimony that at this meeting Glen said Beshaler should be paid his money, and as soon as he could arrange it with his father he would take care of it. Beshaler explained to Glen that he did need some money, and Glen told him to cash the check and they would straighten it out later. Beshaler talked to Glen approximately 3 weeks later about getting his money, and Glen said he was having a problem with his father understanding why the deal was like it was, and he needed additional time to get it ironed out. Beshaler testified that he contacted Glen at least once a month thereafter for 6 or 8 months.

Beshaler testified Geiser did not own any of the calves that were sold; that he did not authorize Helberg to withhold the $19,500; that he at no time authorized Geiser to borrow money on the calves; and that he never at any time made any representations to Helberg that Geiser was his partner, nor had Glen at any time talked to him about whether Geiser was his partner.

Geiser, who at one time had been employed by the Helbergs, testified that the $19,500 he borrowed from Glen had no connection with the Kansas cattle. Beshaler was the sole owner of those cattle. He had sold them for Kiewit to Beshaler. His only interest in the cattle was that he was to pay the trucking and feed bill for a share of the profits. He was to get half of the difference between the purchase and the sale price. He had never been in any partnership with Beshaler.

Defendants set out 16 assignments of error but argue only 7 of them. We consider only those which could be remotely prejudicial. The evidence is fairly conclusive that defendants failed to sustain their claim of a partnership. In any event, all possible issues were submitted to the jury which is the sole judge of the credibility of

witnesses and the weight to be given their testimony. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291.

Defendants' principal contention is that the trial court should have directed a verdict against Beshaler because he changed his testimony without reasonable explanation on a vital issue between the time of the trial and the taking of a deposition 5 years before. To have done so in this instance would have been erroneous.

We have held that if plaintiff, without reasonable explanation, testifies to facts materially different from his deposition concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is to be discredited and should be disregarded. Sacca v. Marshall, 180 Neb. 855, 146 N. W. 2d 375.

The principal point in question is whether Beshaler called Glen immediately upon the receipt of the check and invoice as he testified at the trial, or whether he got in touch with him within 30 days thereafter as indicated by the deposition. While the testimony raises a question of credibility, it is not within the rule set out above. Glen testified that Beshaler did not talk to him until at least 18 months after the check had been cashed. The evidence would support a reasonable deduction that whether Beshaler talked to Glen immediately or within 30 days, he did talk to him before the check was cashed. The issue was undoubtedly argued to the jury, and it is evident that it accepted Beshaler's version of the transaction.

Defendants complain that instruction No. 6 given by the court laid down inconsistent and confusing propositions to be considered by the jury. We assume they refer to instruction No. 3 because instruction No. 6 was not covered in defendants' assignments of error, and their

argument appears to be directed to that instruction.

The trial court submitted the instructions to the attorneys before they were given. Defendants, although they did object to some instructions, made no objections to either No. 3 or No. 6. In any event, instruction No. 3 is not misleading, erroneous, or prejudicial. Therein the court covered defendants' defenses of partnership, partnership by estoppel, accord and satisfaction, and estoppel. The court set out the specific elements necessary to be proved to establish any of the four defenses. It is defendants' position that the language in the instruction is in conflict but we do not so consider it. When the instruction is read in its entirety, we do not feel that the jury could have been misled by it.

Defendants assign as error the failure to give a tendered instruction to the effect that Paul Geiser had been convicted of a felony and that this evidence was made known to the jury so it could judge his credibility. The following appears in evidence in the testimony of Mr. Geiser: "Q Mr Geiser, this deposition is being taken at the Nebraska Penal and Correctional Complex, where you are presently an inmate. Were you convicted of a felony? A Yes. Q And out of what county, Mr. Geiser? A Cherry County. Q What was the date of your conviction? A October 5, 1966." The testimony therefore clearly indicated that the witness was a convicted felon.

Instruction No. 10 given by the trial court on this point was as follows: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider: * * * 8. Evidence of previous conviction of a felony; * * *." There is no merit to defendants' assignment.

Beshaler cross-appealed from the disallowance of an attorneys' fee herein under section 44-359, R. R. S. 1943, which provides as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action

at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

The bond issued by the defendant, National Surety Corporation of New York, provides in part as follows: "KNOW ALL MEN BY THESE PRESENTS: That we Ben J. Helberg and Glen Helberg d/b/a Platte Valley Sales Co. and Western Livestock Auction Company of North Platte, Nebraska, as Principal and NATIONAL SURETY CORPORATION OF NEW YORK, NEW YORK, as Surety are held and firmly bound unto Lester Langford of North Platte, Nebraska (or his successor in official position if any) as trustee for all persons who may be damaged through the breach of this bond, as obligee, in the sum of sixty-four thousand and no/100 Dollars * * *."

One of the conditions of the bond is as follows: "NOW THEREFORE, THE CONDITION OF THIS BOND IS SUCH THAT—1. If the said Principal shall safely keep and faithfully and promptly account for and pay to the owners or their duly authorized agents the proceeds of sales of all livestock received for sale on a commission basis by said Principal at a public stockyards, as defined in the Act of Congress known as the Packers and Stockyards Act, 1921, as amended; * * *."

Defendants argue that plaintiff, having failed to plead or prove any claim for attorneys' fees, is now barred, and cite two Nebraska cases in support thereof. Those cases give no comfort to the defendants. The first is Lawler v. American Surety Co., 101 Neb. 741, 164 N. W.

1050, in which it was held that plaintiff at a subsequent term of court could not have a retaxation of costs so as to award him an attorneys' fee. Judgment was rendered on October 6, 1915. Two days later plaintiff filed an application for the allowance of attorneys' fees. This was overruled, and the term at which the judgment was entered adjourned sine die October 30, 1915. Subsequently, the defendant paid the full amount of the judgment and costs into court. Plaintiff received and receipted for the same. On December 8, plaintiff filed another motion to retax costs, which was overruled, and plaintiff then perfected an appeal. It is obvious that plaintiff's failure to appeal from the overruling of his first motion for the allowance of attorneys' fees made that issue res judicata.

The other case cited by defendants is Haley v. Fleming, 148 Neb. 407, 27 N. W. 2d 626, which involved a construction of section 25-1801, R. S. 1943, and is not in point herein. That case reached this court on a motion to dismiss, and there was no evidence of any nature as to the pleadings or evidence to show the existence of the conditions precedent to an allowance of an attorneys' fee under that statute.

Defendants are in error in suggesting that there are no Nebraska cases exactly in point. Luikart v. Flannigan, 130 Neb. 901, 267 N. W. 165, would appear to indicate otherwise. In that case the defendants argued that the record was defective in that the petition did not contain a claim for an attorney's fee; it was allowed at a subsequent term of court and not " 'upon rendering judgment' " as required by statute; and there is no evidence of the value of the services performed by counsel for plaintiff. The court brushed these objections aside with the following language: "A claim for an attorney's fee after judgment in favor of plaintiff in an action on a fidelity policy or bond may be presented by motion at a subsequent term of court—the course taken herein. Allen v. Tallon, 120 Neb. 611, 234 N. W. 411."

Finding no prejudicial error, the judgment is affirmed except for the disallowance of an attorneys' fee, and the case is remanded to the district court for the allowance of an attorneys' fee for services in that court. Plaintiff is allowed an attorneys' fee of $500 for services rendered in this court.

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

STATE OF NEBRASKA, APPELLEE, V. ROBERT EUGENE WHITED, APPELLANT.
193 N. W. 2d 268

Filed December 23, 1971. No. 38063.

1. **Post Conviction: Constitutional Law.** In the absence of a violation or infringement of a constitutional right, no relief may be had under the Post Conviction Act.
2. **Right to Counsel: Criminal Law.** The rule pronounced in Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, that it is necessary to supply an indigent defendant with a lawyer at his preliminary hearing is not retroactive.
3. **Trial: Evidence: Criminal Law.** The rule announced in United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, that an in-court identification is inadmissible if tainted by an improper prior lineup or confrontation is not retroactive.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Robert Eugene Whited, pro se.

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

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

NEWTON, J.

Defendant appeals from a denial of his request for post conviction relief. As grounds for relief, he states: (1) A lawyer should have been appointed for him at the

time of his arraignment in municipal court; (2) he was wrongfully confronted with an identifying witness immediately after the offense was committed; (3) the police failed to immediately check a purported alibi; and (4) the court erred in admitting leading questions and hearsay evidence. We affirm the judgment of the district court.

Defendant appealed from his original conviction. See State v. Whited, 182 Neb. 282, 154 N. W. 2d 508. Assignments (3) and (4) do not involve violations of constitutional rights. In the absence of a violation or infringement of a constitutional right, no relief may be had under the Post Conviction Act. See State v. Reizenstein, 183 Neb. 376, 160 N. W. 2d 208.

Defendant was arrested on September 14, 1966, was arraigned and waived preliminary hearing on September 16, 1966, and was released on bond on September 29, 1966. Counsel was appointed on October 6, 1966; poverty affidavit was filed and trial commenced on January 4, 1967; verdict was returned January 5, 1967; and sentence was pronounced January 19, 1967. The proposition that he was entitled to a lawyer at the time of his arraignment must be based upon Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, decided June 22, 1970. Defendant cites Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114. That case referred solely to proceedings in the State of Alabama, and the law of that state differed materially from that of Nebraska. The case is not pertinent. No poverty affidavit was filed nor does the record reflect a request for appointment of an attorney at the arraignment and waiving of preliminary hearing. Defendant, who was not inexperienced in such matters, having had five previous felony convictions, waived preliminary hearing. The case of Coleman v. Alabama, *supra*, does not have retroactive application. See, United States ex rel. Walker v. Maroney, 444 F. 2d 47 (3d Cir., 1971); Harris v. Neil, 437 F. 2d 63 (6th Cir., 1971); Vizzard v. Procunier, 439 F. 2d 94 (9th Cir.,

1971); Phillips v. North Carolina, 433 F. 2d 659 (4th Cir., 1970); Konvalin v. Sigler, 431 F. 2d 1156 (8th Cir., 1970); United States ex rel. Bonner v. Pate, 430 F. 2d 639 (7th Cir., 1970). The only contrary holding by the circuit courts we have found is in Rivera Escute v. Delgado, 439 F. 2d 891 (1st Cir., 1971).

The alleged improper confrontation is based upon United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, decided June 12, 1967. The evidence does not indicate that it tainted the in-court identification. The witness had opportunity to view defendant at the scene of the offense and gave an accurate description of him to officers. His identification was not dependent upon the confrontation after arrest. In any event, Wade is not retroactive. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OPHELIA BOHANNON, ALSO KNOWN AS OPHELIA JONES, APPELLANT.

193 N. W. 2d 153

Filed December 23, 1971. No. 38066.

1. **Criminal Law: False Pretenses: Fraud and Deceit.** The gist of the offense of obtaining money by false pretenses is the obtaining of the money of another by false pretenses, with the intent to cheat and defraud.
2. ———: ———: ———. To sustain a charge of obtaining money by false pretenses, there must be reliance upon the representations made, and the pretense must be an effective cause in inducing the owner to part with his property. However, it need not be the sole moving cause.
3. ———: ———: ———. If the owner has knowledge of the truth, the offense of obtaining property by false pretenses has not been committed.
4. **Criminal Law: False Pretenses: Fraud and Deceit: Evidence:**

Trial. The intent to cheat and defraud may be proved by the circumstances surrounding the transaction.

5. **Criminal Law: Witnesses: Evidence: Appeal and Error. It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.**

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for obtaining money under false pretenses. The assignments of error relate to the sufficiency of the evidence to sustain the conviction.

The information charged that from July 1965 to December 1969, the defendant obtained money in excess of $35 from Douglas County, Nebraska, by false pretenses. The jury fixed the value of the money obtained at $3,000.

The evidence shows that defendant is the mother of 9 children and is divorced from William Bohannon, Sr. She applied for Aid to Dependent Children (ADC) in the early 1960's, and received a grant of $195 per month. In July 1967, the grant was increased to $344 per month. From July 1965 through December 1969, she received $13,654.50 in ADC funds.

Eligibility for a grant under the ADC program is determined in part by the resources of the recipient. A parent and 9 children are allowed a maximum of $1,700 in liquid assets under the plan in force in Nebraska. At 6-month intervals a recipient is required to furnish a written statement of assets to the welfare department. This statement is used by the department to determine

whether the recipient is eligible to continue to receive a grant under the program.

In 1965, the defendant moved into a house at 4416 North Thirty-eighth Street in Omaha, Nebraska. On July 7, 1965, the defendant, using the name of Ophelia M. Jones, had entered into a contract to purchase this property on an installment basis. The contract was recorded in November 1965. She represented to the welfare department that this property was owned by Clifford E. Jones and that she was renting it for $75 per month.

On April 29, 1966, the defendant opened a checking account in the Ames Plaza Bank, using the name of Ophelia M. Bohannon. On May 9, 1966, the account was changed to a joint account in the names of Clifford or Ophelia M. Jones.

On September 29, 1967, a certificate of title to a 1967 Cadillac automobile was issued to the defendant, using the name of Ophelia M. Jones.

In February 1968, the defendant, using the name of Ophelia Jones, entered into a contract with Clifford E. Jones for the purchase of a property at 2407 Ames Avenue where Jones operated a music shop known as Psychedelic Sounds. The contract was recorded in February 1968.

On July 23, 1969, a certificate of title to a 1966 Chevrolet automobile was issued to the defendant, using the name of Ophelia M. Jones.

The record contains 6 asset statements signed by the defendant dated October 18, 1965, August 26, 1966, March 15, 1967, September 20, 1967, January 30, 1969, and September 15, 1969. The checking account, the real estate, and the automobiles are not listed on any of these statements.

The defendant claims that she has no beneficial interest in any of the items which were omitted from the asset statements. She contends that the checking account, the real estate, and the automobiles are really the property of Clifford E. Jones and that Jones placed the

property in her name in an effort to avoid any claim by his divorced wife. Jones testified that he was the owner of the property in question.

The records of the welfare department show that on November 15, 1967, a neighbor complained that the defendant was "buying property, driving a 1968 Cadillac and living with a man." A caseworker called on the defendant to discuss the complaint. The defendant told the caseworker that Jones, her landlord, was "divorced and desires arrangements to keep his property from his ex-wife and children. Therefore, he wanted to place his new car and some property he had bought in her name." The caseworker advised the defendant "to have the name changed on this car registration and property." About 6 weeks later the department ascertained that a Cadillac automobile was registered under the name of Ophelia M. Jones. On February 8, 1968, the caseworker again visited the defendant and "emphasized the importance of Mr. Jones putting the car into his name."

Apparently, the department did nothing further until 1970 when the records in the courthouse were examined and it was ascertained that the Cadillac was still registered in the defendant's name and that she was a party to the contract to purchase the property on Ames Avenue. Her grant was then suspended as of January 1, 1970, and her case closed on April 1, 1970, "because of assets in excess of eligibility."

The gist of the offense is obtaining the money of another by false pretenses, with the intent to cheat and defraud. Dwoskin v. State, 161 Neb. 793, 74 N. W. 2d 847. The evidence of the State tended to prove that the defendant was the owner of the property omitted from the asset statements. The jury was not required to believe the testimony of the defendant and Jones that she had no beneficial interest in the property. It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.

An essential element of the offense is that there be re-

liance upon the representations made. Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653. The pretense must be an effective cause in inducing the owner to part with his property, and if the owner has knowledge of the truth, the offense has not been committed. However, the pretense need not be the sole moving cause that induced the owner to part with his property. Wax v. State, 43 Neb. 18, 61 N. W. 117.

To the extent that the welfare department had knowledge of the defendant's ownership of property omitted from the asset statements there was no reliance on the asset statements. The record does not show that the welfare department had any information concerning the checking account, the property on Ames Avenue, or the 1966 Chevrolet automobile until after December 1969. As to these items the jury could find that the welfare department relied upon the asset statements.

The defendant contends that the evidence is insufficient to establish an intent to cheat and defraud the county. The intent to cheat and defraud may be proved by the circumstances surrounding the transaction. State v. Swanson, 179 Neb. 693, 140 N. W. 2d 618.

The defendant argues that she did not want to have the grant continued; that it was reinstated in 1969 without any request from her after a 3-month suspension; and that she did not appeal from the action of the department in closing her case in 1970. The record shows that the defendant could have terminated the grant at any time by a written request to the department. If the defendant did not want the money, she could have returned the checks instead of cashing them. The fact that she did not comply with the advice of the caseworker in regard to the Cadillac automobile and the property on Thirty-eighth Street was a circumstance to be considered by the jury in determining her intent.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent.

This court has held in a large number of cases, one of which is Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653, that an essential element of the crime of obtaining money by false pretenses is reliance by the defrauded party upon the alleged false representation. In the cited case this court approved a statement from other Nebraska cases as follows: " 'It is not sufficient that there is a false pretense; *the owner of the property must rely on it;* the pretense must be *an effective cause in inducing* the owner to part with his property. Therefore, if the owner has knowledge of the truth or does not believe the pretense, or, although believing it, yet parts with the property on some other inducement, or investigates it and parts with the property, relying entirely on the results of his investigation, the offense has not been committed.' " (Emphasis supplied.)

The record in this case clearly discloses, I think, as a matter of law that (1) the information contained in the official records of the welfare department shows that at the time the payments were made the welfare department did not (and as a matter of law could not) rely upon the alleged misrepresentations contained in the asset statements because the department had knowledge of the facts which the State now claims were fraudulently concealed, and (2) the evidence in this case does not show Mrs. Bohannon had assets (including those originating with Jones) which made her children ineligible for ADC payments. Any failure to disclose facts which, if known, would not have made her ineligible to receive the payments on behalf of her children is legally immaterial because the existence of such facts could not be the basis of denial of aid. As a consequence such nondisclosure, whether deliberate or through misunderstanding, could not be an *effective cause* in inducing the payments because if known they would not have been lawful grounds for denying payment.

As to the facts of reliance the State itself introduced into evidence reports of the caseworkers whose duty it was to supervise the Bohannon case. As the majority opinion points out, on December 6, 1967, the caseworker investigated a complaint that Mrs. Bohannon was driving a Cadillac and buying property. The caseworker's report under date of December 6, 1967, shows: "Mrs. B. explained that the man with whom she has been going is divorced and desires arrangements to keep his property from his ex-wife and children. Therefore, *he wanted to place his new car and some property he had bought in her name.* Also, Mrs. B. stated that this man is the landlord of her house and does occasionally visit but never lives with her. Caseworker advised her that this was not an acceptable situation. Mrs. B. stated that this man had asked her to marry him; however, she is not certain what her decision will be. *Caseworker advised her to have the name changed* on this car registration and property." (Emphasis supplied.)

A report of another caseworker under date of January 30, 1969, is as follows: "Mrs. B's. home is in good condition and quite large. The furniture and interior decoration job in the living room is in excellent taste. The room is panelled in dark wood and furnishings and walls are done in reds and burnt oranges. This home hardly compares with any other ADC families. This lavishness is due to the fact that Mrs. B. has a rich boy friend. He leaves one of his cars, a grey and black 1968 Eldorado Cadillac with Mrs. B. to let her drive. He has a business of his own on 24th Street. *Mr. Jones wants to have everything in Mrs. B's. name. The reasons for this are not established.* Mrs. B. *rents the house from* Mr. Jones at only $75, and *he pays the utilities and buys her extras when needed.*" (Emphasis supplied.) A similar report under date of April 1, 1969, shows: "At Mrs. Bohannon's request a home visit was made this date. Mrs. Bohannon finally admitted that Mr. Jones and her were not really married in St. Paul as she had reported.

Mrs. B. reported that Mr. Jones only wants every one, his mother, their friends, plus the Welfare Department to think that he is married to Mrs. B. It seems that Mrs. B. handles his business affairs. *By having everything he owns in Mrs. B's. name* he feels that his ex-wife cannot claim anything for herself." (Emphasis supplied.) The majority opinion itself shows Mrs. Bohannon made no attempt at concealment. The contracts of purchase were recorded immediately in each instance. The welfare department knew at least as early as January 28, 1968, that she was using the name of Ophelia Jones.

The above clearly discloses the welfare department knew that property alleged to have originated with Jones was in fact in Mrs. Bohannon's name and that it was in fact being used to "pay utilities and buy her extras when needed."

The welfare department continued making ADC payments despite the knowledge it had. The record establishes as a matter of law that the welfare department did not rely upon the asset statements of August 26, 1966, March 15, 1967, September 20, 1967, January 30, 1969, and September 15, 1969, because it had actual knowledge they were not correct.

This set of facts cannot be distinguished from the Beyl case which we have cited. In that case the defendant was charged with obtaining money by false pretenses from a grain buyer. The scale operator at the elevator discovered the falsity of the representations prior to delivery of the check for the grain which was involved in connection with the falsity, but he delivered the check anyway. The court held the crime was not committed.

Introduced into evidence were certain regulations of the State Department of Welfare. These regulations include the following: *"MAXIMUM AVAILABLE RESOURCES:* An ADC unit need not be entirely without resources to be eligible for assistance. A moderate amount of cash, insurance, or other resources on which

the child or family may draw in case of emergency or other acute need may contribute measurably to family security and stability. The standards below are applicable to determining eligibility on the basis of available resources:

Unit without parents, one child	$ 750
Unit without parents, two children	$1500
Unit with one parent and one child	$1500
For each additional child or parent add	$ 25

. . .

"*DETERMINATION OF OWNERSHIP OF RESOURCES:* Property which appears on record in the name of an ADC unit must be considered his. Ownership of real estate may be determined through documentary sources. Records in the office of the register of deeds or office of the county clerk will show in whose name the property is recorded. Information in regard to estates which have not been settled or which are in probate may be secured through the records of the county court. *In case of joint ownership, the terms on which the property is held will need to be verified.* If the property has come to the holder as a part of an estate, the records of the county court are consulted; if by joint purchase, the facts will appear in the record of the deed. *Jointly owned personal property in some instances may be liquidated by any one of the holders.*" (Emphasis supplied.) The regulations also exempt from the definition of available resources certain items and these include the following: "(a) real property which the unit occupies as a home; (b) household goods of moderate value used in the home; . . . (d) resources to a maximum value of $3,000 used by the unit in a planned effort directed toward self-support; . . .." The regulation which defines available resources also provides: "The worth of resources, both available and exempt, is determined on the basis of their *current market value.*" (Emphasis supplied.)

This brings us to the second reason why the record

will not support a conviction. There is no evidence in the record that on any of the asset statements dates upon which statements the State relies for the false pretense the defendant had "assets available" in excess of those allowed by the regulations. The home itself is an exempt asset and need not be considered. As to the Cadillac and business property which was being purchased under contract, the record discloses only equities existed, and there is no evidence in the record to show the market value of these equities and what they could be converted into for cash. As to the bank account which was involved, the balances therein on the date of the asset statements are as follows: August 26, 1966, $156.57; March 15, 1967, $308.48; September 20, 1967, $658.66; January 30, 1969, $285.33; and September 15, 1969, $151.21.

As noted from the Beyl and other cases, one of the elements of the crime is that the alleged representations must be "an effective cause" of the defrauded party parting with the money or property. Any immaterial representation therefore, that is, one which would not affect eligibility, could not be an effective cause within the foregoing definition. We must keep in mind here that we are not dealing with the case of a private individual being allegedly defrauded. We are here dealing with a case in which the party was legally entitled to the funds if she was eligible. I take it no one would deny that under the equal protection clauses of the Constitutions of the United States and State of Nebraska if a person is eligible for ADC he cannot be deprived thereof. This is certainly at least implicit in the opinions of the Supreme Court of the United States. Lewis v. Martin, 397 U. S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561; King v. Smith, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118.

The record is wholly devoid of any evidence to show that Mrs. Bohannon had "available resources" in excess of the $1,700 which she was allowed by the regulations. Assuming that Mrs. Bohannon was legally free to liquidate the jointly owned property (which she was not),

there was no attempt by the State to prove the market value of the equities and that they exceeded the $1,700 available resources allowed. There is nothing whatever to show the music shop property is not an exempt property within the regulations of the welfare department.

We point out that on two occasions Mrs. Bohannon was suspended from welfare. On the last such occasion it was because of her representation she was married to Jones. When the welfare department found out this was not true, it put her back on without any request of her own. Apparently on the earlier occasion she was put back on without any request of her own. All these things fortify a conclusion there was no reliance. Section 43-512, R. R. S. 1943, places upon the county board of public welfare the obligation through its agents and employees to make an investigation of the allegations of any application. The welfare department is not entitled to rely upon the asset statements alone and disregard all the other information in its files furnished to it by the applicant.

An essential element of a jury verdict in these cases is a finding as to the amount of which the party was defrauded. In this particular case the jury found $3,000 although, as the majority opinion recites, she received after July 1965, $13,654.50. There is absolutely no rational way to tell from the evidence how the jury could arrive at such a figure. This again, to my mind, demonstrates that the jury verdict was the result of confusion and misunderstanding.

I would reverse the conviction for the reason the evidence is legally insufficient: (1) Because it shows as a matter of law that there was not and could not be any reliance upon the alleged false representations, and (2) because the record in this case fails to establish that the representations were material and could justify the withholding of the payments. It therefore fails to establish that any misrepresentations could be a legally effective cause of the payments.

STATE OF NEBRASKA, APPELLEE, V. GENE LYNN ANDERSEN, APPELLANT.

193 N. W. 2d 159

Filed December 23, 1971. No. 38148.

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

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Cecil W. Orton, for appellant.

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

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

SPENCER, J.

The only issue raised in this appeal from a guilty plea to the crime of burglary is the excessiveness of the sentence. Defendant Gene Lynn Andersen was sentenced to a term of not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex, and was given credit for the time spent in the county jail awaiting trial and sentence. We affirm.

Defendant, who was 24 years of age, with two accomplices broke into a store at night at Wynot, Nebraska. It is defendant's contention that the sentence was excessive in view of defendant's age; the fact that he was merely a follower with two more experienced participants; and that he had cooperated with the State in entering a plea of guilty.

From a review of the presentence investigation, which is a part of the record, we are convinced that the trial court did extend leniency to the defendant, and that the sentence is a minimal one. Defendant was sent to the

Boys' Training School at 14, where he spent 14 months for burglary. In 1964 he was apprehended for petit larceny and given a year's probation. In 1969 he was involved in a burglary in South Dakota but no charges were filed because he was in custody in Montana on a similar charge. On the Montana offense sentence was suspended and he was placed on 2-years' probation. He was still on probation when the current offense, which carries a fine, jail up to 6 months, or a 1 to 10 year imprisonment penalty (section 28-532, R. R. S. 1943), was committed. Considering defendant's previous involvement, no abuse of discretion is disclosed by the record.

We have said on previous occasions: "Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion." State v. Lenz, 183 Neb. 496, 161 N. W. 2d 710.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

LAWRENCE F. WEBER, ADMINISTRATOR OF THE ESTATE OF MARIE E. HICKMAN, DECEASED, APPELLANT, V. SOUTHWEST NEBRASKA DAIRY SUPPLIERS, INC., A CORPORATION, ET AL., APPELLEES.

193 N. W. 2d 274

Filed December 30, 1971. No. 37895.

1. **Automobiles: Negligence: Statutes: Highways.** Section 39-751, R. S. Supp., 1969, is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained therein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way.

2. **Automobiles: Negligence: Highways.** The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law.
3. **Automobiles: Negligence: Trial: Jury.** Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct the operation of the automobile and to exercise control over it. This ordinarily is a question for a jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion, then the question is one for decision by the court as a matter of law.
4. **Evidence: Negligence: Trial: Husband and Wife: Death.** Where the evidence is clear that the only person within the class for which an action may be brought under section 30-810, R. R. S. 1943, is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for the defendant.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Mitchell & Beatty, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr, for appellees.

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

SPENCER, J.

This is an appeal by Lawrence F. Weber, administrator of the estate of Marie E. Hickman, deceased, plaintiff, from the dismissal at the close of the plaintiff's evidence of a wrongful death action against Southwest Nebraska Dairy Suppliers, Inc., a corporation, and Milford Johnson, defendants. The trial court determined the driver of the plaintiff's vehicle was negligent as a matter of law; that such negligence was imputed to Robert N. Hickman and the deceased, Marie E. Hickman, his wife; and that Robert N. Hickman was a widower and the only heir of Marie E. Hickman who

sustained pecuniary loss under section 30-810, R. R. S. 1943. We reverse.

This action involves a collision on July 23, 1969, at approximately 9:30 a.m., between a pickup truck jointly owned by the deceased and Robert N. Hickman, and a truck owned by Southwest Nebraska Dairy Suppliers, Inc., and operated by Milford Johnson, in the approximate center of an open intersection of two graveled roads 2½ miles west and 4/10 of a mile north of Elm Creek, Nebraska. Johnson, hereinafter referred to as defendant, was traveling north and the Hickman vehicle operated by Mrs. Audrey Grassmeyer, a family friend, was traveling east. Defendant had the directional right-of-way.

The Hickman pickup was partly loaded with corn which Mr. Hickman was going to feed to cattle on his pasture 1 mile east and 8 miles north of the intersection. Hickman had found chokecherries in this pasture and the evening before his wife and Mrs. Grassmeyer had decided to ride with him so they could pick the chokecherries. When they were ready to leave the Hickman farm home, Mrs. Grassmeyer was standing on the driver's side of the pickup, which she had driven before. Mr. Hickman told her, "* * * go ahead and I will open the gates." Mrs. Grassmeyer had been to the pasture before. She got into the driver's seat with Mrs. Hickman in the middle and Mr. Hickman on the other side. As they turned east on the gravel road to the north of the farm and approached the intersection, Mr. Hickman noticed some calves strung out along the fence and told Mrs. Grassmeyer "* * * just drive slow and I will count these calves." Mrs. Grassmeyer drove slowly approaching the intersection and at Hickman's request stopped the pickup about a car length west of the corner post in the southwest corner of the intersection so he could count the calves bunched in the corner. After he had counted the calves he said "* * * they are all there." He then leaned over to move some tools on the floor under

his feet. The pickup started forward slowly; the brakes were applied; and the next thing he remembered was waking up in the hospital. The evidence would indicate that the Hickman pickup hit the left front side of the defendant's vehicle.

The decedent had been employed as a school teacher for 5 years. In addition to her teaching duties, she generally helped with the farm chores such as feeding and milking cattle, stacking hay, and buying supplies for the farm. She transacted 95 percent of the financial business of the farm; did the paperwork; filled out tax returns; and helped in the purchase of cattle. The income from her teaching job was deposited in a joint banking account and was used for paying farm expenses. The Hickmans employed no farm help.

The intersection was an open one. From the evidence and the photographs in evidence, both parties could see approaching vehicles for at least 250 feet from the intersection. The plaintiff's evidence would indicate that the defendant was negligent in not maintaining a proper lookout. The primary questions, however, are whether or not the driver of the Hickman vehicle was negligent as a matter of law, and if so whether or not her negligence could be imputed to Robert N. Hickman.

Without regard to defendant's possible negligence, we find that Mrs. Grassmeyer was guilty of negligence more than slight as a matter of law. Under ordinary circumstances, the defendant's vehicle would have the directional right-of-way. Plaintiff produced no evidence that would negative this directional right-of-way. Except for the extensive damage to the vehicles, there is no indication of the speed of the respective vehicles. If Mrs. Grassmeyer had looked before starting up, or at any time before entering the intersection, she would have seen the approaching vehicle. The photographs in evidence would indicate that the right front of the Hickman vehicle struck the left door of defendant's vehicle. At the time of impact the front of defendant's vehicle had

started across the center of the intersection.

We said in Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496: The statute (now § 39-751, R. S. Supp., 1969) is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained therein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way.

In Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36, we said: "The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law."

Was the negligence of Mrs. Grassmeyer imputed to Robert N. Hickman? We hold that whether it was or not is a jury question.

The facts indicate Mrs. Grassmeyer was driving because Hickman asked her to so he could open some gates which were hard to open. It is undisputed that Hickman, a joint owner of the vehicle, directed Mrs. Grassmeyer to drive slowly so he could count the calves along the fence, and then had her stop approximately two car lengths from the intersection until he could count the calves bunched in the corner. After he indicated he had counted the calves he said they were all there. Mrs. Grassmeyer then accelerated the vehicle and immediately thereafter collided with the defendant's vehicle.

The rule in this state is: "Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the

owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile and to exercise control over it." Petersen v. Schneider, 154 Neb. 303, 47 N. W. 2d 863.

In Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107, we held that where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct the operation of the automobile and to exercise control over it. This is ordinarily a question for a jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion, then the question is one for decision by the court as a matter of law. That is not the situation herein, and the defendant's motion to dismiss should not have been sustained.

This action is brought by an administrator under section 30-810, R. R. S. 1943, for the exclusive benefit of Robert N. Hickman, the widower and next of kin. The evidence is undisputed that Robert N. Hickman is the sole and only person sustaining pecuniary loss in the death of his wife. We have heretofore held in an action by a plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for the defendant. Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

We fail to perceive any distinction between a situation where the action is brought by a personal representative other than the beneficiary and one where the beneficiary himself is the plaintiff, if in both situations he is the sole and only person who can be benefited by the action and is guilty of negligence as a matter of law. If the

jury should find that the negligence of Mrs. Grassmeyer is imputable to Robert N. Hickman, then there could be no recovery herein.

Where the evidence is clear that the only person within the class for which an action may be brought under section 30-810, R. R. S. 1943, is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for defendant.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McCOWN, J., concurring in result only.

Where the evidence is inconclusive as to whether or not the owner is directing or controlling the operation of the automobile, the question is for the jury. See Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

On the facts here, it seems apparent that Robert N. Hickman's conduct as a matter of law did not amount to direction and control of the operation of the car at the time the accident actually occurred. He had finished the task for which he had requested Mrs. Grassmeyer to drive slowly and stop. When he had counted the calves, he said: "They are all there" and then leaned over and began to move some tools under his feet. From that point on, he was only a passenger. Even if his conduct should be held to constitute an exercise of control or the temporary assumption of the operation of the automobile, that control of operation was clearly over before Mrs. Grassmeyer began to drive the automobile again. If a request to drive slowly or to stop for a few moments at a designated location constitutes assuming control and directing the operation of an automobile, then virtually any statement which includes such a request would constitute not only an immediate assumption of control, but would also extend that control to the end of whatever journey the parties were taking, under the theories advanced by the majority opinion. This is neither logical nor reasonable. A request by an owner

passenger for a stop to permit him to get a newspaper at the start of a journey would then raise a jury issue as to whether any negligence of the driver coming after the request had been complied with should or should not be imputed to the owner. Even a stop request necessitated by an owner's urgent need for service station facilities would raise a jury question as to assumption of control of the automobile thereafter.

A more important problem here arises over the basic issue of imputation of negligence. The individual for whose death this action was brought apparently took no action, and did not even utter a word from the time the journey began. Yet it is left to the jury to determine whether or not her husband's requests to the driver made the negligence of the driver imputable to him, and then, because the husband is the sole beneficiary, barred him from any recovery against the defendant for her death.

The doctrine of imputed contributory negligence, which developed largely in the latter part of the Nineteenth Century, was based on theories of fictitious agency relationships. It is now generally recognized that such theories of agency are entirely fictitious and the doctrine of imputed contributory negligence has been largely discredited. See Restatement, Torts 2d, § 485, p. 541, et seq.

Section 485, Restatement, Torts 2d, states: "Except as stated in §§ 486, 491, and 494, a plaintiff is not barred from recovery by the negligent act or omission of a third person." Comment a under section 485 states: "The rule stated in this Section rejects, except as indicated by the reference to other Sections, the doctrine of 'imputed contributory negligence,' under which the plaintiff is barred from recovery against the defendant because the negligence of a third person, with whom the plaintiff stands in some relation, has contributed to his harm. * * *" Comment b outlines the exceptions referred to in section 485. These exceptions do not apply here. Comment c then states: "With these exceptions, the common law no longer imputes the negligence of a

third person to the plaintiff to bar his recovery for the harm he has suffered. even in situations where he would be liable for that negligence as a defendant in an action brought by a third person."

The major change in judicial position occurring between the First and Second Restatement is clearly reflected in section 485. There is a definite turn around as to imputed contributory negligence and the old "both-ways test." See, Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L. J. 831; 2 Harper and James, Law of Torts, c. 23, p. 1264; Prosser, (4th Ed.) Torts, § 72, p. 475; Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 144 N. W. 2d 540 (1966).

In addition to the fundamental imputed negligence problem, the majority opinion also applies the rule that under our death statute, where the sole beneficiary is guilty of negligence more than slight as a matter of law, it is the duty of the court to direct a verdict for the defendant. That rule in itself is quite correct, but the Nebraska cases cited, and indeed virtually all of the cases supporting the point, involve the personal negligence of the sole beneficiary. With that principle there can be little quarrel. However, the majority opinion assumes that a sole beneficiary is personally negligent whenever he is vicariously responsible for the negligence of the driver. This simply does not follow and it constitutes an even more obvious misapplication of the discredited imputed contributory negligence doctrine. The majority opinion on policy issues may be generated partially from the constricting provisions of the Nebraska Motor Vehicle Guest Act. Nevertheless, the opinion does not march to the beat of the modern judicial drum.

IN RE ESTATE OF AGNES V. PANTER, DECEASED. ROBERT WALLACE FLINT, APPELLANT, V. BYRON D. PANTER, EXECUTOR OF THE ESTATE OF AGNES V. PANTER, DECEASED, APPELLEE.

193 N. W. 2d 279

Filed December 30, 1971. No. 37977.

1. **Judgments: Fraud and Deceit: Negligence.** It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary. The petitioner must also show that the failure to obtain a just decision is not attributable to his own fault or negligence.
2. Wills. A codicil may alter, enlarge, or restrain the provisions of a will. Its distinguishing feature is that it is an addition to or qualification of a will.
3. **Wills: Estates: Notice.** Notice that a will and codicil are being offered for probate is sufficient to put a party receiving the notice upon inquiry to determine what documents are being offered for probate.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Affirmed.

Woods, Aitken, Smith, Greer, Overcash & Spangler, Richard L. Spangler, and Jack Craven, for appellant.

Gerald J. Hallstead, for appellee.

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

BOSLAUGH, J.

This is an appeal in an action to vacate a decree admitting a will to probate.

Agnes V. Panter died on July 13, 1967. She left surviving her Byron D. Panter, a son, and Robert Wallace Flint, a son of a deceased daughter. Her will dated January 26, 1966, and a codicil dated May 13, 1966, were admitted to probate in the county court of Saline County, Nebraska, on August 9, 1967. Byron D. Panter is the executor and the sole beneficiary under the will and codicil.

On November 4, 1968, after a petition for final settle-

ment had been filed by the executor, Robert Wallace Flint filed his petition in the county court to vacate the decree admitting the will and codicil to probate.

The petition to vacate alleged that the will and codicil were the result of undue influence practiced upon the deceased by Byron D. Panter; that Robert Wallace Flint, the petitioner, had been informed by the deceased, before she entered the hospital in 1965, that she had made a will leaving one-half of her estate to the petitioner and the other one-half to Byron D. Panter for life with the remainder to the petitioner; that the petitioner did not know about the will and codicil executed in 1966 until after they had been admitted to probate; that the petitioner "believed, and was lead (led) to believe" that the will being offered for probate was the previous will of the deceased; and that the petitioner was misled by the failure of Byron D. Panter and his attorney to inform the petitioner that the will and codicil being offered for probate had been executed by the deceased in 1966.

On February 3, 1969, the county court sustained a general demurrer to the petition to vacate and dismissed the proceedings. The petitioner filed a notice of appeal to the district court on February 13, 1969. A transcript from the county court was filed in the district court on February 28, 1969.

On July 28, 1969, Byron D. Panter moved to dismiss the appeal because of the failure of the petitioner to plead. This motion was overruled, and on August 12, 1969, the petitioner filed an "Answer to Petition for Final Settlement" which contained allegations similar to those contained in the petition to vacate filed in the county court. A general demurrer to the answer was sustained on September 14, 1970.

The record shows that the petition for probate was filed in the county court on July 19, 1967. On the same day the court ordered that the petition be heard on August 9, 1967, and that notice be given as required by law. A notice of hearing was published as required by

section 30-217, R. R. S. 1943. On July 22, 1967, the attorney for Byron D. Panter, the proponent, filed his affidavit in the county court stating that he had mailed a copy of the notice of hearing to the petitioner as required by section 25-520.01, R. R. S. 1943. The notice recited that the petition for probate of the *will and codicil* of the deceased would be heard on August 9, 1967. The petitioner does not contend that he did not receive a copy of the notice of hearing.

It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary. The petition must also show that the failure to obtain a just decision is not attributable to his own fault or negligence. Gleason v. Poore, 167 Neb. 312, 92 N. W. 2d 705; In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379; Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010.

The petitioner in this case had notice that, in addition to the will, a codicil was being offered for probate. This was notice that the will which was being offered for probate had been changed in some particular. The distinguishing feature of a codicil is that it is an addition to or a qualification of a will. Owens v. Doyle, 152 Conn. 199, 205 A. 2d 495, 11 A. L. R. 3d 1006. A codicil may alter, enlarge, or restrain the provisions of a will. 94 C. J. S., Wills, § 1b, p. 678.

The circumstances in this case were sufficient to put the petitioner on inquiry after receiving the notice of hearing. A person exercising due diligence would have made further inquiry to determine what was being offered for probate. In re Estate of Reikofski, *supra;* Miller v. Estate of Miller, *supra.*

The petitioner relies upon Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737, in which a petition to set aside a decree admitting a will to probate was held sufficient as against a demurrer. In the Johnson case the petition alleged that Richards had sent a copy of the will to the petitioners a few days before the hear-

ing and had advised them that it was in the process of being probated. The petitioners then wrote to Richards "immediately" requesting information as to the date of hearing. Richards did not answer the request. These circumstances were held to exempt the petitioners from a conclusion of negligence and an absence of diligence. There are no circumstances alleged in this case that show diligence on the part of petitioner.

The order of the district court sustaining the demurrer to the "answer" of the petitioner was correct. The judgment is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

KIRBY BAILEY, APPELLEE AND CROSS-APPELLANT, V. LEON MCCOY, APPELLANT AND CROSS-APPELLEE.
193 N. W. 2d 270

Filed December 30, 1971. No. 38000.

1. **Trial: Courts.** Special findings by the district court ordinarily are unnecessary unless a party requests them with a view of excepting to the decision of the court upon the question of law involved in the trial.
2. **Trial: Courts: Parties.** The district 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.
3. **Partnership.** A partnership may continue, although it admits a partner or a partner retires.
4. **Partnership: Contracts.** The agreement in many respects is the law of the partnership.
5. **Partnership: Contracts: Words and Phrases.** In a service partnership agreement with a provision that the partners base payment for good will on annual income, the word "income" ordinarily imports net profits.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Affirmed as modified.

Kirby & Spittler, for appellant.

Thomas E. Brogan, for appellee.

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

SMITH, J.

Kirby Bailey sued Leon McCoy to wind up the affairs of a partnership formed to render accounting and income tax services. After a trial the district court rendered judgment of $3,062.42 in favor of Bailey. McCoy appeals and Bailey cross-appeals.

In the year 1966 Bailey, an Internal Revenue Service examining agent, was living at Norfolk. McCoy was conducting a combined income tax, accounting, insurance, and real estate business at Neligh. They entered into a written agreement of partnership in October 1966, to render income tax and accounting services at Neligh from January 1, 1967. Bailey and his family moved to Neligh.

Bailey and McCoy in the agreement adopted many provisions that a lawyer had drafted in an unrelated transaction between McCoy and a third party. The partnership would remain in existence until dissolution by mutual agreement or court action. McCoy sold Bailey one-half of McCoy's "interest" for $1. The partnership would pay $50 a month for rental of office space and equipment, and for utilities. The premises and all present office equipment would remain the property of McCoy.

Material ambiguities began in paragraph VII of the agreement: ". . . the value of the partnership is considered to be equal to the annual income therefrom."

Paragraph VIII of the agreement set out a procedure for sale of the undivided interest of either partner to the other. Sixty days' notification of the outgoing partner's desire to "terminate" the partnership was required. Should the parties not agree upon the price, appraisers

would set it. Prior to January 1, 1969, however, upon withdrawal of Bailey, the price payable by McCoy at his option would be $1. Should McCoy "not elect option to purchase other one-half, that in event of dissolution, that he will have the option to divide the customers equally between the two partners. This will in no way guarantee that either or both partners will retain all of the customers he acquires. It is agreed however, that neither will solicit those customers acquired by the other partner."

Succeeding paragraphs formed background of the present controversy. Under paragraph IX refusal of either party to pay the appraisal price conferred upon either one the right to a judicial dissolution of the partnership. Under paragraph X the partner departing or "forcing"" dissolution agreed not to solicit income tax or accounting business in Antelope County, in which Neligh, but not Norfolk, was located. The paragraph would be inoperative, should the parties divide the business.

In December 1967, Bailey and McCoy negotiated with Wayne E. Boone to form a three-man partnership. They orally agreed Boone would receive one-third of the net profits from January 1, 1968, but no interest in the business until January 1, 1970. The parties performed into the year 1969.

On May 5, 1969, Bailey submitted to McCoy and Boone a financial statement of that date. In the statement, Bailey admitted having overdrawn his account $1,647.50 in 1967 and $1,719.90 from January 1, 1968, to May 5, 1969. The federal partnership income tax return for 1968 set out an overdraft of Bailey in the sum of $2,605.24. In addition to those amounts Bailey admitted owing McCoy $584.84 on an unrelated insurance account. The parties agreed upon the last item and the amount of the 1967 overdraft.

On May 14, 1969, Bailey notified McCoy of Bailey's intention to retire July 15, the notification referring to

the 1966 agreement. Afterward McCoy retained all bank records and files of clients except a corporation and its majority stockholder. The corporation probably was employing Bailey at the time of trial in September 1969. McCoy and Boone were continuing all other business. No creditor's rights intruded.

The district court found generally for Bailey on his petition and for each party on right to an accounting. In rendering judgment, the court did not disclose how it computed the amount. Neither party requested special findings, and no one may rightly complain. Special findings ordinarily are unnecessary unless a party requests them with a view of excepting to the decision of the court upon the question of law involved in the trial. See § 25-1127, R. R. S. 1943.

McCoy argues that (1) the Bailey-McCoy partnership terminated December 31, 1967, and Bailey is indebted to McCoy on an account stated in the sum of $1,647.50, the amount of the overdraft in 1967; (2) settlement of those accounts barred Bailey's right to recover under paragraph VII of the written agreement; (3) the court erroneously debited Bailey's account in the sum of $584.84 on the insurance account which was unrelated to the partnership; and (4) McCoy was entitled to recover Bailey's overdraft of $2,605.24 set out in the partnership tax return for 1968.

Bailey on cross-appeal contends that (1) only one partnership existed; and (2) the word "income" in paragraph VII of the 1966 agreement meant gross income. He urges a right to recover $10,459.19, based on the year 1968, or $14,236.16 which equaled one-half of the gross income for the fractional year January 1 to May 5, 1969.

Agreement on the amount of the overdraft in 1967 did not rise to the dignity of a settlement that barred Bailey's right under paragraph VII of the 1966 agreement. The debit of $584.84 on the insurance account was indisputedly accurate. McCoy therefore complains of an unrelated debit without evidence of prejudice to him. He

is also entitled to debit Bailey's account only in the sum of $1,719.90 which apparently equaled the 1968 overdraft less a balance in favor of Bailey for 1969.

Two other problems stand out. One is whether Boone was an indispensable party. No one raised the question in district court. 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. § 25-323, R. R. S. 1943.

Boone was not an indispensable party, whether the number of partnerships was one or two. Prior to January 1, 1970, he possessed no interest in good will. He incurred no obligation and he possessed no right to contribute to the purchase of good will from a retiring partner. Lack of public notification of dissolution was not material here. We decide that a partnership may continue, although it admits a partner or a partner retires.

"Retirement is an obvious cause of dissolution not specified, although it may fall within one of the specific causes. Admission of a new partner is not specified as a cause although it is often said to be. The better view is that it is not.

". . . no dissolution occurs in a large partnership whose articles specify that there is no dissolution on death, retirement, incapacity, etc. Examples include accounting . . . firms with dozens or hundreds of partners, and frequent changes in membership. There is no reason why legal theory should not accept this practical result, and it has done so. And there is no reason to limit it to larger firms.

"The older view of inevitable dissolution depended on delectus personae and the non-transferability of interests in partnership. But both these roots are matters of partnership agreement and can be varied by agreement." Crane and Bromberg on Partnership, § 73, p. 417, n. 3,

and p. 418 (1968). See, also, Bromberg, "Partnership Dissolution - Causes, Consequences, and Cures," 43 Tex. L. Rev. 631 (1965).

The agreement in many respects is the law of the partnership. See, § 67-343, R. R. S. 1943; Uniform Partnership Act (U.L.A.), § 43 (1969); Crane and Bromberg on Partnership, § 5(b), p. 43 (1968); 1 Rowley on Partnerships, § 8.1, p. 196 (2d Ed., 1960); cf. Leighton v. Clarke, 42 Neb. 427, 60 N. W. 875 (1894). "It is time we recognize in this respect (changes of membership) . . . that the partnership is what the partners make it." Crane and Bromberg on Partnership, § 78A, p. 444 (1968).

The second problem is interpretation of the word "income" in paragraph VII of the Bailey-McCoy agreement. A partnership engaged in performing services may possess good will. Crane and Bromberg on Partnership, § 84(a), p. 480 (1968). Good will may or may not be of value when the business has been conducted at a loss. 1 Rowley, § 8.1, p. 196; 2 Rowley, § 47.0, p. 137. In a service partnership agreement with a provision that the partners base payment for good will on annual income, the word "income" ordinarily imports net profits.

Evidence concerning transactions unassailed on appeal is not clear. The positions of the parties and the record lead us to these findings and conclusions. The base year for calculation of the value of good will is 1968, not fractional 1969. The proportion is one-half, not one-third. Bailey's account ought to be credited and debited as follows:

Credit:	Good will		$7,942.14
Debits:			
	Overdraft in 1967	$1,647.50	
	Overdraft in 1968 less balance in 1969	1,719.90	
	Insurance account	584.84	3,952.24
	Balance		$3,989.90

We accordingly modify the judgment by increasing the amount to $3,989.90. So modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

J. W. AUTO PARTS, INC., A CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

193 N. W. 2d 281

Filed December 30, 1971. No. 38004.

Zoning: Municipal Corporations: Counties: Courts: Trial. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Robert H. Beach of Westering & Beach, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, Jon B. Abbott, George B. Selders, Jr., Kent N. Whinnery, Verne W. Vance, and Thomas F. Dowd, for appellee.

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

WHITE, C. J.

The city council of Omaha and the district court, on appeal, denied the plaintiff a permit to operate an automobile salvage and used parts business on his property. The district court dismissed this suit for an injunction against the city. We affirm the judgment of the district court.

The only question presented is whether there was a rational basis for the city council's action. The regulat-

ing body has a wide discretion in the granting or denying of a permit and the record must show arbitrary and unreasonable action. Judicial review does not permit policy determinations. The record shows, inter alia, the following:

(1) Close proximity to residential areas at higher elevations (6 nearby and a residential area in the City of Ralston, 6 blocks away);

(2) Smoke and soot infiltrating the residential areas from fires deliberately set to burn out automobile interiors in the process of dismantling;

(3) One hundred and fifty cars stored or parked in various stages of dismantling on the back lot of plaintiff's premises;

(4) Used and dismantled parts stored and strewn about in disorder on the premises;

(5) Besides the smoke problem, the evidence is undisputed as to the general unsightliness of the plaintiff's operation;

(6) The deliberate burning of the wrecked cars in the dismantling process, with the consequent fire hazard, in a rapidly developing area already including many residences;

(7) Accidental fires resulting from the use of cutting torches in the dismantling process. They are not infrequent, three occurring between the time the temporary injunction was granted and the trial in the district court; and

(8) The hazard inherent in the attraction of the premises to small children and the increasing danger as the area develops.

The validity of the ordinance under which the council took action, or the power of the city to reasonably regulate the use in question, is not challenged.

Applicable here in principle is what we said in Graham v. Graybar Electric Co., Inc., 158 Neb. 527, 63 N. W. 2d 774: "What is the public good as it relates to zoning ordinances affecting the use of property is, pri-

marily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere." Of the same import are: City of Omaha v. Glissman, 151 Neb. 895, 39 N. W. 2d 828; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376; Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634; Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835.

From what we have said it is clear that the city council and the district court did not abuse their discretion in refusing relief.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

J. I. CASE CREDIT CORPORATION, APPELLEE, V. HAROLD G. THOMPSON ET AL., APPELLANTS, IMPLEADED WITH THE BANK OF LINDSAY, APPELLEE.
193 N. W. 2d 283

Filed December 30, 1971. No. 38018.

Foreclosure: Mortgages: Property: Limitations of Actions: Statutes. An action to foreclose a real estate mortgage may be brought within the period of limitation provided by section 25-202, R. R. S. 1943, even though an action on the debt is barred.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

William G. Whitford, for appellants.

George H. Moyer, Sr., of Moyer & Moyer, for appellee.

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

BOSLAUGH, J.

This is an action to foreclose a real estate mortgage. The trial court found that the defendants, Harold G. Thompson and Dorothy Thompson, were indebted to the plaintiff in the amount of $4,801.94 with interest at 6 percent from October 5, 1961; that the plaintiff's mortgage was a first lien on the property for that amount; that a mortgage of The Bank of Lindsay was a second lien on the property; and that the plaintiff was entitled to a decree of foreclosure.

The defendants Thompson appeal, claiming that the judgment is erroneous because an action on their promissory note to the plaintiff was barred by section 25-205, R. R. S. 1943, at the time this action was commenced. The defendants rely upon Brainard v. Hall, 137 Neb. 491, 289 N. W. 845, and several earlier cases in which it was held that no action could be maintained upon a mortgage when an action on the debt was barred by the statute of limitations. See, Kyger v. Ryley, 2 Neb. 20; Hurley v. Estes, 6 Neb. 386.

Prior to 1869 there was no separate statute of limitations applicable to mortgages. In 1869, section 6 of the Code of Civil Procedure (now section 25-202, R. R. S. 1943), applicable to actions for the recovery of title or possession of land, was made applicable to mortgages. Laws 1869, § 1, p. 67. In Hale v. Christy, 8 Neb. 264, this court stated that the 10-year period of limitation prescribed by section 6 of the Code was applicable to actions for mortgage foreclosure. See, also, Hurley v. Cox, 9 Neb. 230, 2 N. W. 705, stating that the 5-year period of limitation, applicable to an action on the note, barred the mortgage foreclosure action prior to the 1869 amendment to section 6 of the Code.

The quotation from Hurley v. Estes, *supra,* to the effect that no action can be maintained on a mortgage after an action on the debt is barred, which appears in Brainard v. Hall, *supra,* was inadvertent. The rule has been to the contrary since the 1869 amendment to section

25-202, R. R. S. 1943. See, Cheney v. Cooper, 14 Neb. 415, 16 N. W. 471; Herdman v. Marshall, 17 Neb. 252, 22 N. W. 690; Cheney v. Woodruff, 20 Neb. 124, 29 N. W. 275; Cheney v. Campbell, 28 Neb. 376, 44 N. W. 451; Campbell v. Upton, 56 Neb. 385, 76 N. W. 910.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES P. STAPLETON, APPELLANT.
193 N. W. 2d 284

Filed December 30, 1971. No. 38104.

Criminal Law: Drugs, Narcotics, and Poisons: Guilty Plea. The fact that a defendant is a narcotics addict and experiencing some symptoms of withdrawal does not invalidate a plea of guilty where the record otherwise indicates that the plea was voluntary and entered intelligently and understandingly.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

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

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

BOSLAUGH, J.

The defendant pleaded guilty to unlawful possession of heroin and was sentenced to 2 years' imprisonment. The defendant appeals, claiming that his plea was invalid.

Apparently the offense was committed on March 1, 1971, while the defendant was in custody in Grand Island, Nebraska. The defendant contends that because he was a narcotics addict and received methadone for only "a few nights" while he was confined in the jail, he was

incapable of intelligently and understandingly entering a plea of guilty.

The defendant was arraigned in the district court on March 11, 1971. After being fully advised as to his rights, the defendant waived the right to counsel and entered a plea of guilty. The district judge inquired of the defendant specifically as to whether access to or denial of narcotic drugs had anything to do with his plea. The defendant answered that it did, partly; that he was guilty of having them; and that he was going through withdrawal. The judge then asked the defendant if he felt a compulsion in connection with his plea. The defendant answered: "No, not that I need to. I'm guilty. I didn't see any point laying around in jail." Later the county attorney asked the defendant if the fact that he had not had methadone for several days had any bearing on his waiver of counsel and plea of guilty. The defendant answered "No" and confirmed that he had stated to the county attorney that he did not want to do a lot of dead time.

The sentencing hearing was held on the following day, March 12, 1971. The district judge asked the defendant if there was any reason why he would like to withdraw his plea of guilty and the defendant answered, "No, sir." The defendant then made a lengthy unsworn statement in which he related his history of drug addiction and his circumstances prior to his arrest in Grand Island, Nebraska.

The defendant is 29 years of age. He has previous convictions for grand larceny and petit larceny. He had been on probation for a charge of assault with intent to do bodily injury. The sentence imposed here was the minimum.

We find nothing in the record to sustain the defendant's claim that his plea was invalid. The fact that a defendant is a narcotics addict and experiencing some symptoms of withdrawal does not invalidate a plea of guilty where the record otherwise indicates that the plea was volun-

tary and entered intelligently and understandingly.

The record shows a sincere effort on the part of the district judge and the county attorney to give the defendant the benefit of every right that he had.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL BLUNT, APPELLANT.
193 N. W. 2d 434

Filed January 7, 1972. No. 37933.

1. **Criminal Law: Robbery.** An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation.
2. ———: ———. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial.
3. **Criminal Law: Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

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

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

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

NEWTON, J.

This is an appeal from a conviction for robbery. The evidence reveals that on May 28, 1970, a cleaning establishment of Max I. Walker, Inc., was entered at about

12:20 p.m. by a person identified by two witnesses as the defendant. Defendant first entered and asked for clothes. There were none in the name given. He left and returned a few minutes later. On this occasion he entered the rear room and created a disturbance with the lady who did the pressing. The mailcarrier entered the shop and asked defendant to leave after threatening to call the police. Defendant went out with the mailcarrier but returned and the mailcarrier crossed the street. He saw defendant leave carrying something which he dropped and picked up, and then he ran down the street. In the meantime, the women in the shop were screaming. When defendant returned the third time, the lady acting as the counterclerk had waited on a customer and left the cashdrawer open. Defendant put in his hand to remove the money and she shut the drawer on his hand. He pushed her away with sufficient force that she fell and lacerated her knees. He then jerked the cashtray out on the floor, removed the money, and fled. He was apprehended about 5 minutes later approximately 2 blocks from the shop. When he saw the police officer, he attempted to flee, then surrendered. He then had a scraped area on the back of his left hand and was possessed of $111.37, a $17.16 check, and a claim check on the Walker cleaning establishment in the name of another individual. The manager testified $169.26 was missing.

We find the record sustains the conviction and that the judgment of the district court should be affirmed.

Defendant asserts the evidence is insufficient in that the use of force was not proved. An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. See § 28-414, R. R. S. 1943. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial. See, Williams v. State, 51 Neb. 711, 71 N. W. 729; Cooper v. State, 9 Md.

App. 478, 265 A. 2d 569; People v. Williams, 23 Ill. 2d 295, 178 N. E. 2d 372.

Defendant further contends that the sentence of not less than 24 years 6 months, nor more than 35 years, is excessive. The sentence is a severe one and it would have been helpful had the court, by means of questioning the defendant at the time sentence was pronounced or by other means, made defendant's background and past conduct a part of the record. The present record contains only an indication that defendant had been at least twice previously convicted of felonies. On this record we are not in position to judge whether or not the trial court abused its discretion. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. See State v. Agostine, 184 Neb. 158, 165 N. W. 2d 353.

Another assignment of error is that contradictions in the evidence adduced required a directed verdict of acquittal. It is well established that matters of credibility are for the jury. Defendant also insists he was deprived of a chance to prepare his defense and that the record of the preliminary hearing was suppressed. These contentions are not supported by the record and are without merit.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The defendant here was convicted of robbery. He took a little over $100 in cash and checks from the cash register and shoved or knocked the cashier to her knees when she shut the cash register drawer on his fingers. There is no evidence that he displayed or used a weapon.

Following the adoption of the majority opinion, the court directed that the presentence investigation re-

ports be forwarded, and they have now been examined. The defendant is a black male born February 14, 1936, a native of Kansas City, Missouri. His felony criminal record begins in 1955 when he pleaded guilty to a charge of burglary and was sentenced to 2 years in the Missouri State Reformatory. In 1957, he was convicted of robbery, first degree, and sentenced to 5 years in the Missouri State Penitentiary. He was discharged in April of 1960 and apparently moved to Omaha, Nebraska, in June of 1960. In 1961, he was convicted of armed robbery in Douglas County, Nebraska, and sentenced to 7 years in the penitentiary. This was an armed robbery with a shotgun in which he took over $60 in cash from a service station attendant and also stole the attendant's gun. In October 1966, he was convicted of burglary, again in Douglas County, Nebraska, and sentenced to 6 years in the Nebraska Penal and Correctional Complex. He was paroled June 18, 1969, and was convicted of the robbery in this case on November 4, 1970. In this case, the sentence was solely on a robbery count. An habitual criminal charge was dismissed after the conviction on the robbery count and prior to the sentence here. The sentence was for a minimum term of 24 years 6 months to a maximum term of 35 years.

Section 29-2308, R. R. S. 1943, authorizes this court to reduce the sentence against an accused if it is excessive and enjoins on us the duty to render such sentence against the accused as, in our opinion, may be warranted by the evidence. Comparatively recently we have often repeated the holding that a sentence imposed by the trial court within the prescribed statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. That rule is repeated in the majority opinion here.

If the facts here do not warrant the intervention of this court in reducing the sentence, it is quite clear that the intended scope of section 29-2308, R. R. S. 1943, is being drastically restricted. While it may be true that

this court will add considerably to its burden by undertaking to consider excessiveness of sentences, and the inherent difficulties in attempting to achieve any sort of uniformity are obvious, nevertheless, the demands of justice require at least a reasonable effort to deal with the problem of excessive sentences.

Admittedly, the defendant's record is bad. He is clearly not entitled to any leniency whatever. Nevertheless, he ought to be entitled to even-handed justice. It seems clear that the sentence given is excessive under the circumstances. The evidence here warrants a sentence of 10 years at most. Any sentence in excess of that amount constituted an abuse of discretion.

SMITH, J., concurring.

I concur with the majority opinion, but no one should dismiss the dissenting opinion by McCown, J., lightly. My difference with him lies in a view of Nebraska practice and an intuitive reification of statutory sentencing structures, social defense, deterrence, punishment, and rehabilitation. See § 29-2260, R. S. Supp., 1971.

The sentencing judge ordinarily has been acting on a presentence report without advice from behavioral scientists. Scientific investigation occurs at the Diagnostic Center of the Division of Corrections upon admission of the prisoner. The sentencing judge may defer action to obtain a report from the Center or to order a psychiatric examination. A committed offender is eligible for parole prior to expiration of the minimum term whenever the minimum sentence provided by law, less certain reductions, has been served and the judge approves parole of the offender. See, §§ 83-1,105 and 83-1,110, R. S. Supp., 1969; § 29-2261, R. S. Supp., 1971.

When we review a sentence allegedly excessive, from necessity we ordinarily act without expertise. Prior convictions then loom out of a penal policy that grotesquely appears to subscribe to a rigorous sentence for a recidivist. In this case, however, Blunt surely needs treatment to reintegrate himself into society. He is now

a dangerous offender, a substantial threat. If treatment proves unsuccessful, his lengthy separation from society is justifiable.

The law is deeply indebted to the behavioral sciences which have ameliorated penal policy, but much remains to be done. My difference with McCown, J., is one of timing. The insight of Justice Cardozo more than 40 years ago retains vitality today:

"We have put away the blood feud, the vendetta, the other forms of private war, but in the framing of our penal codes we have not forgotten the passions that had their outlet and release in pursuit and retribution. I do not say that it is wise to forget them altogether. The thirst for vengeance is a very real, even if it be a hideous, thing; and states may not ignore it till humanity has been raised to greater heights than any that has yet been scaled in all the long ages of struggle and ascent. . . .

". . . the present system, in the view of many, is as irrational in its mercies as in its rigors, and in its rigors as in its mercies. . . .

". . . I have faith . . . that a century or less from now, our descendants will look back upon the penal system of today with the same surprise and horror that fill our own minds when we are told that only about a century ago one hundred and sixty crimes were visited under English law with the punishment of death, and that in 1801 a child of thirteen was hanged at Tyburn for the larceny of a spoon. Dark chapters are these in the history of law. We think of them with a shudder, and say to ourselves that we have risen to heights of mercy and of reason far removed from such enormities. The future may judge us less leniently than we choose to judge ourselves. . . .

"The law, like medicine, has its record of blunders and blindness and superstitions and even cruelties. Like medicine, however, it has never lacked the impulse of a great hope, the vision of a great ideal. . . .

". . . Not all her ministers have been true to the ideal which she has held aloft for them to follow. But . . . the word has been proclaimed, to steady us when we seem to falter, to strengthen us when we seem to weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudice, the spirit is still pure." M. Hall, Selected Writings of Benjamin Nathan Cardozo, 378 to 393 (1947). See, generally, Ancel, Social Defence, 215 to 221 (1965); Inbau and Carrington, "The Case of the So-Called 'Hard Line' Approach to Crime," 397 Annals of Am. Ac. Pol. and Soc. Sc., 19 (1971); Skoler, "There's More to Crime Control Than the 'Get Tough' Approach," 397 Annals of Am. Ac. Pol. and Soc. Sc., 28 (1971).

IN RE APPLICATION OF RADIO-FONE, INC., OMAHA, NEBRASKA.
RADIO-FONE, INC., OMAHA, NEBRASKA, APPELLANT, V. A.T.S. MOBILE TELEPHONE, INC., ET AL., APPELLEES, CURTIN-CALL COMMUNICATIONS, INTERVENER-APPELLEE.
193 N. W. 2d 442

Filed January 7, 1972. No. 37947.

1. **Public Service Commissions: Appeal and Error.** When an appeal is taken from the Nebraska State Railway Commission's denial of a certificate of public convenience and necessity, the only questions to be decided by this court are whether the commission acted within the scope of its authority and if the order complained of was reasonable and not arbitrarily made.
2. **Public Service Commissions: Constitutional Law: Carriers.** Under Article IV, section 20, Constitution of the State of Nebraska, the Nebraska State Railway Commission has plenary power to regulate common carriers.
3. ———: ———: ———. The constitutionally created powers and duties of the Nebraska State Railway Commission include the regulation of rates, service, and control of common carriers.
4. **Public Service Commissions: Telecommunications: Public Utilities.** Mobile telephone service in its different aspects is a form of telephone service and subject to all statutes and regulations pertaining to telephone service.

5. ———: ———: ———. A certificate of public convenience and necessity which authorizes its holder to render "telephone service," does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment, and methods then in use.
6. **Public Service Commissions: Telecommunications: Words and Phrases.** In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at a distance by electrical means.
7. **Public Service Commissions: Carriers.** The object and purpose of the Nebraska State Railway Commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose.
8. **Public Service Commissions: Telecommunications: Public Utilities.** The invasion of a mobile telephone service company of the territory of another similar company, either in service or construction, is intended to be prohibited unless the invading company first applies for and receives a certificate of public convenience and necessity.
9. **Public Service Commissions: Carriers: Public Utilities.** Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons.
10. ———: ———: ———. Ordinarily, a new carrier cannot be certificated until the existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Earl H. Scudder, Jr., for appellant.

Erickson, Sederstrom, Johnson & Birmingham, Robert J. Kutak, Lewis J. Kunkel, Jr., and William B. Woodruff, for appellees.

David J. Cullan, for intervener-appellee.

Bert L. Overcash of Woods, Aitken, Smith, Greer, Overcash & Spangler, for amicus curiae.

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

WHITE, C. J.

Radio-Fone, Inc., hereinafter referred to as Radio-Fone, applied to the Nebraska State Railway Commission, hereinafter referred to as the Commission, for the issuance of a certificate of public convenience and necessity authorizing it to operate as a domestic public land radio common carrier with its proposed base in Omaha, Nebraska, and its service area extending for a 35-mile radius. Protestants to the application were A.T.S. Mobile Telephone, Inc., Business Executive Services, Inc., and Nebraska Mobile Telephone Company, and intervener Curtin-Call Communications. A.T.S. Mobile Telephone, Inc., hereinafter referred to as A.T.S., objected on the ground that it already holds a certificate of public convenience and necessity under which it renders a similar telephone service in the 35-mile radial area Radio-Fone proposed to serve. The other three protestants objected on the ground that they *also* proposed to offer radio telephone service to the area being serviced by A.T.S. The Commission was thus faced with four proposals to furnish competitive service to the licensed carrier. Only one, Radio-Fone, appeals.

The Commission conducted hearings in November 1969 and January 1970 and, thereupon, entered an order denying the application. Radio-Fone appeals to this court claiming that the Commission acted arbitrarily, unreasonably, and outside lawful authority in denying the application.

Although the heart of a radio common carrier's task is to provide telephonic communication via radio wave, the essential service may take many peculiar forms. Basically, Radio-Fone proposed to offer two types of radio telephone services. The first, an automatic dial one-way paging system, would allow a landline telephone caller to dial directly into a mobile paging unit

and state his message without operator assistance. The mobile paging unit would receive the message but would have no transmission capability. The second proposed service was an automatic dial, duplexed (simultaneous talk and listen) two-way mobile communications system that would have no operator intervention when calling from a mobile unit to a landline system, but with operator intervention from a landline telephone to a mobile unit.

At the time of the hearings, A.T.S. was offering a duplexed two-way mobile service with operator intervention on two channels and on a third channel, a tone-and-voice one-way paging service with the operator relaying the message after activating a tone-emitting mechanism to alert the mobile unit. From the evidence presented, automation, the by-passing of operator intervention, appears to have been the primary difference between the services proposed by Radio-Fone and those being rendered by A.T.S.

Besides an apparent attempt to characterize the services offered by A.T.S. as antiquated, Radio-Fone introduced evidence at the hearings to show that A.T.S. was not performing adequately the services it did offer. Some witnesses for Radio-Fone testified that as or having been subscribers for either the mobile telephone or paging services provided by A.T.S., they were of the opinion the service provided had been less than exemplary. Generally their complaints related to the overcrowding of the radio channels and the improper relaying of messages by the A.T.S. operators. In opposition thereto A.T.S. subscribers testified that the service was adequate and had improved recently. A.T.S. had moved to new facilities and had received additional FCC licensed radio channels for communication to mobile units.

A.T.S. offered evidence at the hearings to show that there were reasons for the subscribers' temporary dissatisfaction with services; that the problems had been resolved; and that A.T.S. was moving ahead to provide

better service in the future. The record shows that in September 1968, the joint owners of A.T.S. became involved in litigation concerning the exercise of an option to purchase the corporation by one of the joint owners. Amidst this turmoil in management, in January and April 1969, A.T.S. filed applications with the FCC for additional radio channels, and to thus improve and furnish new service, but the FCC held the applications pending the termination of the litigation between the joint owners.

It was at this point in the history of A.T.S. that Radio-Fone submitted its application to the Commission for a certificate of public convenience and necessity, asserting in answer to interrogatories submitted in August of 1969 that "A.T.S. cannot provide service because of legal problems." In September of 1969, the litigation over the control of A.T.S. terminated, the corporation moved into new facilities, and a letter was sent to the Commission describing current developments within the corporation and promising further development. On November 14, 1969, A.T.S. received its second *two-way mobile channel license* from the FCC and on November 13, 1969, was also granted a construction permit for a *one-way paging channel* which was prior to the Commission's hearings on Radio-Fone's application.

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756 (1937), we said that when an appeal is taken from the Nebraska State Railway Commission's denial of a certificate of public convenience and necessity, the *only* questions to be decided by this court are whether the Commission acted within the scope of its authority and if the order complained of was reasonable and not arbitrarily made. Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441; Canada v. Peake, Inc., 184 Neb. 52, 165 N. W. 2d 587. After a review of the record, we are not convinced that the Commission's action was arbitrary and unreasonable in relation to the facts presented at the hearings. Although there is evi-

dence that A.T.S. may have provided less than exemplary service, we cannot say upon review of the facts that the Commission's determination that the service provided was not less than "reasonably adequate," was unreasonable or arbitrary.

The real issue in this case is whether the Commission exceeded its powers under the law in its denial of Radio-Fone's application. There is no question that under Article IV, section 20, of the Constitution of the State of Nebraska, the Nebraska State Railway Commission has plenary power to regulate common carriers. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*. In the absence of specific legislation, the powers and duties of the Commission, as enumerated in the Constitution, are absolute and unqualified. State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502. The constitutionally created powers and duties of the Commission include the regulation of rates, service, and control of common carriers. In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192; Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 103 Neb. 695, 173 N. W. 690.

Thus, the Commission shoulders a heavy burden in regulating common carriers in the public interest. This court has long recognized that it is the primary duty of the Commission, and not this court, to act as ongoing supervisor of the conduct of intrastate common carriers. In this regard, we have long noted the limited nature of the review that this court can give on appeal of an order of the Commission. In re Lincoln Traction Co., *supra;* Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*; Moritz v. Nebraska State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

We have recognized that the Commission has continuing jurisdiction over its orders in regard to the regulation of common carriers, with the doctrines of collateral estoppel and res judicata having no application

whatever. Simmerman v. National Trailer Convoy, Inc., 179 Neb. 400, 138 N. W. 2d 481; Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584; Neylon v. Petersen & Petersen, Inc., 183 Neb. 813, 164 N. W. 2d 452; Canada v. Peake, Inc., *supra.*

Radio-Fone argues that a proper interpretation of section 75-604, R. R. S. 1943, requires a reversal because an improper burden of proof was required of it. We reject this contention. The statute provides: "No person, firm, partnership, corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that *(1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory,* or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." (Emphasis supplied.)

Radio-Fone itself invokes the application of this statute. It therefore cannot properly deny that the mobile service and specialized facilities it uses are not "telephone service" and not subject to Commission regulation. Moreover, the courts have generally held that mobile telephone service in its different aspects is a form

of telephone service and subject to all statutes and regulations pertaining to telephone service. State ex rel. Utilities Commission v. Two Way Radio Service, Inc., 272 N. C. 591, 158 S. E. 2d 855 (1968); Commercial Communications, Inc. v. Public Utilities Commission, 50 Cal. 2d 512, 327 P. 2d 513, app. dism. and cert. den., 359 U. S. 119, 341, 79 S. Ct. 722, 896, 3 L. Ed. 2d 674, 927.

In State ex rel. Utilities Commission v. Two Way Radio Service, Inc., *supra*, the court said: "A certificate of public convenience and necessity which authorizes its holder to render 'telephone service,' does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. * * * The Commission and the courts may take judicial notice of the well known fact that telephone companies today habitually transmit conversations by electrical impulses traveling through part of the intervening space without proceeding upon wires. There transmissions are a part of 'telephone service' as that term is used and understood today. See Commercial Communications v. Public Utilities Commission, 50 Cal. 2d 512, 327 P. 2d 513, app. dism. and cert. den., 359 U. S. 119, 341, 79 S. Ct. 722, 896, 3 L. Ed. 2d 674, 927."

Closely applicable to the present case is the following from Commercial Communications, Inc. v. Public Utilities Commission, *supra*: "The word 'telephone' is not defined in the code. In its narrow sense 'telephone' refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as 'An instrument for reproducing sounds, especially articulate speech, at a distance.' In defining 'telephony' the Encyclopaedia Britannica (1954 ed.) states 'In a broad sense the term telephone or telephony

includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means.' * * * In common understanding the communication effected by private mobile systems would appear to be a telephone communication."

It is clear, therefore, either under the general constitutional power of the Commission (Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*, and subsequent cases) or the specific statute sought to be interpreted, section 75-604, R. R. S. 1943, that a licensed operating telephone company (mobile service included) has a monopoly, subject to regulations by the Commission of all forms of telephone service within its defined area.

Directly applicable here is our holding in the recent case of Northwestern Bell Tel. Co. v. Consolidated Tel. Co., 180 Neb. 268, 142 N. W. 2d 324, where we said: "This court has said that the object and purpose of commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc., 179 Neb. 735, 140 N. W. 2d 400.

"We have also said: 'It is clear that the invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity.' Sherdon v. American Communications Co., 178 Neb. 454, 134 N. W. 2d 42.

"This court, *even in the absence of a statute* regarding duplication of facilities, has stated: *'Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest.* Such a competing line will be authorized *only for compelling reasons.'* In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. See, also, The Greyhound Corp. v.

American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664." (Emphasis supplied.)

The force of the above language is an extension of the basic proposition that in Nebraska the concept of public utility regulations now is and always has been, one of regulated monopoly. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra;* In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296; The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664.

Confining ourselves to the statute, section 75-604, R. R. S. 1943, the act prohibits, by its terms, anyone from offering telephone service in the "territory of another telephone company" without a certificate by the Commission. Such a certificate can be granted only (1) if the area is "not receiving reasonably adequate telephone service" and (2) "will not within a reasonable time receive reasonably adequate telephone service." Both of these requirements must be met. The suggestion of Radio-Fone to the contrary is patently erroneous. The purpose is to permit no duplication unless the existing company is not and will not in a reasonable time furnish adequate service. The act puts into effect the existing carrier rule applied by this court in numerous public utility cases—that a new carrier cannot be certificated "until the existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of the commission." The Greyhound Corp. v. American Buslines, Inc., *supra.*

The Commission's determination that Radio-Fone had not met its burden of proof under the statute and the applicable case law was not arbitrary, capricious, or unreasonable, and was within the authority permitted by the applicable statute and the constitutional powers of the Commission. Its judgment is therefore affirmed.

AFFIRMED.

CHARLES E. GRANTHAM AND THEORA GRANTHAM, HUSBAND AND WIFE, APPELLANTS, V. GENERAL TELEPHONE COMPANY OF THE MIDWEST, A CORPORATION, ET AL., APPELLEES.
193 N. W. 2d 449

Filed January 7, 1972. No. 37961.

1. **Courts: Jurisdiction: Appeal and Error: Judgments: Motions, Rules, and Orders.** Jurisdiction of this court over appeals from district court is based on final judgments or orders. An order that affects a substantial right in a special proceeding is final.
2. ———: ———: ———: ———: ———. Ordinary burdens of trial are insufficient for this court to classify an otherwise interlocutory or partial summary judgment with orders that affect substantial rights.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Appeal dismissed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Ross & Schroeder, Luebs, Tracy, Huebner & Dowding, and Tye, Worlock, Tye, Jacobsen & Orr, for appellees.

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

SMITH, J.

Plaintiffs alleged that defendants in constructing a building next to plaintiffs' existing building caused plaintiffs physical damage and loss of business profits. Defendants answered that plaintiffs had agreed at least to a method of fixing the physical damage. They also moved for summary judgments on general statutory grounds.

The district court sustained the motions for summary judgments on the issue of physical damage. On the issue of lost profits, however, the court overruled the motions. The journal order stated that liability on the latter issue remained a jury question as to all defendants. Plaintiffs attempted to lodge an appeal in this court.

On our own motion and after argument we examine appealability of the order. Our jurisdiction over appeals from district court is based on final judgments or orders. A final order is one (1) affecting a substantial right in an action, when it in effect determines the action and prevents judgment, or (2) affecting a substantial right in a special proceeding or upon summary application in an action after judgment. A judgment is the final determination of the rights of the parties in an action. Unless the context is shown to intend otherwise, "action" includes any proceeding in a court. See, Art. V, § 2, Constitution of Nebraska; §§ 25-1301(1), 25-1902, 25-1911, and 49-801(2), R. R. S. 1943.

Ordinary burdens of trial are insufficient for us to classify an otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Hart v. Ronspies, 181 Neb. 38, 146 N. W. 2d 795 (1966); cf. 6 Moore's Federal Practice (2d Ed., 1971), §§ 56.20(3.-0), 56.20(3.-2), 56.20(4), and 56.21(2), pp. 2745, 2754 to 2756, 2767, and 2789; Moore's Federal Practice Rules Pamphlet (1970), 940 and 941. That rule governs here. This case is not one in which the court in determining substantial rights only retained the cause for determination of incidental matters. See Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32, 16 A. L. R. 3d 363 (1963).

APPEAL DISMISSED.

CLARA SCHLEUSENER, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF EDWARD SCHLEUSENER, DECEASED, APPELLEE, V. NEBRASKA TRACTOR & EQUIPMENT COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH CUMING COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

193 N. W. 2d 438

Filed January 7, 1972. No. 37970.

1. **Motions, Rules, and Orders: Trial: Judgments: Courts.** In a

case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

2. **Motions, Rules, and Orders: Trial: Evidence.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party 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.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN and JOHN C. BURKE, Judges. Reversed and remanded with directions to dismiss.

Fraser, Stryker, Marshall & Veach, for appellant.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner, for appellee Schleusener.

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

SPENCER, J.

This is an action for the wrongful death of Edward Schleusener while a passenger in an automobile owned and operated by an employee of the Nebraska Tractor & Equipment Company. Deceased died from carbon monoxide poisoning on March 22 or 23, 1966, while an occupant of a stalled automobile, during a violent snow storm. Judgment was rendered for the plaintiff executrix. We reverse.

On March 22, 1966, Joseph Grasso and Charles W. Martin, employees of the Nebraska Tractor & Equipment Company transported the deceased and five other members of the board of county commissioners of Cuming County to Grand Island to inspect a road maintainer and a tractor for which the board was negotiating. The

deceased and two of the other commissioners rode with Martin in his 1966 Buick automobile which it is stipulated was being operated in the business of the company. The weather on the morning of March 22, 1966, was mild, "like a spring day," although there was some light rain or mist in the air. The occupants of both cars wore light clothing. There was no indication of a serious weather change. They reached Grand Island shortly before noon.

Both automobiles left Grand Island sometime before 2 p.m., with the Grasso car in the lead. The parties were headed for Dodge where they were to discuss the transaction. It was then the intention to drop off one of the commissioners at that point, with the others going on to West Point. The weather was then cloudy and rainy. The two vehicles proceeded east on U. S. Highway No. 30 to Central City, then north from Central City on State Highway No. 14 to Albion, where they turned east onto State Highway No. 91. The rain had turned to snow, and it was getting slushy. The snow had gotten heavier as they approached Albion and Grasso reduced the speed of his vehicle to 40 miles per hour. After passing Albion the cars passed through or around the towns of Lindsay, Humphrey, Creston, Leigh, and Clarkson. By the time they passed Clarkson the snow was very heavy and the wind, which had suddenly turned to the northwest, was increasing in velocity.

About 15 rods west of Clarkson a truck forced the Grasso car off the road. It was then approximately 4:30 p.m. The Martin car pulled up alongside. Grasso told Martin that he would be able to get his car going again, and to go ahead. Martin pulled out. A truck came by, and then Grasso proceeded forward. Grasso and the occupants of his car never saw the Martin car again. In a very short period the snow got heavier, visibility became poor, and the Grasso motor started to sputter and miss. Grasso drove approximately another mile and the car stopped. It was then about 5:05 p.m. Grasso

testified that the storm by then had suddenly accelerated in intensity. "When I first pulled off it just seemed like it was a matter of a few minutes and everything zeroed in." The occupants of the Grasso car testified that the weather was real bad; they couldn't see; and they decided to stay in the car. Grasso tried to start his motor from time to time, but was unable to do so. The occupants of the Grasso car remained in the car until they were found about 11 a.m. the next morning.

The Martin car was found on the south side of Highway No. 91 at approximately 2 p.m., March 23, with its front wheels on the highway and its rear wheels off the road. It was about 2½ miles east of Howells and about 3½ miles west of Dodge. It was stipulated the four occupants of the car were dead and had died from carbon monoxide poisoning. The trunk lid was open and sprung, so that it could not be closed. The right front vent of the car was open enough to permit one of the witnesses to put his fingers in it. The car was running, the heater was on, and the radio was playing. The exact time that the Buick reached the point where it was found is not known, but from the record we assume it was before 6 p.m. The Martin car was found less than 10 miles from where the Grasso car stopped.

The evidence is fairly conclusive that none of the parties had heard storm warnings of any kind, and that the storm came up suddenly and was probably the worst storm some of them could remember. A farmer from the Howells vicinity testified as follows: "Q. How do you recall this storm, when did it come up and what did you notice? A. Well, for one thing, it came up so quick that it never give nobody a chance to realize what was really going to happen because we have never had a storm like this for many years, as long as I can remember I have never seen one that came up that quick."

It was stipulated "that the Buick Wildcat automobile owned and operated by Charles W. Martin, within the scope of his employment, and while on company busi-

ness for the Defendant on March 22, 1966, was in all ways in a good and operable condition with no defects, with the understanding, however, that the day following this tragedy, as was testified to by various witnesses, the trunk lid was open and sprung, open to the degree that it took three men, as testified to by one of the witnesses, to try and force it down."

Plaintiff's expert witness, an assistant professor of mechanical engineering at the University of Minnesota, in response to a hypothetical question as to whether the carbon monoxide would enter the trunk, testified as follows: "It is my opinion that carbon monoxide from the—being discharged from the tailpipe could get in and would get in to the vehicle by means of getting into the trunk from underneath and inside of the bumper and up over into the trunk area where it could mix with the air and be forced forward or would simply by mixing with the air flow forward and into the occupied area of the vehicle, there being no complete restriction preventing that."

On cross-examination, plaintiff's expert testified as follows: "Q. And that is shown in these photographic exhibits that I have just shown you and specifically, because it appears so clearly in Exhibit 7, being color, if the wind came from the northwest across the rear end of that car with the trunk lid up and the exhaust pipe down here in the lower right-hand corner, couldn't it very well blow it right on around the side of the car? A. Some of the exhaust would probably go around the side, but some of it also accumulates underneath the bumper and comes up and around and across the bumper here and spills over into the trunk."

Defendant sets out seven assignments of error. We consider only the one involving the overruling of defendant's motion for judgment notwithstanding the verdict.

In Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, we held: "In a case where a motion has been

made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict."

We examine the record herein pursuant to the general rule applicable to such motions enunciated in Corbitt v. Omaha Transit Co., *supra:* "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party 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."

Before the plaintiff can recover herein she must prove that the defendant was negligent in one or more of the particulars claimed by her, and that such negligence was a proximate or contributing cause of the death of the deceased.

We have set out enough of the evidence to determine if plaintiff proved actionable negligence by a preponderance of the evidence. Plaintiff alleges that Martin was negligent in failing to stop his vehicle in a place of safety when he knew or in the exercise of reasonable care should have known that the severe weather conditions presented an unreasonable risk of injury or harm to the passengers.

As we view the record, it is conclusive that the storm suddenly accelerated in intensity. The last time the Martin car was seen was when Martin stopped to see if Grasso needed help and was told to go on. What happened thereafter must be left entirely to conjecture because there were no eyewitnesses and the actions of Martin and the occupants of his car are unknown. What

can we say Martin did or failed to do that a reasonably prudent person would or would not have done? From hindsight, we may say the occupants of his car would not have died if he had driven into Howells and sought shelter. Yet the Grasso car stalled and its occupants remained in the car and survived. There were also other vehicles caught in the storm without the fatal result experienced by the occupants of the Martin car. The deaths were not caused by exposure but by carbon monoxide poisoning.

Is the evidence sufficient to permit a jury to find that a reasonably prudent person would have stopped before the point at which the Martin car was stopped or, more important, that the decision to attempt to reach Dodge was solely that of Martin? The car, which was headed for Dodge, Nebraska, was found 3½ miles from that point. While the car passed within a mile of the town of Howells, 2½ miles from which it was found, and possibly might have been driven into that town, we cannot say that Martin was negligent in failing to do so. The occupants of his car were county commissioners of Cuming County. They undoubtedly were much more familiar than he with the territory through which they were passing. If we were to indulge in speculation, which we would do to find a jury question on this issue, it would be just as reasonable to believe that the occupants of the car were encouraging Martin to drive forward on the main highway rather than to take the spur road into Howells.

The cause of death was carbon monoxide poisoning. How, if at all, was Martin responsible for the death? Plaintiff's main claim of negligence is that Martin was negligent in operating his automobile with the trunk lid up after it became stalled. There is no evidence as to how the trunk was opened, by whom, or when. The evidence is conclusive that when the car was found the trunk lid was sprung and could not be closed. However, it is not the opening of the trunk but the running of the

motor with the trunk lid open which plaintiff asserts as negligence. The vehicle was stopped or stuck at the point where found; the occupants were dressed in light clothing; and the storm was such that it would not have been practical for the occupants to leave the car. The car heater and the radio were on, and the motor was running at the time the car was found. As to whether it had been running continuously, we have no way of knowing. The evidence is undisputed that one of the car vents was open sufficiently to permit a witness to put his fingers through it.

It is the plaintiff's theory that the exhaust fumes from the car curved up into the open trunk and then seeped into the automobile, and that Martin as the owner and driver should have anticipated this result. In attempting to reconstruct the deaths 5 years later, where no tests were performed at the time, we can only theorize as to how the carbon monoxide fumes entered the car. Although plaintiff's expert, who inspected the car 5 years later, and studied some photographs of it, was of the opinion that if the trunk lid had been closed there would have been little likelihood of carbon monoxide poisoning, he did not examine the muffler system or run the engine, and admitted he had no way of knowing the condition of the system at the time of the deaths. It was stipulated that the car was in a good and operable condition with no defects on March 22, 1966.

Exhibits 5 and 7, which are photographs of the rear of the Martin car when found, would indicate a buildup of snow which covered the rear bumper of the car. How soon this happened after the car was stalled, or with relation to the time the trunk was opened or the time of the deaths of all the occupants, is of course not known, and any conclusions we might draw would be pure speculation. From the photographs we could surmise that after the buildup of the snow, the carbon monoxide came out the two ends of the rear bumper or passed under the car to the front end which was partly open.

However, if we assume that carbon monoxide coming through the trunk was the method by which the deceased was asphyxiated, we still have the question as to whether Martin's failure to realize this possibility would be sufficient to charge him with negligence. We do not believe plaintiff met her burden of proving that some negligence of Martin was the cause of decedent's death.

Defendant's motion for judgment notwithstanding the verdict should have been sustained. The judgment is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., participating on briefs.

NEBRASKA MIL-NIC, INC., A CORPORATION, APPELLANT, V. HALL COUNTY, NEBRASKA, ET AL., APPELLEES, CITY OF GRAND ISLAND, NEBRASKA, ET AL., INTERVENERS-APPELLEES.

193 N. W. 2d 450

Filed January 7, 1972. No. 37983.

1. **Statutes: Limitations of Actions: Municipal Corporations: Annexation.** Section 18-1717, R. R. S. 1943, enacted with the emergency clause on April 29, 1967, provides for a 1-year limitation period in which a party may contest any annexation or contest any act done prior to April 29, 1967, pursuant to such annexation, which annexation was made pursuant to any statute of this state which has been, on April 29, 1967, declared to be unconstitutional.
2. **Statutes: Limitations of Actions.** A special statute of limitations, where applicable, controls over a general statute of limitations because the special statute is the one that more properly expresses the legislative will.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

E. Merle McDermott, for appellant.

Sam Grimminger and Gerald Buechler, for appellees.

Duane A. Burns, Kenneth H. Elson, James D. Livingston, and Walter Lauritsen, for interveners-appellees.

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

WHITE, C. J.

This is an action for the refund of real and personal property taxes. Plaintiff alleges that its property was purportedly annexed to the City of Grand Island on November 20, 1963, by virtue of Ordinance No. 4075. On March 15, 1968, the district court for Hall County in a case entitled Pokorski v. City of Grand Island (following our decision in Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776), adjudged Ordinance No. 4075 to be unconstitutional and void, and the taxes levied by the city and School District No. 2 were therefore void. Plaintiff, relying on this ruling, prays for a refund of taxes for the years 1964, 1965, and 1966, a sum in excess of $30,000. This action was commenced on November 13, 1969, by the filing of a claim with the Hall County Treasurer and Board of Supervisors, pursuant to section 77-1736.04, R. S. Supp., 1967, the general tax refund statute. The County Board denied the refund and an appeal was taken to the district court. The district court dismissed the action, holding that it was barred by the statute of limitations. We affirm the judgment of the district court.

Section 77-1736.04, R. S. Supp., 1967, provides in part: "If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any personal property or real estate tax, assessment, or penalty or any part thereof, was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such illegal tax,

assessment or penalty for the year such tax, assessment or penalty is determined to be illegal shall be repaid and refunded in the county where originally paid to the person paying such tax, assessment, or penalty. * * * If the tax, assessment, or penalty has been distributed by a collecting officer, then the person claiming a refund, or the agent or authorized representative of such person, shall file a claim with the county treasurer for such refund within two years after the final judgment is entered declaring such tax, assessment, or penalty as illegal."

Plaintiff contends that the tax was adjudged void in the Pokorski case which was decided March 15, 1968, and that he has commenced his action for the refund within 2 years of that date and hence within the statutory period.

The defendants contend that the applicable statute of limitations is section 18-1717, R. R. S. 1943, and that under its terms this action is barred because it was not commenced within 1 year from April 29, 1967. The statute provides: "Any party affected by any annexation of property made by any city or village prior to April 29, 1967, *whose rights have not already been barred by any other applicable statute of limitations,* shall be required to commence any action or proceeding of any kind or nature, whether legal or equitable, to contest such annexation or to contest any act done prior to April 29, 1967 pursuant to such annexation, within one year from April 29, 1967 or the same shall be forever barred. The period of time prescribed by this section for bringing an action shall not be tolled or extended by nonresidence or disability. The limitation of this section shall also apply to any action or proceeding of any kind or nature, whether legal or equitable, to contest any annexation or to contest any act done prior to April 29, 1967 pursuant to such annexation, which annexation was made pursuant to any statute of this state which has

been, on April 29, 1967, declared to be unconstitutional." (Emphasis supplied.)

We agree that section 18-1717, R. R. S. 1943, is applicable in this case. An examination of the underlying history fortifies this conclusion.

In 1963 the Legislature enacted L.B. 338, Laws 1963, c. 59, p. 249. This bill revised the procedures for extending the boundaries of cities of the first class. Ordinance No. 4075, under which plaintiff's property was annexed to the City of Grand Island, was enacted pursuant to the terms of L.B. 338. On *January 6, 1967,* this court rendered its decision in Williams v. County of Buffalo, *supra,* declaring L.B. 338 unconstitutional. This invalidation of the enabling statute undermined all municipal annexation ordinances enacted under it. Cities of the first class were thus exposed to a potential financial crisis in that annexations and the taxes levied under them were stripped of their legality, and numerous tax refund claims could be expected. Section 18-1717, R. R. S. 1943 (enacted with the emergency clause on April 29, 1967), was specifically designed to alleviate their predicament by strictly limiting the period during which such claims could be made. The 1-year statute of limitations is reasonable, serves a good policy, and was obviously designed to deal with precisely the situation before the court.

The phrase "to contest any act done * * * *pursuant* to such annexation," in section 18-1717, R. R. S. 1943, is clearly broad enough to encompass an attack on taxes levied by virtue of a purportedly illegal annexation. Thus, both this statute, and section 77-1736.04, R. S. Supp., 1967, deal with the general subject of contesting illegally collected taxes. Under these circumstances, the special statute of limitations enacted in 1967 dealing with annexation controls over the more general limitation of actions for tax refunds, because the special statute is later and specifically expresses the legislative will. Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE A. WATERS, APPELLANT.
193 N. W. 2d 453

Filed January 7, 1972. No. 38132.

Criminal Law: Evidence. Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

Appeal from the district court for Pawnee County: WILLIAM F. COLWELL, Judge. Affirmed.

Peter Burrill Beekman, for appellant.

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

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

SMITH, J.

A jury found Eugene A. Waters guilty of burglary, this court having granted him a new trial in State v. Waters, 186 Neb. 257, 182 N. W. 2d 214 (1970). On appeal he assigns insufficiency of the evidence for error.

Someone broke into a gas station at Table Rock at night on November 21-22, 1969, a Friday and Saturday. A few small coins and checks were lying in the area. The intruder stole 8 to 13 salted peanut roll bars of the 10-cent size and approximately $158, less the change and checks dropped there. The sum stolen comprised bills, coins, and perhaps checks. Among the coins were a roll of quarters and loose quarters totaling $15 to $20, a few pennies, no dimes, some nickels, and one 50-cent piece.

A state patrolman, Robert Chab, and the sheriff,

Charles Hall, testified as follows. Saturday, November 22, 1969, at 9 a.m., in Table Rock, they entered an abandoned house without doors or window glass. In one room they found Waters in bed with seven salted peanut rolls of the 10-cent size. Chab found $2.69 in Waters' topcoat, and Hall found $60 in the pocket of Waters' trousers. The sum of $2.69 consisted of quarters, a dime, nickels, and pennies. The $60 sum comprised a $20-bill, two $10-bills, and four $5-bills.

When Waters exposed the candy by sitting up in bed, he volunteered: "I can explain the candy bars." Interrupting Miranda warnings, he said he had purchased the candy bars at a bus stop located 6 miles east of Humboldt. He also fixed the time of his arrival at the house at midnight or 2 a.m. that morning.

After departure of Hall and Waters, Chab discovered $71 in a dried cornhusk in the room that Waters had occupied. The sum comprised two $20-bills, three $5-bills, and sixteen $1 bills. At the gas station, Hall in searching Waters' sports jacket found $17 which comprised 65 quarters, 5 nickels, and 1 50-cent coin.

Waters testified as follows. He possessed $71 when he entered Nebraska from Iowa. While in Omaha, he earned $50. When he arrived in Table Rock the day before the burglary, he had $149 to $153. The difference between the latter sum and $121 represented winnings at pocket billiards. He had purchased 11 peanut roll bars in Omaha and 1 at the bus stop near Humboldt. He admitted telling the officers that he had purchased candy at Humboldt without mention of the Omaha purchase. During his travels in Nebraska that week, he accumulated coins in placing a number of long distance telephone calls. He traveled to Table Rock in search of a job, but after arrival there he decided to look elsewhere.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v.

Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The evidence against Waters is sufficient.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID ADAMS, APPELLANT.
193 N. W. 2d 579

Filed January 14, 1972. No. 37799.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Evidence.** Voluntary statements made by a defendant are ordinarily admissible, especially when the defendant was not in custody when the statements were made.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

David L. Herzog, for appellant.

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

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

NEWTON, J.

Defendant was charged and convicted of manslaughter in connection with the death of his wife who died by reason of being shot in the hand and head with a shotgun. We affirm the judgment of the district court.

Defendant asserts the evidence is not sufficient to sustain his conviction and that the admission of certain statements attributed to him was erroneous.

The evidence was conflicting. On review it appears that the jury could justifiably find as follows: Defend-

ant had been out most of the night and returned home early in the morning. A tenant in an apartment across the hall had seen and talked with defendant about 5:30 to 5:45 a.m. the morning his wife was killed, and shortly thereafter heard some loud talking, a woman scream, and a sound like a door banging emanating from the direction of defendant's apartment. At about 8:50 a.m. defendant returned to the neighbor's apartment and said: "I killed my wife." He asked the neighbor to go get the baby. The neighbor entered defendant's apartment and found the body whereupon he returned to his own apartment and called the police. Defendant was nervous, crying, and appeared dazed. When the police arrived, two of them heard defendant volunteer the statement: " 'I was out messing around and I came home, we argued.' " Defendant's defense consisted of an alibi. He and a woman acquaintance stated he had been in her apartment from about 6 a.m. to 8:45 a.m. The woman made contradictory statements to the police, on one occasion stating defendant had left her at about 7:10 a.m. and further stating defendant had not spent the night with her but if it would help him, she would say he had. Later she said he had gone to bed with her. No one admits to having heard the shot and the time of death could not be definitely established. Defendant admits he and his wife had troubles; that he had struck her on several occasions; and that he anticipated trouble when he returned home the morning of her death. The shotgun used was one belonging to a brother of defendant but kept in defendant's apartment together with a box of shells of the type and make fired. Under all the circumstances, we find the evidence sufficient to sustain the conviction. "In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." State v. Howard, 184 Neb. 461, 168 N. W. 2d 370.

Defendant maintains the volunteered statements attributed to him were not admissible in evidence because he was dazed or suffering from shock. It does not appear that defendant was irrational at any time and voluntary statements made by a defendant are ordinarily admissible, especially when the defendant was not in custody when the statements were made. See State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

OLGA VIRKA ET AL., APPELLANTS, V. EDGAR KNOX, SUPERINTENDENT OF SCHOOLS, SAUNDERS COUNTY, NEBRASKA, ET AL., APPELLEES.
193 N. W. 2d 573

Filed January 14, 1972. No. 38016.

1. **Schools and School Districts: Statutes: Time.** The determination as to the validity and sufficiency of petitions for school district reorganization filed under sections 79-402 to 79-404, R. R. S. 1943, and R. S. Supp., 1969, is made as of the date the petitions are filed with the county superintendent by the county committee for school district reorganization.
2. ———: ———: ———. By its terms, section 79-402, R. R. S. 1943, provides that the petitions, although presented to the county committee prior to the time of holding the statutory public hearing, shall not be filed with the county superintendent until 10 days following a public hearing.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Sidner, Svoboda & Schilke and G. Michael Wiseman, for appellants.

Robert E. Sullivan and Everett O. Inbody, for appellee Knox.

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

WHITE, C. J.

This is a case involving the procedure for school district reorganization within a county under sections 79-402 to 79-404, R. R. S. 1943, and R. S. Supp., 1969. Boiled down, the essential question involved in this case is whether the county superintendent, in examining the petitions for the reorganization of the school district under the statutes involved, should have taken the date of July 9, 1970, being the date upon which the petitions for reorganization were filed with him, as the date for making a final determination of the validity of the signatures and the number of qualified legal voters in the district. The district court held that the date upon which the petitions were *filed* with the county superintendent on July 9, 1970, was the correct date. We affirm the judgment of the district court.

No challenge is made in this error proceeding as to the compliance by the appellees with the procedural provisions and requirements of section 79-402, R. S. Supp., 1969. The statute provides in part: "Petitions proposing to create a new school district or to change the boundary lines of the existing school districts shall, when signed by at least sixty percent of the legal voters in each district affected, be submitted to the county committee for school district reorganization * * *. The county committee shall, within forty days, review and approve or disapprove such proposal and submit it to the state committee for school district reorganization. The state committee shall, within forty days, review and approve or disapprove the proposal and return said proposal, with any recommendations deemed advisable, to the county committee. The county committee shall, within fifteen days of receipt of the returned proposal, consider the action of the state committee and determine whether to give final approval or disapproval to the proposal. The county committee shall also, within fifteen days of receipt of the returned proposal, advertise and hold a public hearing at which the recommenda-

tions and action of the state and county committees shall be *presented* to the legal voters in attendance. *The county committee shall hold the petitions for ten days following the hearing, at the end of which time the committee shall file the petitions with the county superintendent.*" (Emphasis supplied.)

The county superintendent found that on May 1, 1970, a petition containing the signatures of 35 legal voters, and accompanied by a list of all of the legal voters in said district at that time, shown to be 53, was presented to the secretary of the county committee for reorganization of school districts for Dodge and Saunders Counties. It is apparent from the statutes involved that if the proper date for the determination of the validity of the petition was May 1, 1970, the petition complied with the 60 percent requirement.

But the county superintendent also found that on July 9, 1970, the last date upon which names of legal voters could be added to or deleted from the petition, there were 56 legal voters in the district. In this determination the county superintendent included three persons who had qualified as legal voters in said district after May 1, 1970. On July 9, 1970, the remaining legal signatures on the petition numbered 32, and thus the county superintendent found that the petition was legally insufficient to meet the 60 percent requirement. We have the simple proposition of determining at what point in time the county superintendent should make a final determination both as to the number of valid signatures on the petition and the number of qualified voters against which this number is compared for the determination of the percentage requirement.

We consider our holding in Harnapp v. Bigelow, 178 Neb. 440, 133 N. W. 2d 611, as determinative of the issue in this case. In the Harnapp case this court stated as follows: "Although section 79-404, R. R. S. 1943, requires that a list of the legal voters in each district affected be given to the county superintendent when the

petition is presented, the validity or sufficiency of the signatures upon the petition is not determined upon the basis of this list alone. Section 79-402, R. S. Supp., 1961, requires the county superintendent to advertise and hold a hearing for the purpose of determining the validity and sufficiency of the petitions after they have been filed with the county superintendent. *The determination as to validity and sufficiency is made as of the date that the petitions are filed with the county superintendent.*" (Emphasis supplied.)

It is obvious from reading the above statute what the legislative intent was. The selection of the language used is significant. The statute contemplates that there is an intermediate period of time in which the petition must be sent to the state committee for school district reorganization for the securing of its approval. The statute provides that the petition shall "*be submitted*" to the county committee for school district reorganization. It then provides that within 15 days after receipt of the returned proposal it must advertise and hold a public hearing at which time the "recommendations and action of the state and county committees shall *be presented* to the legal voters in attendance." The statute specifically provides that following compliance with these procedures the committee "*shall file* the petitions with the county superintendent." It therefore becomes clear that by its terms, section 79-402, R. S. Supp., 1969, specifically provides that the petition is not *filed* with (only "submitted" and "presented" to) the county superintendent until it has gone through two county meetings, a state committee meeting, and a hearing has been held. The Harnapp case, *supra,* fixes that date of filing as the time when the county superintendent shall make a determination of both the validity and sufficiency of the petitions.

The record is conclusive that the county committee *filed the petitions* with the county superintendent on July 9, 1970, thus July 9, 1970, rather than May 1, 1970,

is the critical date for the determining of the validity and the sufficiency of the petitions in this case. The district court so held.

Independent of the above analysis, we would be required to reach the same conclusion in the light of the purpose, design, and scheme of the statute. Other statutes and our case decisions have clearly held that signatures of legal voters may be added to or withdrawn from the petitions involved during the period between the time of the presentation to the county superintendent and the time they are finally filed with the officer. To hold that registered voters may change their minds or add their names during this period of time and at the same time hold that a qualified voter could not register and place his name on the petition during the same period of time would be inconsistent with the whole scheme and purpose of the statute. It is apparent to us that the date for both determinations should be the same, namely, the date of the filing of the petitions with the county superintendent. It would disenfranchise qualified voters who had not registered at the time of the presentment of the petitions (May 1, 1970). Such a policy would be contrary to and inconsistent with the designed purpose of the statute to permit and require a public hearing and to allow the qualified voters in the district to make a final judgment on the matter within 10 days after such hearing, and at any time before the fixed date of filing the petition with the county superintendent.

Since July 9, 1970, was the critical date, it becomes unnecessary to examine the factual determination by the county superintendent as to the eligibility of three different voters.

The judgment of the district court in this error proceeding affirming the judgment and findings of the county superintendent is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAMELA MARIE JONES, APPELLANT.

193 N. W. 2d 562

Filed January 14, 1972. No. 38057.

Criminal Law: Sentences: Appeal and Error. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellant.

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

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

WHITE, C. J.

The defendant was convicted of forgery. The sole question presented on this appeal is the excessiveness of the sentence.

The defendant, a woman 22 years of age, on the date of sentencing, was sentenced to imprisonment for an indeterminate period of 1 to 2 years for the crime of uttering a forged instrument. The record shows that the defendant in a short period of time contemporaneous with the particular offense to which she pled guilty, uttered and cashed about $600 worth of checks at various grocery stores, department stores, etc. The defendant used two different check books, one the defendant claims she found at a gas station and the second one a woman had left at a health spa. She "found" the purse and the check book in a lounge, and along with it was a billfold, a couple of dollars in change, and identification cards. The record reveals that some of the numerous checks which she issued were for necessities, such as food and clothing, and others were for luxuries. As a

part of a plea bargain, the record reveals that she will not be prosecuted upon any of the other checks involved in the $600 total, or any other offenses in connection with the check transactions.

The record reveals defendant was arrested in 1966 by the vice squad and forfeited bond of $10; an arrest for assault in 1967, no disposition shown; arrest for destruction of property in 1968, no disposition shown; an arrest for disorderly conduct in 1968, fine of $25 and costs; an arrest for petit larceny in 1968, fine of $10 and costs; an arrest for second offense petit larceny in 1969, sentence of 15 days in jail; an arrest for minor in possession in 1969, fine of $25 and costs; and an arrest in 1970 for unlawful entry, larceny, no disposition shown.

The circumstances of the present offense reveal the use of false identification papers, the stealing of a lady's purse, and other background facts which the district court took into consideration in making the determination of whether the defendant was entitled to probation.

The scope of our review is limited to the determination of whether the trial court abused its discretion in imposing the sentence it did. State v. Martin, 185 Neb. 699, 178 N. W. 2d 573; State v. Walker, 186 Neb. 439, 183 N. W. 2d 745. It is apparent that the trial court's determination the defendant was not a fit subject for probation, and the imposition of the minimum indeterminate sentence, was not an abuse of discretion.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TAYLOR BLACK BEAR, APPELLANT.
193 N. W. 2d 563

Filed January 14, 1972. No. 38058.

1. **Criminal Law: Evidence: Trial.** Evidence is sufficient to sus-

tain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

2. **Trial: Instructions.** Jury instructions must be considered collectively. If as a whole they correctly state the law, no error occurs, although one alone may be incomplete.
3. **Criminal Law: Guilty Plea: Plea Bargaining.** It is proper for the court to grant charge and sentence concessions to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would be served.
4. **Criminal Law: Sentences: Appeal and Error.** Unless an abuse of discretion appears on a claim of excessiveness, we will not disturb a sentence within statutory limits.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Albert T. Reddish, for appellant.

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

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

SMITH, J.

A jury found that Taylor Black Bear had uttered a forged check in violation of section 28-601, R. R. S. 1943. On appeal he asserts insufficiency of evidence, error in a jury instruction, and excessiveness of sentence.

The check, exhibit 1, and another check, exhibit 2, were forged by Foster Yellow Elk. On Monday, October 5, 1970, Marguerite Crouse, a checkout cashier at the Food Center in Alliance, cashed exhibit 2. The next day a male Indian presented exhibit 1 to Cora Pauley, also a checkout cashier there. She led the man back to John J. Essay, operator of the Food Center. Essay refused to cash the check which he retained, and he accused the Indian of the transaction the previous day. After departure of the Indian, Essay reported the matter to the police department, and police officers subsequently arrested Black Bear.

Neither checkout cashier could identify the offender.

Roger Roebuck, a bread salesman, had witnessed the transaction on Monday. He positively identified Black Bear, who had been intoxicated. Black Bear had been wearing exhibit 3, a "Viet Nam" jacket with the name "Spotted War Bonnet" lettered on the right front. Roebuck on two other occasions during this period saw Black Bear clad in the jacket. In Roebuck's opinion jackets of that type were not uncommon but he had not seen one exactly like exhibit 3.

Essay testified as follows: Black Bear was the Indian he had confronted on Tuesday. He identified him principally by the jacket. Black Bear had been intoxicated to excess. With bloodshot eyes, he had been staggering and weaving. When Black Bear departed, Essay trailed him half a block, then returned to the store and telephoned the police.

Ten to 15 minutes prior to receiving Essay's report, police officers Lyle L. Grant and Byron Fowler on patrol observed Black Bear, Yellow Elk, and two other Indians in a group a few blocks southeast of the Food Center. Black Bear was the only one who was sober. He said he intended to purchase groceries at the Food Center, walking away in that direction.

Essay described to police officers a man 6 feet tall, intoxicated, and clad in an army-type jacket with the words "Spotted War Bonnet, Viet Nam, Da Nang" lettered on it. After an interval of 15 minutes officers arrested Black Bear. He was sitting calmly in the window well at the front of a hotel that was in the process of demolition. The arresting officers were convinced of his sobriety. He was wearing exhibit 3, the only jacket of that type that either officer had seen in Alliance.

Black Bear, 5 feet 7 or 8 inches tall, testified as follows: He had not known the location of the Food Center. He had not seen either check prior to the arrest. On Tuesday, October 6, he had not been north of the hotel, the Food Center being located in that direction. No tes-

timony implied that someone had borrowed his jacket either day.

There were many other conflicts in the testimony of witnesses, not only among witnesses but also by an individual witness. The conflicts related to Essay's report to the police, purchases of merchandise by the offender each day, description of the jacket, and description of the physical appearance of Black Bear's face.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). Sufficiency of the evidence against Black Bear is a close issue. We resolve it against him.

The definition of "utter" in jury instruction No. 13 tracked our language in Crawford v. State, 164 Neb. 231, 82 N. W. 2d 1 (1957). Although instruction No. 13 did not refer to knowledge as such, in instruction No. 8 the statement of issues read in part: "That at that time the defendant knew said check to be falsely made forged and counterfeited."

Jury instructions must be considered collectively. If as a whole they correctly state the law, no error occurs, although one alone may be incomplete. State v. Davis, 186 Neb. 457, 183 N. W. 2d 753 (1971). Black Bear's complaint respecting the instructions is without merit.

The argument over the sentence is connected with the sentence imposed on Foster Yellow Elk. The court sentenced Black Bear to imprisonment for an indeterminate term of 1 to 4 years, and Yellow Elk, 6 to 18 months.

Yellow Elk had pleaded guilty, and the court stated that it considered the plea in sentencing him. Age 42, he had a record of three prior felony convictions, but the third one had occurred 14 years earlier. Black Bear, age 26, had a record of twenty misdemeanor convictions and four prior felony convictions. His fourth felony conviction had occurred approximately 4 years earlier.

It is proper for the court to grant charge and sentence

concessions to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would be served. A.B.A. Standards Relating to Pleas of Guilty, § 1.8, p. 8 (App. Dr., 1968).

Unless an abuse of discretion appears on a claim of excessiveness, we will not disturb a sentence within statutory limits. State v. Morosin, *ante* p. 521, 192 N. W. 2d 165. We have reviewed the presentence reports on Yellow Elk and Black Bear. The latter's sentence fell within the discretion of the trial court.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. In my judgment the evidence identifying the defendant as the utterer of the forged instrument is wholly insufficient to establish such identity beyond a reasonable doubt. This identification depends completely upon the testimony of John J. Essay. Neither cashier could identify the defendant as the man who attempted to pass the check. Essay identified only an Indian wearing a Vietnam jacket, who *was very intoxicated. His eyes were bloodshot. He was weaving and staggering. The officers who arrested the defendant within 5 to 15 minutes of the incident testified positively that the defendant was sober.*

This case does not present a question of mere credibility of the witnesses for the jury to decide. It is so inherently contradictory that the contradiction can be resolved only by speculation. We refer especially to the testimony as to the sobriety of the utterer and the defendant who was arrested. Where speculation and not reasonable inference must be resorted to there is no identification beyond a reasonable doubt.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ARMAND EDWARD MASON, APPELLANT.
193 N. W. 2d 576

Filed January 14, 1972. No. 38076.

1. **Criminal Law: Guilty Plea.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional.
2. **Criminal Law: Post Conviction: Attorneys at Law.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

John W. Carlson, for appellant.

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

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

SPENCER, J.

This is a post conviction appeal from the overruling of a motion to vacate and set aside a conviction on a guilty plea. Defendant was accorded a hearing on his allegation of unlawful arrest, unlawful lineup, use of illegally obtained evidence, ineffective counsel, and the entry of a plea under a misapprehension of the case in which the plea was tendered, and consequently that the plea was not made knowingly, voluntarily, intelligently, and understandingly. We affirm.

A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. If, therefore, defendant's plea was understandingly and voluntarily made, he has waived his other alleged defenses except that of ineffective counsel. In view of the position we take on the record herein, we consider only the voluntariness of the plea and effectiveness of

counsel. In passing, however, we note the alleged improper confrontation is based upon United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, which was decided June 12, 1967. Defendant's plea was entered on April 27, 1967. Wade is not retroactive. Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. That defense was unavailable if defendant had gone to trial.

Defendant was arrested January 23, 1967, in Lincoln, Nebraska. With two others, Oziah and Hunter, he was charged in Gage County with robbery from the persons of Arlin F. Blome and Dorothy Blome, husband and wife. He was transferred to Gage County and on January 24, 1967, counsel was appointed for him. The facts of the robbery are described in State v. Oziah, 186 Neb. 541, 184 N. W. 2d 725. Defendant, on arraignment, pled not guilty. After Oziah's conviction and sentence of 15 years and Hunter's plea of nolo contendere and sentence of 12 years, defendant, who had a previous record, visited with his attorney about changing his plea from not guilty to guilty. This was done, and defendant was sentenced to 10 years in the Nebraska Penal and Correctional Complex.

Defendant's main contention is that he entered his guilty plea under a misapprehension as to the charge to which he was pleading. He now states he thought he was pleading guilty to the information for armed robbery of Dorothy Blome, when in fact he pled guilty to the information for armed robbery of Arlin F. Blome, both of which occurred in the same house at the same time. After the acceptance of his plea, the county attorney dismissed the information for the robbery of Dorothy Blome.

Defendant premises his claim for relief not on a claim of innocence but on his allegation that Arlin F. Blome's case was much the weaker one because of Arlin's failure to effectively identify him at the preliminary hearing. In this respect, defendant's testimony is in conflict with

that of his trial counsel. His trial counsel testified that Arlin F. Blome did positively identify the defendant but that in his opinion his cross-examination of Arlin F. Blome cast some doubt upon that positive identification. He also testified that he was not able to raise any doubt relative to Dorothy Blome's in-court identification of the defendant.

We find it difficult to believe that defendant had the slightest doubt as to the charge to which he pled guilty. The information was read to the defendant by the deputy county attorney. This information identified the offense as follows: "* * * feloniously and forcibly and by violence and by putting in fear, take from the person of Arlin F. Blome, money of value and property of value with intent to rob and steal." The following from the rearraignment proceedings should also raise a serious doubt as to defendant's present testimony: "THE COURT: Court will now ask you as to how you plead — DEFENDANT: (Interposing) Guilty, your Honor. THE COURT: Just a minute. (continuing) — as to how you plead to the charge in the for which allegation, that on January 22nd, 1967, in the County of Gage, State of Nebraska, defendant feloniously, forcibly and by violence and by putting in fear, take from the person of Arlin F. Blome money of value and property of value with the intent to rob and steal, guilty or not guilty? DEFENDANT: Guilty, your Honor."

It is noteworthy that defendant's motion to vacate and set aside sentence, which he drew himself, did not include this particular allegation. It was not until after counsel was appointed for the post conviction hearing, and counsel obtained leave to amend the motion, that this allegation was included. Defendant's trial attorney testified there was no question in his mind but that defendant was pleading to the charge of robbing Arlin F. Blome. In any event, even if Arlin F. Blome was weak on his positive identification of defendant, if defendant had been tried on that charge, Dorothy Blome's

testimony would still have been admissible against him. She was the one who opened the door when the defendant and his two accomplices forced their entrance into the Blome home.

The defendant has not proved that he was confused regarding the charge to which he was pleading. It is apparent that this is an afterthought because the other charge was dismissed after his plea was accepted. We find the record herein adequately demonstrates that defendant's plea was understandably and voluntarily entered.

Defendant now contends that his counsel was ineffective. The record indicates that his counsel had served 2 years as an assistant United States attorney in Alaska, and there had basic responsibility for criminal prosecutions. When he returned to Nebraska he was appointed as county attorney of Gage County and served in that capacity for 6 years. While most of his experience has been as a prosecutor, there can be little question he was familiar with criminal procedures. The rule is well established in this jurisdiction for post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Moss, 185 Neb. 536, 177 N. W. 2d 284. This definitely was not the situation herein. Defendant understood his position and was interested in obtaining as much consideration as possible on his sentence. He was sentenced to 10 years when the maximum sentence for the offense was 50 years. This was a lighter sentence than those received by his accomplices and in view of defendant's record, and the nature of the offense, a lenient one.

Defendant's motion to vacate was properly denied.

AFFIRMED.

ROBERT L. WESTENBURG, APPELLANT, V. CARROLL WEEDLUN, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

193 N. W. 2d 566

Filed January 14, 1972. No. 38081.

1. **Motor Vehicles: Administrative Law.** The revocation of a license to operate a motor vehicle under the point system is a ministerial act.
2. **Motor Vehicles: Administrative Law: Statutes.** When his records disclose that any person has accumulated a total of 12 or more points within 2 years, the Director of Motor Vehicles is required by section 39-7,129, R. R. S. 1943, to summarily revoke the license and privileges of such person to operate a motor vehicle in this state.
3. ———: ———: ———. The ministerial administrative authority vested in the Director of Motor Vehicles by the statute requires that he apply the applicable violation sections of the motor vehicle statute to the information properly furnished to him under the requirements of section 39-796, R. S. Supp., 1969.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

A. James McArthur, for appellant.

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

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

WHITE, C. J.

Pursuant to the authority of section 39-7,129, R. R. S. 1943, the motor vehicle operator's license of plaintiff was revoked by the Director of Motor Vehicles for the accumulation of 12 points within a 2-year period. Plaintiff appeals from an order of the district court sustaining the revocation. We affirm the judgment of the district court.

Plaintiff contends that the director exceeded his statutory authority in assessing 3 points for a speeding violation which took place July 12, 1970. Under the pro-

visions of subsection (11) of section 39-7,128, R. R. S. 1943, the number of points assessed for a speeding violation depends on the extent which the applicable speed limit was exceeded; 3 points are assessed only where the speed limit was exceeded by more than 10 miles per hour. The abstract of conviction for the violation in question indicates that section 39-723, R. S. Supp., 1969, was violated, and describes the offense as follows: "Speeding; 72 MPH. at night by Vascar." Plaintiff contends that it is not possible to tell from the abstract to what extent the speed limit was exceeded, and that consequently the director could assess only the minimum of 1 point, rather than the maximum of 3. Had less than 3 points been assessed, plaintiff would not have an accumulation of 12 points, and his license could not have been revoked.

Subsection (1) of section 39-723, R. S. Supp., 1969, sets out the various speed limits on highways and roads: "(a) seventy-five miles per hour upon any part of the National System of Interstate and Defense Highways or upon any freeway as defined in section 39-1369, (b) sixty-five miles per hour between the hours of sunrise and sunset, and sixty miles per hour between the hours of sunset and sunrise, upon any concrete, brick, macadamized, or other hard-surfaced highway, or upon any other highway that is part of the state highway system, or (c) fifty miles per hour upon any gravel, dirt, or other highway or road that is not hard surfaced, except upon any highway that is a part of the state highway system."

The abstract in question shows that the plaintiff was going 72 miles per hour "at night." It is apparent, therefore, that he was not on an interstate or other freeway, because speeds of 75 miles per hour are permitted night and day on such roads. For either of the remaining classes of roads with which the statute deals, a speed of 72 miles per hour at night would exceed the speed limit by more than 10 miles per hour, thus re-

quiring an assessment of 3 points against the driver's license of the offender.

The plaintiff contends that the director's power is purely ministerial and that, therefore, he is forbidden to indulge or apply the above analysis and interpretation. In other words, he says that the director's ministerial duties blind him from anything but the four corners of the above abstract. Of course, the duties of the director to assess points and to revoke licenses are ministerial. § 39-796, R. S. Supp., 1969; Lutjemeyer v. Dennis, 186 Neb. 46, 180 N. W. 2d 679.

The various statutes involved require the director to relate the reports of convictions in abstracts to the applicable law. He cannot, in performing his duty, assess the points in a void. A common sense reading of the statute, in light of the information supplied here, would lead to no other conclusion than that the director was required to assess 3 points for speed in excess of 10 miles per hour above the speed limit. The assessment of 3 points, therefore, was ministerial in nature only. It was neither necessary nor required that the court submitting the abstract recite the particular section of the statute applicable.

In Lutjemeyer v. Dennis, *supra,* this court rejected a contention that an abstract of conviction which described the offense as "violating auto signal" was insufficient because it did not specify that this had been done while driving a motor vehicle.

The contentions of the plaintiff are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES THOMPSON, APPELLANT.

193 N. W. 2d 561

Filed January 14, 1972. No. 38100.

Criminal Law: Sentences: Appeal and Error. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

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

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

WHITE, C. J.

The sole question presented by this appeal is the excessiveness of the district court's indeterminate sentence of not less than 5 years or more than 10 years in the Nebraska Penal and Correctional Complex for the crime of forgery. We affirm the judgment and sentence of the district court.

The record in this case shows that the appellant had a prior conviction for burglary. He admitted in open court that he had both escaped from jail and participated in the theft of an automobile. At the same time, charges were pending against the appellant for assault and battery and two further counts of burglary in Hall County, Nebraska. At the same time it appears that Keya Paha County had a warrant for the appellant's arrest for burglary which had not been served. It also appears that on a previous conviction the appellant had been unsuccessfully paroled therefrom. It further appears that the trial court in accepting the guilty plea and imposing the sentence, directed the dismissal of all

pending charges against the appellant, pursuant to a plea bargain.

The maximum sentence for the crime of forgery is a period of 20 years and a fine not exceeding $500. No rule of law is better established in this state than the one where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears. State v. Martin, 185 Neb. 699, 178 N. W. 2d 573. It is apparent, from the recital that we have made herein, that the district court did not abuse its discretion in imposing the sentence that it did under all of the circumstances.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

GEORGE ROSE SODDING & GRADING COMPANY, INC., APPELLANT, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
193 N. W. 2d 556

Filed January 21, 1972. No. 37972.

1. **Trial: Evidence: Witnesses: Appeal and Error.** No formal offer to prove is required to obtain a review of a ruling of the trial court excluding the answer of a witness to a question, where the question itself clearly indicates what the party expected to prove by the witness.
2. **Trial: Trespass: Damages.** The failure to instruct the jury to return a verdict for nominal damages in an action for trespass, where the defendant admitted trespass, is error.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Frank Meares, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen Morrow, John Abbott,

Verne Vance, George Selders, and Kent Whinnery, for appellee.

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

WHITE, C. J.

By request for admissions, the defendant City of Omaha admitted pumping raw sewage onto plaintiff's property at least 6 times in the years 1968 and 1969. In this trespass suit, plaintiff alleged damages to trees and that plaintiff was put to the expense of using road grading equipment to remove the raw sewage that blocked the driveway.

The district court directed a verdict for the city because of failure of proof that any tree damage was proximately caused by the flow of the sewage. It refused to hear testimony on the issue of the reasonable cost and expense of the removal of the sewage from the plaintiff's driveway. We reverse the judgment of the district court.

Amidst a series of questions to the plaintiff concerning the value of the trees allegedly damaged by the sewage, the record reveals the following colloquy upon direct examination of plaintiff: "Q. BY MR. MEARES: How many hours did you spend grading after the sewage spilling? THE COURT: What was the question? MR. MEARES: Do you know how many hours you spent grading after the sewage—MR. STEIN: I will object to that as not within the issues. THE COURT: I will sustain the objection; not within the issues. MR. MEARES: I think that is in the Petition. Just bear with me a moment. Paragraph 7 of the Petition speaks of road grading. MR. STEIN: This is the value of the trees that you are asking. THE COURT: That is correct. The objection is sustained."

It is clear from the record that the above ruling of the court was based on the following exchange between plaintiff's counsel and the court during his attempt to prove tree damage: "Q. BY MR. MEARES: And what

is the value of those trees that you burned in '66? MR. STEIN: I will object to that as lack of proper and sufficient foundation, and also the conditions of the trees when he burned them; no evidence of valuation, and the condition also. THE COURT: Is it your theory that your damage is limited to the amount of trees *which have been burned;* is (this) your theory that you are proceeding under now? MR. MEARES: That were destroyed, yes your Honor. THE COURT: That is what you are proceeding on? MR. MEARES: *First the burning*—THE COURT: *Is that the theory?* MR. MEARES: *Yes.* THE COURT: I think you better lay a little more foundation." (Emphasis supplied.)

The plaintiff had attempted to prove the value of his trees at the time of the *planting.* Having difficulty, he attempted to show the value of *the trees* (nothing else) in the year some were pulled out *and burned.*

Further analysis is superfluous. A fair construction of counsel's statement is an admission that the tree damage claimed was limited to those that had to be burned. We find no indication whatsover of any abandonment of the entirely separate allegation of expense of removal of the sewage from his premises. To bar competent proof of this allegation was error, especially since general pleadings are to be liberally construed. State ex rel. Spillman v. Farmers State Bank of Adams, 115 Neb. 46, 211 N. W. 178; Paup v. American Tel. & Tel. Co., 124 Neb. 550, 247 N. W. 411.

There was no offer of proof, but the questions propounded fairly indicate what plaintiff sought to establish by the answers under the corresponding allegation of the petition. See Williams v. Fuller, 68 Neb. 354, 94 N. W. 118. See, generally, Comments, Offers of Proof in Nebraska, 43 Neb. L. Rev. 105 (1963); 88 C. J. S., Trial, §§ 73, 74, pp. 179, 180, 181. The limitations of the proof and the sustaining of the objection were reversible error.

We further point out, on remand, since the trespass was admitted, that the plaintiff was entitled to an award

of nominal damages. See Kochenthal v. Omaha & C. B. St. Ry. Co., 122 Neb. 244, 240 N. W. 295.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in result.

CLINTON, J., participating on briefs.

SIDNEY F. KEENAN, APPELLEE AND CROSS-APPELLANT, V. RACHEL SWIFT KEENAN, APPELLANT AND CROSS-APPELLEE.
193 N. W. 2d 568

Filed January 21, 1972. No. 38005.

Equity: Trial: Evidence: Appeal and Error: Witnesses. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Wright, Simmons, Hancock & Hall, for appellant.

Van Steenberg, Winner & Brower, for appellee.

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

NEWTON, J.

This is a divorce action. Defendant appeals and plaintiff cross-appeals. Each claims the evidence justifies a decree of divorce on his or her part but is insufficient to sustain a decree for the other. Questions pertaining to the allowance of alimony are also presented. The district court found in favor of plaintiff but allowed temporary support money and permanent alimony. We

affirm the judgment of the district court subject to a minor modification.

Plaintiff was 71 years of age and a former rancher. He had known defendant, who was a resident of Arkansas, for many years. She was 63 years of age and a maiden lady. Plaintiff's first wife died in March 1969. He was in ill health, suffering from diabetes, arthritis, and an ulcer. He felt he needed someone to take care of him but was very reluctant to enter a nursing or rest home. In May he visited defendant in her home and was fully aware of its run-down condition and the circumstances under which she lived. He returned to Arkansas in December, became engaged, and the parties married on December 31, 1969.

He had given the defendant a $1,500 ring, loaned $1,400 to defendant's sister, gave defendant several presents, the sum of $500 the first month of the marriage, and $300 per month thereafter. He was importuned to repair the house but refused on the ground it was not worth the expense. He paid hospital expenses for defendant, but when she received insurance money covering these expenses, she retained it. He had retained his home in Nebraska and hoped to be able to spend part of each year there, but defendant was not amenable to this. The marriage was never consummated for which each holds the other responsible. Plaintiff concluded that defendant's primary interest was not in him, but in his wealth and what could be gotten from him. He returned to his Nebraska home on May 4, 1970, then returned to Arkansas with two sisters on May 9. Defendant was still unwilling to go to Nebraska with plaintiff. At that time he informed defendant he was leaving and sought to obtain his various items of property. His sisters were ordered out of the house and physically evicted. Plaintiff was forcibly restrained but got away in his automobile 3 days later on the pretext of going on some errands downtown. The evidence is conflicting and determination of the facts by the trial court must be given consideration.

"Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243.

Plaintiff made payments of $200 per month for 17 months for defendant's support and has paid $500 to cover defendant's expenses of litigation. During the short period of 4 months during which the marital relationship endured, defendant received at least $1,400, various gifts including a $1,500 ring, and an unspecified amount of insurance money. The decree awards her the further sum of $7,500 and taxes costs, including an allowance of $1,500 for attorneys' fees, to plaintiff. Defendant admitted when testifying that she was no worse off financially after the separation than before the marriage and considering all the circumstances, including the duration of the marital relationship, we find that she has been reasonably recompensed under the decree of the trial court.

The judgment of the district court is affirmed subject to the following. Plaintiff may withhold from the sum of $7,500, allowed as permanent alimony, the sum of $1,500 until such time as the personal property awarded to him, and now in defendant's hands, is delivered to him in Scottsbluff, Nebraska. Defendant is allowed the sum of $350 for the services of her attorneys in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. RAYMOND P. MEDLIN, JR., COUNTY ATTORNEY OF BOONE COUNTY, APPELLEE, V. GARY CHOAT ET AL., APPELLANTS, IMPLEADED WITH RICHARD MICHAELS ET AL., APPELLEES.
193 N. W. 2d 739

Filed January 21, 1972. No. 38012.

1. **Schools and School Districts: Statutes: Administrative Law.** A county committee for school district reorganization is not a governing body within the ambit of section 84-1401, R. S. Supp., 1969.
2. ———: ———: ———. Although the county superintendent of schools is a nonvoting member of the county school district reorganization committee, he must be included in the maximum number permitted by section 79-426.05, R. R. S. 1943.

Appeal from the district court for Boone County: C. THOMAS WHITE, Judge. Reversed and remanded with directions.

Wilson, Barlow & Watson, for appellant.

Raymond P. Medlin, Jr., and Perry, Perry & Witthoff, for appellee Medlin.

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

SPENCER, J.

This is an action in quo warranto brought by the county attorney of Boone County, Nebraska, to void and set aside the election of the members of the Boone County Committee for the Reorganization of School Districts, and to oust all of the elected members from their offices on said county committee. The trial court found the election invalid and ousted the elected members from office. The respondents, Gary Choat, Marvin Richards, Mandy Rasmussen, and Melvin Furby, were the only respondents to answer and defend their right to the office to which they were elected. We reverse.

The election at issue was conducted at a meeting of all members of the school boards and boards of education

of Boone County on December 22, 1969. The meeting was called by the county superintendent, by notice to every elective member of said school boards or boards of education, who were the only ones eligible to vote for members of the reorganization committee. No special notice of any nature was given to the general public, but the meeting was open to members of the general public who wished to attend, and some were present. The trial court, holding article 14 of Chapter 84, R. S. Supp., 1969, and specifically section 84-1405 thereof, to be applicable, voided the election.

Section 84-1401, R. S. Supp., 1969, is as follows: "Except as otherwise expressly provided by the Constitution or the statutes of Nebraska, *all convened meetings of governing bodies of* all agencies, now or hereafter created by Constitution, statute, or otherwise pursuant to law, *of* the executive department of the State of Nebraska, *of* the independent boards, commissions, bureaus, committees, councils, subunits, *or* any other administrative agencies, whether advisory or executive, of the State of Nebraska, *or* of any political subdivision of the State of Nebraska, exercising legislative, executive, or administrative powers or supported in whole or in part by public funds or entrusted with powers of recommending the expenditure of, or actually expending, public funds shall be deemed to be a public meeting which shall be held in a public building except as provided in section 84-1402, and which shall be open in attendance to the public. Sections 84-1401 to 84-1405 shall not be construed to apply to any city having substantially similar requirements in its home rule charter or to the Legislature or any committee thereof." (Italics supplied.)

Section 84-1402, R. S. Supp., 1969, is as follows: "The public policy of the State of Nebraska is that all public meetings should be preceded by some publicized notice specifying the time and place of all such meetings in order that the citizens of the state can intelligently exercise their democratic privilege of appearing at public

sessions of governmental bodies. All such public meetings shall be held in the public building in which the governmental body conducting the meeting operates or is headquartered unless the publicized notice shall designate another public building or other place. The minutes of the governmental body, kept by the secretary or acting secretary of such body, shall record the manner by which such publicized notice was given."

We find the trial court was in error in holding these sections applicable to the election of the county committee for school district reorganization. A reading of Chapter 84, article 14, R. S. Supp., 1969, demonstrates that the obvious intent of that article is to provide for public meetings of all governing bodies. We do not agree that the school district reorganization committee is the type of body contemplated by the statute. It is not a "governing" body of any of the units or agencies embraced within the ambit of section 84-1401, R. S. Supp., 1969.

A more serious question concerns the regularity of the election procedures, which, because of his ruling on the public notice question, was not considered by the trial court. Section 79-426.05, R. R. S. 1943, as it existed on the date of the election, provided so far as material herein as follows: "There is hereby established in each county in the state a committee for the reorganization of school districts, to be known as the county committee. Each county committee shall be composed of not less than six nor more than ten members, no two of which shall be from the same district except in a county having fewer than six districts. The county committee of the county in which the schoolhouse or the administrative office of a joint district lying in two or more counties is located shall be designated to have within its jurisdiction the territory of said joint district for the purpose or organizing school districts. One member of the county committee shall be the county superintendent of schools, who shall serve as a nonvoting member of the committee. All of the members of school boards and boards of

education within the county and joint districts under the jurisdiction of that county committee shall, at a meeting called for that purpose by the county superintendent of schools within one hundred twenty days from August 27, 1949, and each four years thereafter, (1) determine by a majority vote of those present the number of members of the county committee within the limits prescribed in this section, and (2) elect for a term of four years all the remaining members of the committee other than the county superintendent of schools. A simple majority of the elective members of the county committee of counties in which the majority of districts are Class I school districts shall be chosen from Class I school districts with the remainder being chosen from other classes of school districts and with each class of school district having representation on the county committee. At least one of the elective members shall not be a member of any school board or board of education."

The minutes of the meeting of December 22, 1969, indicate that a motion was adopted to have a board composed of 10 members. This would mean, as we interpret the statute, the election of 9 voting members, who with the county superintendent, a nonvoting member, would constitute a committee of 10. Of the nine, at least one of the elective members could not be a member of any school board or board of education. A motion was erroneously adopted after the voting to declare the top 10 elected. The superintendent of schools then certified the election of 10, who with himself made a board of 11 members. While this procedure was irregular, it did not void the election of those properly elected.

The law provides that a simple majority of elective members of the county committee of counties in which the majority of districts are Class I school districts, which includes Boone County, shall be chosen from Class I school districts. The remainder of the board then must be chosen from other classes of school districts, but each class of school districts should have representa-

tion on the committee. In the instant case, one member was chosen from a Class III district, two members from a Class II district, and the remaining seven members certified from Class I districts. A simple majority of nine would be five. It is evident, therefore, that of the seven Class I members certified as elected, only the top five could legally be so certified. This means that only 8 of the 10 members certified as elected were properly certified, and because only 9 were to be elected, there is 1 vacancy on the committee to be filled as provided by law. If the other eight members are all members of school boards or boards of education, then someone must be elected from other than a Class I district who is not a member of a school board or board of education. In any event, the member to be selected must be from other than a Class I district.

The county superintendent assumed the board figure of 6 to 10 referred to in the statute meant elective board members. As set out heretofore, this was an erroneous interpretation. While the electors voted for 10 rather than 9 in this instance, it was merely an irregularity and in no way could have affected the result of the election.

The statute provides several limitations on the membership of the board, but does not delineate any particular method of conducting the election, so any procedures approved by the majority of the electors within the limits of the act would be permissible. In this instance, only the top five candidates from Class I districts could be elected. The four others were required to come from other classes, with each class having at least one member on the board.

The vote for the seven members of Class I districts certified, was as follows:

NAME	VOTES RECEIVED
Mel Furby	33
Bob Zoucha	29
Gary Choat	29
Mandy Rasmussen	27

Marvin Richards	25
Don Skillstad	19
Dick Michaels	18

Dick Michaels, who received 18 votes, and Don Skillstad, who received 19 votes, are the two who should not have been certified as elected. It is to be noted that the votes of those who were properly certified range from 25 to 33, substantially in excess of the two who should not have been certified.

The judgment of the district court is reversed and the cause is remanded to the district court with directions to vacate the election of Don Skillstad and Dick Michaels; to confirm the election of the remaining eight members; and to direct them to fill the vacancy for the ninth spot as provided by law.

REVERSED AND REMANDED WITH DIRECTIONS

STATE OF NEBRASKA, APPELLEE, V. EDWIN J. OLTJENBRUNS, APPELLANT.
193 N. W. 2d 744

Filed January 21, 1972. No. 38013.

1. **Searches and Seizures: Probable Cause: Arrest: Criminal Law.** In a warrantless search the controlling factor is whether the officer had reasonable grounds before the search to make an arrest; and in that connection the essential test is whether the facts available at the moment of the search would warrant a man of reasonable caution to believe that the action taken is appropriate. The existence of probable cause must be determined by a practical, and not by any technical, standard.
2. **Criminal Law: Evidence: Statutes: Motor Vehicles.** Under section 28-522, R. R. S. 1943, possession of a mini-bike without a certificate of registration is prima facie evidence of unlawful possession and concealment.
3. **Criminal Law: Searches and Seizures: Motor Vehicles.** When there are in plain sight within a motor vehicle materials which are indicative of a criminal offense, a subsequent search is justified and legal.
4. **Criminal Law: Statutes: Evidence.** Under section 28-522, R. R.

S. 1943, guilty knowledge may be established by circumstantial rather than direct evidence.

5. **Criminal Law: Statutes: Words and Phrases.** Concealment, within the meaning of section 28-522, R. R. S. 1943, simply means any possession of goods in such a manner as to keep them from the rightful owner and an intent to deprive the owner of his property.
6. **Criminal Law: Trial: Attorneys at Law.** The function of the prosecutor's opening statement is to generally state the nature of the case; and it is within the discretion of the prosecutor how much or how little to comment specifically upon the evidence to be offered.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Richard E. Mueting, for appellant.

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

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

WHITE, C. J.

This is a prosecution under section 28-522, R. R. S. 1943, for concealing a motorcycle with knowledge that it had been stolen, with the intent to defraud the owner thereof. From a jury conviction and sentence in the district court, the defendant has appealed. We affirm the sentence and judgment of the district court.

A mini-bike was stolen in a burglary of the Cleveland Farm Supply, an implement business, in Orchard, Nebraska, sometime between the closing of the business on the evening of July 9, 1970, and the early morning of July 10, 1970. The owner of the business, Vern A. Cleveland, testified that he was the owner of a mini-bike on July 9, 1970. He described his mini-bike and gave its serial number. The invoice, bill of lading, manufacturer's statement of origin, and the mini-bike were then received in evidence. Officer Calhoun identified the mini-bike as the same one found in the pickup truck operated by the defendant.

The defendant was operating a pickup truck, owned by him and one Ernest C. Aldrich, in an easterly direction on Omaha Avenue in Norfolk, Madison County, Nebraska, at approximately 4:50 a.m. in the early morning of July 10, 1970. At the same time, police officer Calhoun of Norfolk was at the intersection of Omaha Avenue and Logan Street in Norfolk, rerouting traffic around a house that was being moved. He stopped the pickup being operated by the defendant and advised him of the condition of the highway and that he would have to take a route through the town to get around the house which was being moved. Following this advice, the defendant proceeded to take the indicated route. As the defendant was making a turn to go north, the officer observed a number of items in the rear of the pickup truck, including the mini-bike owned by the Cleveland Farm Supply. It had been drizzling and raining that morning. The officer testified that the mini-bike was partially covered up. Besides the mini-bike, the officer observed as the pickup drove away from the point of original contact, a number of shotgun butts that were still bearing "manufacturer's tags." The evidence of ownership of the mini-bike was conclusive. Cleveland produced as evidence of ownership a bill of lading and an invoice and a manufacturer's statement of origin, the latter two bearing the same serial number which appeared on the mini-bike. The mini-bike was unused and was in Cleveland's shop for the purpose of sale. There is no evidence in the record of proof of ownership on the part of the defendant, no registration certificate, no invoice, no bill of sale, nor certificate of title.

After the officer had observed the partially covered mini-bike and the new shotgun butts with the manufacturer's tags on them, he became suspicious and followed the defendant on the route to which he had directed him. After the officer's observation of the above items in the rear of the pickup as defendant proceeded, the officer stopped the defendant and asked him for

identification, which the defendant supplied. The officer, after observing the contents of the pickup truck which we have described heretofore, informed the defendant that he was detained for investigation and took him to the police station. Other facts in connection with the arrest and the subsequent search of the pickup truck at the police station will be recited in the course of the opinion.

The defendant contends that the search was illegal and therefore the production in evidence of the mini-bike and the newly manufactured shotgun butts was erroneous and in violation of his Fourth Amendment rights. This court has had occasion to pass upon the applicable principles governing the determination of the validity of a warrantless search either with or without an arrest in many cases. We summarize by stating that we have held that in a warrantless search the controlling factor is whether the officer had reasonable grounds before the search to make an arrest; and in that connection the essential test is whether the facts available at the moment of the search would warrant a man of reasonable caution to believe that the action taken is appropriate. The existence of probable cause must be determined by a practical, and not by any technical, standard. State v. Harding, 184 Neb. 159, 165 N. W. 2d 723; State v. Goings, 184 Neb. 81, 165 N. W. 2d 366; State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129.

In this case we have the situation of the defendant, who was a complete stranger to the officer, operating a pickup truck in the early morning hours and bearing a registration and license from a location two counties distant from the scene of his observation, and at a time at which no business is normally conducted. As the vehicle moved away from the officer he could observe in the rear box of the pickup a number of new shotgun butts with the manufacturer's tags still on them, indicating that they were new, and a new mini-bike, which

were partially covered with some blankets or rugs. After making this observation the officer overtook the defendant for the purpose of further investigating what he had already seen in plain sight in the rear box of the pickup. From the record it is inferred that on the inspection of these objects which he had already seen, the officer determined, and it was a fact, that there was no certificate of registration for the mini-bike or any other proof of ownership to the objects observed. Section 28-522, R. R. S. 1943, provides that possession of a motorcycle without a certificate of registration to the possessor is prima facie evidence of guilt under the particular statute the defendant was prosecuted on. The officer having observed absence of any evidence of registration on the mini-bike, and lack of any indicia of ownership to it, was clearly entitled to act upon these facts which are prima facie evidence of guilt under the statute. No explanation of defendant's possession appears in the record. We point out further, as far as probable cause is concerned, that the possession by the defendant of a number of apparently new shotgun butts with manufacturer's tags on them is a highly suspicious circumstance. Directly pertinent is what we recently said in State v. Rys, 186 Neb. 341, 183 N. W. 2d 253, as follows: "There are numerous cases holding that when materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal."

Applying a practical, and not a technical standard, and realizing that a police officer is free to draw upon the general knowledge that he has developed in the course of his training and experience, and considering the totality of the circumstances, we have no doubt that the materials observed in the pickup, together with the other suspicious circumstances of the hour of the day and the foreign registration of the truck, were sufficient probable cause to justify the retention and the search. The

analogy to our holding in State v. Carpenter, *supra,* is quite obvious. There, as here, we were dealing with a motor vehicle from another county with a foreign registration that was observed at an early morning hour. And again, in the process of identifying the vehicle and the occupants, and without having already made any arrest, the police officers observed in plain sight certain objects (burglary tools) which gave the appearance of being tools of such a character as to be susceptible to use for burglary purposes; and, for the possession of which tools, the vehicle occupants offered no satisfactory explanation to the officers. We held in that case, on its facts, the officers were justified in making a subsequent search of the vehicle and, based upon the information acquired thereby, arresting the occupants. As we see it, this case is stronger than that of State v. Carpenter, *supra,* for the reason that the observation of the materials in this case discloses affirmatively that they were without registration or indicia of ownership and were, therefore, presumptively stolen. We therefore hold that the search and the arrest were with probable cause and there is no merit to this contention by the defendant.

The defendant contends that there was insufficient evidence of exclusive possession and his knowledge of the truck contents to sustain the conviction. Under the facts in this case the following from State v. Rys, *supra,* is applicable, wherein we said: "Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or *in an automobile possessed and operated by him,* the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence." (Emphasis supplied.) The evidence of the defendant's operation and the possession of the automobile is undisputed. There is no merit to this contention.

Defendant contends that there is no proof of his knowledge that the mini-bike was stolen. The answer is

that the very section of the statute under which the defendant is being prosecuted, section 28-522, R. R. S. 1943, makes the fact that the defendant had no registration for the mini-bike a presumption not only that he knew it was stolen but also that he is the one who stole it. Independent of the statutory presumption, there is no rule which requires that guilty knowledge must be established by direct evidence; rather, the element of guilty knowledge and intent may be established by purely circumstantial evidence. The facts herein recited coupled with the unexplained possession of recently stolen goods is sufficient circumstantial evidence upon which the jury may base a finding of guilty knowledge or intent. State v. Henry, 174 Neb. 432, 118 N. W. 2d 335; State v. Solano, 181 Neb. 716, 150 N. W. 2d 585; State v. Perez, 182 Neb. 680, 157 N. W. 2d 162.

The defendant next contends there was no evidence that he actually concealed the mini-bike, that being one of the elements of the offense under the statute, section 28-522, R. R. S. 1943. The defendant would have us interpret the word "conceal" out of context with the meaning and the purpose of the statute. It does not mean that there must be proof that the defendant literally and completely concealed both himself and the stolen articles from all public view. It simply means that he takes possession of the goods in such a manner as to conceal them from the rightful owner and deprive the owner of his property. Bailey v. State, 115 Neb. 77, 211 N. W. 200.

It is contended there is not appropriate evidence of ownership. He contends this because, apparently, the name of the complaining witness is not recited as the assignee in the manufacturer's certificate. Section 60-105, R. S. Supp., 1969, does not require this. All that section requires is that the owner have actual physical possession and that he have a title or a manufacturer's or importer's certificate. Both conditions exist here. Cleveland's oral testimony of the operation of the busi-

ness, the possession of the exact mini-bike, and the identification of the serial number of the mini-bike are sufficient evidence of ownership to justify the jury's findings in that respect. We observe also that along with the manufacturer's certificate there is in evidence the original invoice and the bill of lading to Cleveland which clearly establish ownership in the complaining witness.

The defendant contends that he is entitled to reversal because of error in the opening statement of the prosecution in that the prosecuting attorney failed and neglected to mention in it some of the essential elements of the offense charged. There is a conflict in evidence in this respect, but we do not resolve this conflict. The statute requires that counsel for the state *must* state the case of the prosecution and may briefly state the evidence by which he expects to sustain it. It contains no requirement that the prosecution must specifically enumerate all of the necessary elements of the offense. This contention is totally without merit.

The contentions of the defendant cannot be sustained. No prejudicial error appears in the record of this case. The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERMAN HOFFMEYER, APPELLANT.
193 N. W. 2d 760

Filed January 21, 1972. No. 38059.

1. **Trial: Words and Phrases: Witnesses.** A question is leading when it is so framed as to suggest to the witness the answer which is desired of him. Conversely, a question is not leading where it does not in any way indicate or suggest the answer desired.
2. **Trial: Courts: Witnesses: Criminal Law.** The trial court in a

criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question. The discretion is a legal one and subject to proper limitations.

3. **Criminal Law: Venue: Courts: Appeal and Error.** A request for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there is an abuse of such discretion.
4. **Criminal Law: Evidence: Trial.** As a general rule, evidence of other crimes is not admissible to prove the guilt of the defendant of the particular crime charged. There are exceptions, however, to this rule. Such evidence is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

George D. McArthur, for appellant.

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

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

SPENCER, J.

This is an appeal by Herman Hoffmeyer from a conviction for the crime of fondling a minor. Defendant admitted touching the sexual organs of an 8-year-old girl, but contends it was purely accidental and wholly unintentional. We affirm.

Defendant sets out 12 assignments of error, but discusses only 5 of them in his brief. In accordance with Revised Rules of the Supreme Court, 1967, Rule 8a2(3), defendant has limited himself to those discussed. In passing, we note that among the assignments not discussed is an allegation that the verdict is not sustained by sufficient evidence. We have carefully examined the record, and the evidence was amply sufficient to present a jury question.

The first assignment discussed by defendant is that the trial judge was not justified in permitting the asking

of leading questions. During the examination of a 14-year-old female witness, the prosecutor asked the following question: "Q. Let's stay with Paula and Debbie. Was there any conversation as to their panties?" Defendant's objection to the question as leading was overruled. We do not consider the question to be improper. In general, a question is leading when it is so framed as to suggest to the witness the answer which is desired of him. Conversely, a question is not leading where it does not in any way indicate or suggest the answer desired.

Our law is well settled that a trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question. The discretion is a legal one and subject to proper limitations. See State v. Burton, 174 Neb. 457, 118 N. W. 2d 502. As we said in that case, it is usual and proper for the court to permit leading questions in conducting the examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of the questions asked.

The second assignment of error discussed by defendant was the overruling of defendant's motion for continuance and change of venue because of an inflammatory letter or article which appeared in the "Vox Populi" section of The Hastings Daily Tribune the week before the trial. The letter relates to the molestation of the daughter of the writer and refers to the fact that within a week the man was out on bond and there was nothing that could be done about it. The editor of The Hastings Daily Tribune was called as a witness in defendant's trial. He testified that the letter had no reference whatever to the defendant. He further testified that of his own personal knowledge the person referred to in the "Vox Populi" letter was not the defendant.

The request for a change of venue in a criminal action

is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there is an abuse of such discretion. See State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775. In passing, we also observe that the defendant passed the jury for cause after he had a full opportunity to learn if any of them had read the article in question.

Defendant's third assignment of error is directed to the overruling of his motion for a mistrial when the 8-year-old companion of the prosecutrix, who was also involved on the occasion in question, testified as follows: "Q. What happened then, Paula? A. Well, he asked me to get on his lap, and I did, and then he asked me about the underwear. And after I told him, then he asked me if he could see my—between my legs. Q. What happened then, Paula? A. Well, he felt it. Q. Did he put his hands in your panties, honey? A. Yes. Q. Did he touch or rub it, honey? A. Yes." It is a general rule that evidence of other crimes is not admissible to prove the guilt of the defendant of the particular crime charged. There are exceptions, however, to this rule. Such evidence is relevant and admissible if it tends to prove a particular criminal intent, which is necessary to constitute the crime charged. See State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605. This was a similar act, which occurred at approximately the same time, at the same place, and, in view of the defendant's defense of accidental or inadvertent touching, is relevant to show intent or motive. The jury was properly instructed that the evidence in question was received solely for the limited purpose of showing the intent or motive of the accused in the particular act charged.

Defendant's fourth assignment of error is directed to the sustaining of an objection to the following question he asked prosecutrix' mother: "Q. Have you in times past had occasion to warn Lisa not to take candy from strangers or get in the car with strangers, particularly strange men?" As an original question, defendant's con-

tention has merit. Here, it is nonprejudicial, or at best harmless error. Prosecutrix' mental state was not in issue, and the prosecutrix herself testified during cross-examination to exactly the facts which the defendant sought to elicit from her mother, so that the evidence was merely cumulative.

The last assignment of error discussed by defendant refers to the sustaining of an objection to the following question: "Q. Now, Mr. Hoffmeyer, I would like to have you tell this jury what your attitude and feeling is towards small children and towards small girls." The objection was sustained as not material nor relevant. Defendant was charged with indecently fondling a minor. Evidence of mens rea at the time of the act was admissible and defendant was permitted to testify about his mental state at that time. His attitude generally towards young children at other times was immaterial.

The judgment is affirmed.

AFFIRMED.

VERNON MIDDLEBROOK, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
193 N. W. 2d 572

Filed January 21, 1972. No. 38068.

Habeas Corpus: Probable Cause: Words and Phrases. Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Vernon Middlebrook, pro se.

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

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

SMITH, J.

Vernon Middlebrook on January 20, 1971, petitioned for a writ of habeas corpus. He alleged that the warden had not allowed him certain credits on his sentence. The district court denied the writ. Middlebrook appeals.

Middlebrook asserts that we should determine his date of discharge to be January 8, 1973. The State points out that the warden has credited him with approximately 2⅔ months for county jail time. The dispute is probably at an end, but we place our decision on another ground.

Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown. In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673 (1949). Middlebrook had no judicial remedy, and rightly so.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LUGEAN R. MORGAN, JR., APPELLANT.
193 N. W. 2d 742

Filed January 21, 1972. No. 38095.

Criminal Law: Evidence. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Walter J. Matejka and J. Patrick Green, for appellant.

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

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

McCOWN, J.

Lugean R. Morgan, Jr., was tried and found guilty of breaking and entering a dwelling. He received a penitentiary sentence of 4 to 8 years and this appeal followed.

At approximately 2 a.m., on August 21, 1970, Omaha police officers responded to a burglary-in-progress call and proceeded to 2614 North 33rd Street in Omaha, Nebraska. As one of the police cruisers arrived in an alley behind the house, the officers saw two people near the back door of the house. The couple ran from the back door with police officers in pursuit. Officer O'Connor lost sight of the fleeing man momentarily, but searched at the point where he disappeared, and found the defendant curled up in some weeds and grass. The defendant was found within 50 feet of the back door. Another police officer apprehended a woman in the immediate area immediately thereafter. The back door of the residence was open and the door frame showed signs of forced entry. A stereo record player, a window fan, and records were found in the backyard of the residence. A TV set was found in the open trunk of a Chevrolet car parked in the alley behind the house. All of these items were identified as belonging to Otis Keys, who resided in the house. The car in the alley belonged to an acquaintance of the defendant. The defendant admitted having borrowed the car on some previous occasions, but denied specifically having borrowed it that night. The defendant also admitted knowing the woman who was arrested at the same time he was.

The defendant's testimony was that he was walking down the street when he saw the police cruisers and heard a shot. Upon hearing the shot, he ran from the street and sought cover. The evidence establishes that a shot or shots were fired, but the record is entirely inconclusive as to who fired the shot and whether it occurred before, during, or after the flight of the couple from the back door of the house.

The defendant asserts that the evidence was insuffi-

cient to sustain the finding of guilty beyond a reasonable doubt. We cannot agree. While in some respects the evidence was circumstantial, it established a case almost as damning as if there had been an actual eyewitness to the specific act of burglary.

The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Escamilla, *ante* p. 457, 191 N. W. 2d 548; State v. Ortiz, *ante* p. 515, 192 N. W. 2d 151.

While the evidence of the State and the testimony of the defendant were in conflict, the jury resolved those conflicts against the defendant. The question of the guilt or innocence of the defendant was clearly for the jury to determine under proper instructions safeguarding the rights of the defendant. The evidence here is more than sufficient to sustain the jury's finding of guilt.

The defendant also contends that the trial court committed prejudicial error in giving an instruction concerning aiding and abetting. The evidence here was aimed at establishing the defendant's participation as a principal. Even if it be assumed that the instruction as to aiding and abetting was erroneous, it could not have been prejudicial to the defendant. See Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DECABOOTER WILLIAMS, APPELLANT.
193 N. W. 2d 570

Filed January 21, 1972. No. 38114.

Criminal Law: Sentences: Appeal and Error. A sentence within

the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas P. Lott, for appellant.

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

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

CLINTON, J.

The defendant was charged with robbery under the provisions of section 28-414, R. R. S. 1943, found guilty by a jury, and sentenced to serve a term of not less than 3 years nor more than 10 years in the Nebraska Penal and Correctional Complex. He appeals. The sole assignment of error is that the sentence is excessive. The claim is founded upon the premise that the crime of which the defendant was found guilty was a first offense and that he is only 19 years of age.

The record discloses the defendant and a companion accomplished the robbery of a grocery store and its proprietor by an assault upon the person of the proprietor with a pair of scissors but without inflicting serious personal injury. Defendant was the active perpetrator of the assault which consisted of an attack from the rear, grabbing around the neck with the arm, choking, thrusting a pair of scissors against the back, and later striking several times. After being released the victim secured a revolver from a place of hiding and cocked it, and went toward the defendant, who then, according to the victim, rushed at him with the scissors as if to stab him. The victim then shot the defendant, inflicting a minor wound.

We have often said: A sentence within the limits prescribed by statute will not be disturbed in the absence

of an abuse of discretion. State v. Jurgens, *ante* p. 557, 192 N. W. 2d 741. We cannot say the record establishes an abuse of discretion.

AFFIRMED.

MID-AMERICA PIPELINE COMPANY ET AL., APPELLANTS, V. LELA BELLE WARREN, ADMINISTRATRIX OF THE ESTATE OF CHARLES WARREN JR., DECEASED, APPELLEE.

LELA BELLE WARREN, ADMINISTRATRIX OF THE ESTATE OF CHARLES WARREN, JR., DECEASED, APPELLEE, V. PANHANDLE CONSTRUCTION COMPANY ET AL., APPELLANTS.

193 N. W. 2d 749

Filed January 21, 1972. Nos. 38124, 38192.

1. **Master and Servant: Workmen's Compensation.** The general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.
2. ———: ———. It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do he is performing his duty to the employer who gave the order. Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.
3. ———: ———. Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master.
4. **Appeal and Error: Evidence: Judgments.** If there is reasonable competent evidence to support the findings of fact in the

trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

Appeals from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Pilcher, Howard & Dustin and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

John J. Higgins of Eisenstatt, Higgins, Kinnamon & Green, for appellee.

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

NEWTON, J.

Two actions consolidated for trial purposes are involved here. In the first, the administratrix of the estate of Charles Warren, Jr., deceased, seeks to recover workmen's compensation from the Panhandle Construction Company, hereinafter referred to as Panhandle. In the second, Mid-America Pipeline Company, hereinafter referred to as MAPCO contends it was a special employer of Warren and, as such, liable under the workmen's compensation laws. Both companies carried insurance with the same insurer and the cases presented may be determinative of the right of the administratrix to bring an action for negligence against MAPCO.

The compensation court, and the district court on appeal, found Panhandle to be liable as a general employer and further found that MAPCO was not a special employer of Warren and was not liable for workmen's compensation. We affirm both judgments of the district court.

Panhandle had been engaged as an independent contractor in the construction of portions of an anhydrous pipeline for MAPCO but had no part in the construction of MAPCO's propane pipeline. In some instances the parties had written contracts for work to be done on a fixed-price basis. In other instances, Panhandle worked

under oral contracts on a cost plus 25 cents per foot basis. At the time of Warren's accident, Panhandle was delayed in its written contract work because MAPCO had right-of-way problems and in the interim Panhandle was performing miscellaneous jobs on a cost plus or cost basis.

On December 5, 1968, a break occurred in MAPCO's propane line north of Yutan, Nebraska. MAPCO did not have the men and machinery available to repair the break. It requested help from Panhandle. Required were a back hoe, a back hoe operator and oiler, a winch truck with driver, a welding outfit and welder, and a truck with a lowboy trailer to haul the back hoe. MAPCO supplied its own supervisor to oversee the work. Warren was a truck driver and the undisputed evidence shows that in connection with the pipeline break repair matter, his only job was to load the back hoe, haul it to the scene of the break, and unload it, then later to return it. Warren was, and had been for many years, an employee of Panhandle. He received directions from his superior to load the back hoe and take it to the scene of the break which would be identified by a MAPCO representative who also suggested the use of back roads in getting there. Warren drove to the scene of the break, then got into an automobile, for an unknown purpose, and rode into the field with the MAPCO supervisor. An explosion occurred and both were killed.

Apparently it was not unusual for Panhandle to assist MAPCO in small jobs of this nature and in such cases it billed MAPCO for extra work solely on a cost basis. This was done for the assistance rendered in connection with the propane line break. The invoice forwarded to and paid by MAPCO covered machine use, wages, social security, unemployment insurance, compensation insurance, etc. It may reasonably be inferred from this record that Panhandle, which received a considerable volume of contract work from MAPCO, was anxious to oblige MAPCO by assisting it in minor ways such as in

the case of the propane break and consequently performed this work on a cost only basis.

Under these circumstances was Warren at the time of his death an employee of Panhandle, MAPCO, or both? Panhandle was his general employer. A Panhandle representative informed Warren he had a trip he wanted Warren to make, directed Warren to get the truck, load the back hoe, and to contact the MAPCO representative, who thereafter explained to Warren the site or location of the break. It is evident that in taking the back hoe to the vicinity of the pipeline break, Warren was following orders received from his superior in Panhandle. Once at the scene his only remaining duty was to unload the back hoe and its operator would take it in charge. His duties were not such as to place him in the slightest degree under the orders of the MAPCO supervisor. Why he got into the supervisor's automobile remains in the realm of speculation.

The following excerpts from Shamburg v. Shamburg, 153 Neb. 495, 45 N. W. 2d 446, appear pertinent here. " * * * the general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. * * *

"* * * 'It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing

what the new master directs him to do he is performing his duty to the employer who gave the order. * * * Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.'

"* * * 'Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master.' "

The record indicates that at all times Warren was following the orders of his general employer and was not subjected, either by his employer or himself, to the control of MAPCO.

Pertinent also is the following rule: "On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." Gifford v. Ag Lime, Sand & Gravel Co., *ante* p. 57, 187 N. W. 2d 285. See, also, Bole v. S.M.S. Trucking Co., *ante* p. 341, 190 N. W. 2d 780.

The contention of Panhandle that it is not properly taxed with attorney's fees is based on its claim that it was not, at the time of the accident, the employer of Warren. In view of the foregoing, this contention is without merit.

The judgments of the district court are affirmed. Appellee is awarded an attorney's fee in the sum of $500 for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO W. CLIFTON, APPELLANT.
193 N. W. 2d 558

Filed January 21, 1972. No. 38155.

1. **Criminal Law: Guilty Plea: Constitutional Law.** When a defendant voluntarily and understandingly enters a plea of guilty

with full knowledge and understanding of a prior violation of his constitutional rights, the plea of guilty waives such rights.

2. **Criminal Law: Probation and Parole: Appeal and Error.** Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Leonard Dunker and Dean & Badami, for appellant.

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

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

CLINTON, J.

Defendant was charged in the trial court with operating on July 21, 1970, a motor vehicle while under the influence of alcoholic liquor and that this was his third offense.

On October 20, 1970, he appeared with his counsel, was arraigned, and entered a plea of not guilty. On November 24, 1970, through his attorney he moved to suppress certain evidence as follows: (a) Admissions of the defendant of drinking; (b) all statements made by the defendant after his arrest as well as and including all tests of a physical nature performed by the defendant at the requests of the officers; and (c) urine specimen. The sole grounds of the motion to suppress was the allegation that "The officers failed to advise the defendant of his right to counsel pursuant to . . . (citing authorities)." No other factual allegations of any kind were set forth in the motion. A hearing was held on the motion on November 27, 1970, at which time no evidence was presented but the following stipulation was entered into: "If the defendant, Leo W. Clifton, would testify he would testify that at the time of his arrest he was not given the Miranda warnings pursuant to the case of Miranda v. Arizona; . . . That if the police

officers, the arresting officers, were to testify they would testify they did not give the defendant, Leo W. Clifton, the Miranda warnings, nor did Mr. Clifton request an attorney." It will be observed that the stipulation is somewhat broader than the motion in that it encompasses not only the failure to advise of right to counsel but the much broader scope of all warnings required by Miranda. However, it is also to be noted it does not appear from the stipulation that at the time of the admissions, whatever they may have been, the defendant was in custody. Nor does the stipulation negative the possibility that the statements may have been volunteered and therefore not within the scope of Miranda. The trial court denied the motion to suppress.

Thereafter on February 1, 1971, the defendant appeared with his attorney and indicated to the court that he wished to waive a jury trial and be tried by the court. At that time the court explained to the defendant the effect of such a waiver. The defendant reiterated his desire to waive a jury trial.

On March 17, 1971, the defendant again appeared with his attorney and at that time asked leave to withdraw his plea of not guilty. The court by interrogation of the defendant determined he had not been incarcerated but had been out on bond; he had had every opportunity to talk to his lawyer that he wanted; he was fully advised concerning the withdrawal of the plea; and this is what he wanted to do. The court granted leave to withdraw the not guilty plea.

The defendant was rearraigned in the presence of his attorney. The information was read in full and the defendant, who reads English, followed along on a copy of the information as it was read. He was meticulously interrogated by the court as to whether he understood the charge. He said he did. He was asked how he intended to plead and he responded, "I am guilty." He was asked about the allegations of the two prior convictions of driving while intoxicated and he acknowledged

he had been twice convicted of the charge. The court carefully and fully explained to him all the rights which he would waive by a plea of guilty and what the effect of such a plea would be, including the fact the penalty for the offense was a term in the correctional complex for a term of 1 to 3 years. The court asked him whether any law enforcement officer had used any force, violence, or threats to make him plead guilty against his will. He acknowledged they had not. He likewise acknowledged no promises had been made to him to induce him to plead guilty. The court ascertained from the defendant that his counsel was retained privately, that counsel had advised him of his rights, and that counsel had performed satisfactorily as far as the defendant was concerned.

The court inquired of counsel as to whether he felt the guilty plea was voluntary and intelligently made and with awareness as to the consequences. The attorney answered affirmatively. The court put to counsel this question: "From your investigation of the facts, and your knowledge of the law, do you think the plea which he is making is consistent with the facts and the law as you know it?" The attorney answered: "Yes, sir, I do."

The defendant was asked how he pled to the information and he responded, "Guilty."

Presentence investigation was made and on April 28, 1971, defendant was again present with his counsel and was afforded the right of allocution which he declined to use. His attorney made a plea for probation. The court imposed sentence upon the defendant of 1 year's confinement in the penal complex, ordered him not to drive from the date of sentence until 1 year after he was discharged from his sentence, and revoked his motor vehicle operator's license.

The defendant appeals and assigns as error: (1) The overruling of the motion to suppress; and (2) the refusal of the court to suspend sentence and grant probation.

We affirm the judgment of conviction and the sentence.

A plea of guilty voluntarily and intelligently made waives any violation of known constitutional rights which may have preceded the plea. Here the plea was clearly voluntarily and intelligently made and the defendant and his attorney clearly knew of the failure of the police officers to give the Miranda warnings. For reasons best known to the defendant and his counsel he elected not to further assert his rights under Miranda in a trial below and if necessary in this court. There is nothing in the record to establish that the failure of the court to suppress (assuming but not holding that it should have been suppressed) the evidence induced the guilty plea. The record shows that admissions defendant may have made and results of the urine test were not used against him. His plea of guilty is under the circumstances here conclusive. State v. Cooper, 182 Neb. 765, 157 N. W. 2d 412; McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763.

Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed. State v. Jurgens, *ante* p. 557, 192 N. W. 2d 741. Section 29-2260, R. S. Supp., 1971, was not yet effective at the time of sentencing, but even applying its standards we cannot say there was an abuse of discretion. The presentence report shows a recent history of drunkenness, several moving traffic offenses in addition to the driving while intoxicated offenses, and one offense of malicious destruction of property. The trial court may well have concluded that repetition of the offense was probable or that incarceration was necessary or would be helpful in connection with the drinking problem.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN L. CAMPBELL, APPELLANT.

193 N. W. 2d 571

Filed January 21, 1972. No. 38210.

Criminal Law: Death: Appeal and Error. Death of defendant pending review on appeal of criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL and WALTER H. SMITH, Judges. Reversed and remanded with directions to dismiss.

Peter B. Beekman, for appellant.

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

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

CLINTON, J.

Defendant was charged with the crime of operating a motor vehicle while his operator's license was under suspension. He was tried and convicted in the county court; he appealed to the district court where he was tried and convicted; and he appealed to this court. Prior to hearing of oral arguments here the defendant died. The death of the defendant makes the case moot and requires dismissal of the appeal. Stanisics v. State, 90 Neb. 278, 133 N. W. 412. However, the question arises as to whether or not the judgment of conviction which did not become final during the decedent's lifetime still stands. In the cited case the defendant died while the appeal was pending. The administrator of the estate sought to revive in the administrator's name to contest the validity of the conviction and to relieve the estate from liability for costs. The court seemed to assume that the estate would be liable for costs but held this was insufficient reason for a revivor. Practically all of

the federal courts and most of the state courts which have had occasion to consider the question hold that the death of the decedent pending appeal abates not merely the appeal, but also the proceedings had below in the prosecution from its inception and therefore the correct procedure is to vacate the conviction, and reverse and remand with directions to dismiss the indictment or information. Durham v. United States, 401 U. S. 481, 91 S. Ct. 858, 28 L. Ed. 2d 200; Annotation, 83 A. L. R. 2d 864; Annotation, 9 A. L. R. 3d 462, 496. We think, since at the time of the decedent's death there was no final judgment of conviction, the procedure held applicable in the last-cited authorities is the more consistent with principle. Further, there appears to be no sufficient reason to make a decedent's estate as distinguished from the decedent himself liable for costs of prosecution where there is no final judgment of conviction. The judgment of conviction is vacated and the cause is remanded to the trial court with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

NILE VALLEY COOPERATIVE GRAIN AND MILLING COMPANY, APPELLEE, V. FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, APPELLANT.
193 N. W. 2d 752

Filed January 28, 1972. No. 37940.

1. **Insurance: Contracts.** Objectively reasonable expectations of a beneficiary-insured regarding terms of his insurance contract ordinarily will be honored.
2. **Insurance: Contracts: Words and Phrases.** The applicable part of the "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff is construed as follows: Liability is limited to that proportion of any loss which the last reported value bears to the actual value at the time of the re-

port, provided liability does not exceed the amount stated in the schedule endorsement of the policy.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

William B. Craig, for appellant.

Robert M. Harris, for appellee.

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

PER CURIAM.

A fire destroyed plaintiff's "Taylor" building and contents which included fixtures temporarily removed from plaintiff's "Butler" building 40 feet away. Heat from the fire warped sides and the top of the Butler building. Plaintiff sued on two policies of fire insurance: (1) A standard policy which allegedly covered not only the Butler building but the fixtures also; and (2) a provisional policy relating to loss of personal property in the Taylor building.

After a trial to the court judgment went for plaintiff on each claim. Defendant appeals. It assigns for error (1) the allowance of damages for the fixtures under the standard policy; and (2) the amount of the award under the provisional policy which the court, according to defendant, erroneously interpreted.

In late June 1968 plaintiff began its annual cleaning of the Butler building preparatory to receipt of grain for storage. The work which lasted several weeks included (1) removal of partitions in the form of steel I-beams, and sliding panels that together formed walls for storage; (2) sweeping; (3) application of an exterminative spray; and (4) sealing of the building. Plaintiff stored the partitions and panels in the Taylor building to prevent exposure to moisture with consequent rust during the interval. The fire happened July 12.

The standard policy covered the Butler building "while located or contained as described in this policy," an

endorsement defining "building" to include bins. The endorsement permitted alterations, improvements, repairs, and "such use of the premises as is usual and incidental in the business conducted therein and all articles and materials usual and incidental to said business . . .."

Objectively reasonable expectations of a beneficiary-insured regarding terms of his insurance contract ordinarily will be honored. See, Funke Estate v. Law Union & Crown Ins. Co., 97 Neb. 412, 150 N. W. 262 (1914); Keeton, "Insurance Law Rights at Variance with Policy Provisions," 83 Harv. L. Rev. 961 at 967 (1970); cf. § 44-101, R. R. S. 1943. Expanding operation of the rule, we apply it to questions of coverage. The circumstances of this case relieve us of the burden of spelling out limitations. Defendant does not argue that temporary removal of the fixtures increased its risk. See generally Keeton,"Insurance Law Rights at Variance with Policy Provisions: Part Two," 83 Harv. L. Rev. 1281 (1970). The removal and the cleaning were normal business practices. The provisions of defendant's endorsement were liberal. Defendant incurred liability for loss of the fixtures.

The provisional policy contained a "full reporting" or "honesty" clause. Weeding out prolix and irrelevant provisions governing underreporting, overreporting, delinquent reporting, coinsurance and their consequences, we quote the policy: "Insurance is provided . . . for . . . coverages indicated below . . .. Amount $18,000 . . .. On Provisional Stock . . . (in Taylor building) Subject to . . . Form . . . 455 (11-63) . . . this Company . . . to an amount not exceeding the amount(s) above specified, has insured . . . (plaintiff) to the extent of the actual cash value of the property at the time of loss . . . against all DIRECT LOSS BY FIRE . . . (Form 455) (11-63) STANDARD PROVISIONAL STOCK FORM for . . . Warehouse Risks . . .. 1. On stock consisting of grain . . . seeds . . . and all other merchandise and supplies . . .. 2. . . . the amount of insurance . . . at any

time . . . shall be determined by . . . Paragraph 5. . . . 3. The insured . . . agrees to file with the insurer . . . a true statement . . . of the value (as defined in Paragraph 4) of the stock covered . . . as of the close of business on each Saturday . . .; and, if the insured so elect, such an amount or addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value . . .. 4. . . . wherever the term "Stock" is used . . . it shall . . . include all property covered . . . as described in Paragraph 1 . . .. 'Value' . . . shall apply in the manner set forth in . . . (4a) . . . at the time when such ascertainment of value is required by the conditions of this policy: (4a) The value of stock . . . shall be the cost of replacing such stock . . .. 5. The amount of Insurance . . . at any time . . . shall be determined by following the formula set out in . . . 5A . . . and 5E. Section 5A. As of the time at which insurance in force is to be determined, ascertain the value as defined in Paragraph 4 . . .. Section 5E. 1. If the amount determined by . . . 5A . . . is less than the 'Limit . . .' named in the 'Schedule Endorsement' . . ., the amount thus determined shall be the 'Amount of Insurance under this form.' . . . SUPPLEMENTAL COVERAGES . . . Debris Removal: . . . this insurance covers expenses incurred in the removal of all debris . . .. However, the total liability under this policy shall not exceed the amount of insurance in force under this policy at the time of loss . . .."

Plaintiff's last report, dated July 6, 1968, and timely, valued the stock at $6,500, or 100 per cent of actual value. It listed, however, only flour and feed at $6,000 and seed at $500. Plaintiff omitted to value other stock in a space on the form, overvaluing flour, feed, and seed. Loss of the listed items in the fire amounted to $4,416.50, and of other merchandise and supplies $2,866.11, or a total loss of $7,282.61. The cost of removing debris was $200. Plaintiff claimed a loss of $6,700 including the $200 item which the court allowed.

Defendant argues that plaintiff, in not itemizing its stock, underreported so as to limit its recovery to $4,416.50, the loss of reported items.

Insurers in many instances require such reports only to ascertain value. "The premium cost must be measured in relation to the . . . value which actually falls within the protection of the policy at various times during its term. Hence, it is essential that the actual amount of premium be determined at the end of the policy year instead of at the beginning, and some way must be devised to determine retroactively how much value had been insured . . .. Practicality dictates that the value of stock be determined at convenient intervals but with sufficient frequency . . . to provide a fairly accurate reflection of the over-all amount of exposure to which the coverage had been subjected." Cotton, "Metered Fire Insurance—A Survey of the Reporting Form Fire Policy," 1958 Ins. L. J. 217 (1958).

In defendant's policy time frames concerning stock reports and losses are ambiguous. The applicable part of the policy is interpreted as follows: Liability is limited to that proportion of any loss which the last reported value bears to the actual value at the time of the report, provided liability does not exceed the amount stated in the schedule endorsement of the policy. Plaintiff having reported 100 per cent of the value in its latest and timely report, defendant incurred a liability of $6,700. The judgment was correct. See, American Eagle Fire Ins. Co. v. Burdine, 200 F. 2d 26 (10th Cir., 1952) (Murrah, J.); Hanover Insurance Co. v. McLoney, 205 F. Supp. 49 (D. C., E. D. Ky., 1962); but cf. Columbia Fire Ins. Co. v. Boykin & Tayloe, Inc., 185 F. 2d 771 (4th Cir., 1950); Aetna Ins Co. v. Rhodes, 170 F. 2d 111 (10th Cir., 1948).

Other assignments of error are not well taken. The judgment is affirmed. For services of counsel in this court we allow plaintiff $500. See § 44-359, R. S. Supp., 1971.

AFFIRMED.

NEWTON, J., dissenting in part.

The majority opinion holds that plaintiff may recover the value of certain fixtures temporarily removed from the Butler building and stored in the Taylor building. These fixtures consisted of I-beams and sliding panels which were normally affixed to and formed part of the Butler building. Also included in this category is an aeration fan used as a blower to aerate grain stored in the building and normally affixed to the Butler building as a part of it. These fixtures were not removed from the Butler building for the purpose of making "alterations, improvements, and repairs to any building" as authorized by the policy which extended coverage under such conditions. They were removed solely to facilitate cleaning of the building.

Each of the two buildings was separately covered in the same policy. The fixtures mentioned were integral parts of the Butler building and insured as such. Had they remained in the Butler building, they would not have been damaged. The policy is not ambiguous and clearly does not extend coverage to fixtures removed from the building for cleaning purposes.

It is intimated that the following clause—"Permission granted for such use of the premises as is usual and incidental in the business as conducted therein and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require, * * *"—extends the Taylor building coverage to these fixtures. This cannot be as these fixtures were not "usual and incidental" to the business conducted in that building. Furthermore, *full recovery* has been otherwise had as to the Taylor building coverage and unless the amount for which that building and its contents is insured is increased by judicial fiat, it cannot afford coverage for these fixtures.

To state that coverage is afforded because the insured expected to have such coverage when the policy clearly does not afford it simply means that the insured

can disregard the clear terms of the policy and rewrite it to suit itself. An unambiguous contract is not subject to change by construction. "A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract." G. Bartling & Co. v. Harris Truck Lines, Inc., 175 Neb. 465, 122 N. W. 2d 243. See, also, Hazuka v. Maryland Cas. Co., 183 Neb. 336, 160 N. W. 2d 174.

I would disallow plaintiff's claim as to these fixtures.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. GENEICE ROSENBERGER, APPELLEE.
193 N. W. 2d 769

Filed January 28, 1972. No. 38002.

1. **Public Lands: Improvements: Constitutional Law: Statutes.** A tenant on school lands has a compensable interest in the nature of a property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent declaration of unconstitutionality of such a statute for lack of due process.
2. **Public Lands: Improvements: Statutes: Landlord and Tenant.** In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" compensable under the lease statutes.
3. **Public Lands: Improvements: Landlord and Tenant.** The value of a tenant's interest resulting from "improvements" on school lands is required to be determined prior to sale of the land.
4. **Public Lands: Improvements: Trusts.** Title to the school lands of this State is held in trust for the benefit of the common schools and the State is required to administer them as trust property, subject to the rules of law applicable to the handling of trust estates.

Appeal from the district court for Box Butte County: JOHN H. KUNS, Judge. Affirmed.

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

Daniel Stubbs of Stubbs & Metz, for appellee.

McGinley, Lane, Mueller, Shanahan & McQuillan, John A. Gale, and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for amicus curiae.

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

MCCOWN, J.

The Board of Educational Lands and Funds of the State of Nebraska brought this action under the provisions of section 72-240.11, R. S. Supp., 1969, for a declaratory judgment to determine the ownership of certain permanent "improvements" placed on a section of school land located in Box Butte County by the lessee of the land at his expense. The district court determined that the defendant lessee was the owner of the "improvements" and the Board of Educational Lands and Funds has appealed.

The defendant, Geneice Rosenberger, was the holder of leases covering a section of school land located in Box Butte County, Nebraska. She acquired the leases upon the death of her husband in 1959. The leases were initially for 25 years, commencing January 1, 1942, and had been extended for the years 1967 and 1968. The particular "improvements" set out in the petition and involved in the dispute were an irrigation pump and well, and land leveling.

The petition alleged that the irrigation pump and well was a replacement of a bad well drilled in 1951. The date of replacement was uncertain. The evidence shows permission of the Board of Educational Lands and Funds for an additional irrigation well in 1954. The decree of the district court refers to two irrigation wells. The evidence is confusing as to the identification of any particular well as to the date of installation and we shall,

therefore, assume that the irrigation pump and well in dispute here was placed on the land prior to 1953 and without direct written permission of the board.

All of the land leveling was done between 1948 and 1953 and was done without specific written permission of the board. The record does indicate that an agreement with the Soil Conservation Service as to the leveling was agreed to by the board. Costs of all wells and land leveling was paid solely by the lessee.

Same historical background is essential. Almost since the beginning of statehood there have been statutes regulating the leasing of the public school lands of the State. These lands comprise several million acres. Until recently, the State never assumed any of the costs of "improvements" on the school lands but, instead, our statutes encouraged the lessees in making "improvements" to these lands. The interests of the lessees in such "improvements" were protected by statutes which required a new lessee to pay the old lessee for his "improvements." In case of dispute as to value, the value was to be determined by a board of appraisers, subject to a right of appeal to the courts. All improvements put on leased public land are required to be assessed to the owner of such improvements as personal property. § 77-1209, R. R. S. 1943.

From time to time the Legislature defined "improvements." Those statutory definitions had little regard for the technical niceties of common law nor its definitions. Generally they made no distinctions between "improvements" which are severable from the land and those which became an actual part of the land itself and could never be severed. Neither did the Legislature make any distinctions between trees, crops, or plowing for future crops. Presumably, the Legislature intended to provide compensation to lessees for placing on the land something which would be separately valued upon termination of the lease, and that in itself added value to the land.

This court, in 1966, accurately stated: "The statutes on their face declare a compensation policy that has been uninterrupted for almost 50 years." Banks v. State, 181 Neb. 106, 147 N. W. 2d 132.

With this background, we turn to a consideration of the relevant cases dealing with the issues now before us. That record begins in 1955 with Watkins v. Dodson, 159 745, 68 N. W. 2d 508. The "improvements" statute involved included growing crops and the crop in controversy was wheat. The appraisement of "improvements" was conducted as required by statute and the new lessee paid the amount of the appraisal to the county treasurer. The old lessee filed an appeal from the appraisal but proceeded to harvest the wheat. This court held that the statute providing for appraisement of the value of the "improvements" and payment for them by the new lessee was unconstitutional because it failed to provide for notice and hearing to the owner of the property (the old lessee). The court clearly held that the interest of the old lessee in the "improvements" was a property right which entitled the former tenant to procedural due process before he could be deprived of the interest. It therefore held that the 1947 version of the improvement appraisal statute still in effect in 1952, was unconstitutional.

In Mara v. Norman, 162 Neb. 845, 77 N. W. 2d 569 (1956), the old lessee had made improvements which were appraised under the statute declared unconstitutional in Watkins, and the amount of the appraisal was paid to the county treasurer. Following the release of the Watkins opinion, the county treasurer refused to pay the amount of the appraisal to the old tenant but paid the amount into court. The amount paid for the crop, however, was returned to the new tenant, since the old tenant had harvested it. The district court found that the old tenant was entitled to the appraised sum for other improvements, but on appeal this court apparently determined that since the statute dealing with the ap-

praisal of improvements was unconstitutional, neither tenant could rely on it as the source of recovery. The court, however, again clearly recognized that the old tenant had an interest in the "improvements" and gave him permission to amend his pleadings to have determined whether or not "his improvements" had been taken and converted by the new lessees and if so, their value.

In 1966, following the passage of a statute providing for sale of the school lands, this court decided the case of Banks v. State, 181 Neb. 106, 147 N. W. 2d 132. In that case, we specifically held that a tenant on school lands has a property interest resulting from improvements made prior to September 14, 1953, notwithstanding the unconstitutionality of an appraisal and compensation statute that otherwise would be a source of his interest. That holding applied to "improvements" made before there was any requirement of approval by the state board, but the case also held that land leveling done without permission after September 14, 1953, was not compensable because of the statutory change which was effective on that date, requiring prior approval of improvements by the state board. The Banks case also specifically held that in the event of a sale of school lands to a third person under the provisions of the 1965 sale statute, a tenant has a right to compensation resulting from improvements compensable under the lease statutes, and that the value of the tenant's property interest resulting from improvements on school land is required to be determined prior to the sale of the land. That case is fully determinative of the issues here and without question requires affirmance of the judgment in this case.

In 1970, however, State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599, was decided. That case involved a quonset building erected by a tenant without permission after September 14, 1953. The court did not refer to Banks although it determined, as Banks had determined

before it, that "improvements" made without permission *after* September 14, 1953, became the property of the State and could not be removed. The position of the court in Bardsley was that because the appraisal portion of the 1947 "improvements" statute was unconstitutional, therefore all prior statutes containing the same provisions were also unconstitutional and all such statutes were complete nullities. Therefore, it was stated that only the common law applied and lessees obtained no interest in any "improvements" under any "improvement" statutes. The clear implication of Bardsley as to pre-1953 "improvements" was that the lessee had no interest in such improvements, either a property interest or a compensable interest, solely because Watkins had declared the 1947 appraisal portion of the statute unconstitutional for lack of notice and due process. Such a conclusion would either remove the sole basis for the finding of unconstitutionality in Watkins, or would itself result in an unconstitutional taking of property without just compensation. The court relied upon the common law rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee in the absence of an agreement, express or implied, or a statute indicating otherwise, citing Blomquist v. Board of Educational Lands & Funds, 170 Neb. 741, 104 N. W. 2d 264.

Even assuming that the statutes for more than 50 years were unconstitutional for lack of due process in taking the property of the lessee tenants without notice, they at least constituted an agreement, express or implied, or an indication and commitment by the State that the lessee of school lands had a compensable interest in "improvements" placed on the school lands by the lessee in reliance on the statutes.

To the extent that State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599, holds that a lessee of school lands has no interest except a common law interest in "improvements" placed on such lands without specific written

permission prior to September 14, 1953, it is overruled. The holding in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132, is reaffirmed and readopted.

A tenant on school lands has a compensable interest in the nature of a property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent declaration of unconstitutionality of such a statute for lack of due process.

In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" compensable under the lease statutes. Banks v. State, *supra*.

The value of a tenant's interest resulting from "improvements" on school lands is required to be determined prior to sale of the land. Banks v. State, *supra*.

It is quite clear that title to the school lands of this State is held in trust for the benefit of the common schools and that the State is required to administer them as trust property, subject to the rules of law applicable to the handling of trust estates. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520.

Beneficial interests of the educational trust in the school lands must of necessity be fully protected. Theories and standards of valuation of such intermingled interests have posed problems and obscured the basic issue. At the termination of the lease, or any later valuation date, the fair market value of the land should be determined as if none of the authorized "improvements" had been added. The fair market value of the land with the improvements on it should then be determined as of the same date. The difference is the value added to the land by the compensable improvements. The compensable interest of the tenant in "improvements" is limited to the value of the "improvements" so determined, or the actual cost of the "improvements" furnished and paid for by the tenant, whichever is less.

The judgment of the district court here determined that the defendant lessee was the owner of all of the "improvements" and declared her ownership. That judgment, within the limitations set out in this opinion, was correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the decision of the court in this case for the reason that I cannot be a party to the rape of the school land trust. I concede the legislative intent to grant rights to lessees in the improvements, but question the power of the Legislature to grant an interest of any nature in the land.

In this case, as in the Banks case, we are not concerned with rights as between lessees, but rather with the question whether a trustee may grant rights to the detriment of a cestui que trust. It is the law of trusts which should be controlling herein, and not the intent of the legislation.

It is undisputed that no request was made nor permission granted to place improvements on the land previous to 1954. Previous to that time there was no statute dealing with the rights and obligations as between a lessee of school land and the Board of Educational Lands and Funds with regard to permanent improvements placed upon the school lands by a lessee. In such situation, under the provisions of section 49-101, R. R. S. 1943, the common law applied. Under the common law, permanent improvements placed on real estate by a lessee without the consent of the landlord became the property of the landowner. It is also of interest to note that after the installation of the irrigation wells the lessee sublet the leased property to other lessees.

As set out in Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alien-

ate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

The majority opinion holds improvements on leased property create a property right. I have no quarrel with that holding if it is restricted to property rights in the removable improvements. However, I am in complete disagreement that land leveling, irrigation wells, and like improvements create a property right in other than those portions which conceivably can be removed, and to so hold would necessarily create a property interest in the land itself. This is beyond the power of the Legislature to grant, and is a direct violation of the school lands trust to the detriment of the common schools, the cestui que trust.

Over the years, the school land trust has been manipulated by the legislative process for the advantage of school land lessees, and to the detriment of the trust, by inadequate rental returns. The legislation under consideration, as construed by the majority opinion, is an extreme manipulation for the benefit of school land lessees, and is an obvious encroachment upon the trust itself.

The law applicable herein is well stated in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520: "A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. The rule is no different in the leasing of property of a trust estate."

In that same case, we said: "The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself. * * *

"That the Legislature has the power to provide the method of administering the public school lands of the

state as a trust is not subject to question. But the method provided must be one which is within the law governing the administration of trust estates. The designation of these lands as a trust in the Constitution has the effect of incorporating into the constitutional provision the rules of law regulating the administration of trusts and the conduct and duties of trustees. A breach of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach."

It seems elementary to me that in dealing with this trust a strict interpretation must be placed upon all statutes, agreements, and proceedings for the protection of the beneficiaries of our public school lands. This fact, it appears to me, has been wholly ignored by the Banks case and the majority opinion herein. I have no quarrel with these holdings when interpreting rights between lessees. As I interpret the improvement statutes, they refer to *authorized* improvements, and contemplate, and I believe can only contemplate, the relationship between the old and the new lessees. The statute is so limited. To extend them, as was done by the Banks case and is done by the majority opinion herein, is to ignore the trust nature of the property, and to read into the statute a grant which is beyond the power of the Legislature to give. In the first instance, the State merely serves as an intermediary between the old and the new lessees. I cannot accept any interpretation that grants lessees any land benefits as against the trust, for the simple reason that the Legislature is without power to create or grant such benefits. What the majority opinion does is to diminish the value of the school lands by considering the State as a new lessee rather than as a trustee. To me this is not only judicial legislation but legislation in violation of a constitutional prohibition.

WHITE, C. J., and NEWTON, J., join in this dissent.

ROBERT L. HODGSON, APPELLANT, V. VERNON GLADEM, APPELLEE.
193 N. W. 2d 779

Filed January 28, 1972. No. 38009.

Automobiles: Negligence: Trial. A driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

Appeal from the district court for Boone County: C. THOMAS WHITE, Judge. Affirmed.

Jewell, Otte, Pollock & Gatz, for appellant.

Kenneth H. Elson and James D. Livingston, for appellee.

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

CLINTON, J.

This action arises from a collision which occurred on May 27, 1969, between two motor vehicles at an intersection of two county roads. The plaintiff prayed for damages caused to his vehicle by the collision. Defendant filed a cross-petition asking recovery for personal injuries and damages to his vehicle. At the conclusion of all the evidence the defendant renewed an earlier motion for a directed verdict against the plaintiff on the grounds of plaintiff's contributory negligence. The plaintiff moved for the dismissal of the defendant's cross-petition on the grounds of the defendant's negligence. The court found both parties guilty of negligence more than slight as a matter of law and dismissed both the petition and cross-petition. The plaintiff appealed to this court. We

affirm the judgment of the district court. We have noted the date of the accident to indicate that it occurred prior to the repeal of section 39-728, R. R. S. 1943, but by so doing do not mean to imply that the result would necessarily be different if such repeal had occurred before the accident date.

There is no significant dispute in the evidence. The roads in question were unpaved but graveled. The intersection was not protected by stop signs or other traffic controls. At the time of the collision it was daylight, clear, and dry. The plaintiff's vehicle, a pickup-type truck carrying a mobile veterinary clinic, was traveling in a westerly direction on the east-west road. The plaintiff was a passenger in his own vehicle which was being driven by an employee. The defendant's vehicle, a passenger car, driven by him, was northbound on the north-south road. Each was in its own proper lane of traffic. The intersection was, insofar as it pertains to these two drivers, a "blind intersection." The view of each as to the approach of the other was completely obstructed by an embankment and a shelterbelt of trees, consisting of plum brush and cedars at least 6 to 8 feet tall which could not be seen through. The obstruction extended along the south of the east-west road to about the fence line east of the intersection. The shelterbelt extended east from the intersection and neither driver could see the other at any time in their approach to the intersection.

The plaintiff testified that his vehicle was traveling 40 to 45 miles per hour as it entered the intersection. His driver had decelerated without application of the brakes as they approached the intersection and they had been traveling at about 45 miles per hour. Plaintiff saw the other vehicle an instant before the collision. At that time his truck was already in the intersection. He estimated the speed of the other vehicle when he saw it at 50 miles per hour and that this vehicle was perhaps 20 feet south of the intersection when the plain-

tiff's vehicle entered it. The defendant's vehicle struck that of the plaintiff in the "left door and the left side of the mobile clinic." The plaintiff had traveled the road in question before but not for about 2 years. He did not warn his driver to slow down because it was a blind intersection. His driver told the plaintiff after the collision that he did not remember seeing the other vehicle before the impact.

The plaintiff's driver testified they were traveling "Forty to forty-five" miles per hour. He had been over the road before but not for a couple of years. He described the shelterbelt along the fence line. He decelerated 150 feet from the intersection. He stated that the edge of the trees was about 5 to 10 feet from the intersection. He did not remember seeing the other vehicle. He admitted that he had told the defendant when they were in the hospital after the accident that he did not see the defendant's vehicle before the impact. He did not remember applying the brakes before the collision. He looked to the south when the vehicle was a a little past the shelterbelt. He saw nothing. He could see 1,000 feet south down the road.

The defendant testified that the north-south road on which he was traveling was a more traveled road than the east-west road; that the posted speed limits on the north-south road are 50 miles per hour. He described the shelterbelt and stated that the embankment on which it was located was about 4 feet high. One could not see through the trees. He was going about 45 miles per hour as he approached the intersection and he thought he slowed by deceleration as he approached. He saw the plaintiff's vehicle before the collision but realized at that time there was nothing he could do to avoid it. He did, however, apply his brakes. He estimated he saw the plaintiff's vehicle when his own was about 30 feet from the impact. He knew the intersection was a blind one. He did not know which vehicle entered the intersection first.

The sheriff of Boone County who investigated the accident testified. His only testimony of consequence was that the defendant's vehicle left 15 feet of skidmarks just before the impact. The skidmarks were south of the intersection about 20 feet.

Pictures of the intersection and the area at the southeast corner thereof were introduced into evidence, but it is not possible from them to draw any firm conclusions as to the exact distance in feet each may have been from the intersection when he could have first seen the other. It could be concluded, however, that the radius of vision was a little more than indicated by the testimony of the plaintiff's driver.

It is evident of course the plaintiff had what is usually referred to as the directional right-of-way. A jury could have found the plaintiff's vehicle entered the intersection slightly ahead of that of the defendant. A jury could also have found the plaintiff's driver looked to the south at about the time the plaintiff's vehicle entered the intersection, but saw nothing even though, under the facts here, the other car had then to be almost at the intersection.

It is equally evident both drivers approached a blind intersection at about the same time and at such a rate of speed that neither could take any effective action to avoid the accident when he first saw or could have seen the other.

The plaintiff argues that the question of his contributory negligence, if any, and its comparison with that of the defendant presented a question of fact for the jury to decide. He cites and relies upon the following propositions of law. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is for the jury. Before a verdict can be directed against a motorist for failing to see an approaching automobile at an unprotected intersection, the

approaching automobile must be undisputedly in a favored position.

One of the cases cited by the plaintiff is Sanderson v. Westphalen, 178 Neb. 298, 133 N. W. 2d 16. In that case the plaintiff and defendant occupied the same relative positions they do in this case, that is, the plaintiff was traveling west and the defendant north. The significant difference, however, is that in the cited case each had a clear view of the approach of the other for about 700 feet. The plaintiff in that case, although failing to see the approach of the defendant's vehicle at the time he actually looked, could expect to be seen by a driver approaching from the south and therefore have his directional right-of-way respected. In this case neither could see the other until almost in the intersection. Sanderson v. Westphalen, *supra,* is not applicable here.

The underlying purpose of right-of-way rules is, of course, to prevent collisions and they must be applied, together with the other applicable rules relating to the exercise of due care, in such a way that if the rules are observed they will tend to have this result.

In the case of an intersection with a completely obstructed view, known to be such by the drivers, there are only two alternatives which can have the desired effect. Either the driver of the automobile not having the directional right-of-way must approach the intersection at such a speed that he can observe down the favored road and can stop if necessary before entering and crossing and the driver on the right be deemed to have an absolute right-of-way and have no duty whatever to keep a lookout to his left, assuming he is traveling within the prima facie lawful speed limit, or both drivers must approach the intersection at such speed that each may effectively exercise an option on how to proceed as may be indicated by circumstances when they reach a point where they can see. The latter we believe is the more acceptable principle.

The court has never held that the driver on the right,

on approaching an intersection at about the same time as the one on the left, has an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with underlying purpose of the rules.

In Barajas v. Parker, 165 Neb. 444, 85 N. W. 2d 894, where the plaintiff had the directional right-of-way at an intersection where the view was obstructed to her left and the other car was approaching from that direction, this court said: "In this case the testimony of plaintiff discloses that the plaintiff did not look in the direction from which the defendant was approaching. This, in the light of the facts and law, amounted to contributory negligence more than slight. It was her duty to look for approaching automobiles and to see those within the radius that denoted the limit of danger. See, Evans v. Messick, supra; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

"This radius was narrowly limited in the present instance but this could not be a basis for departure from the rule. The ground area itself apparently did not prevent a view of the intersection from ¾ mile to the south and almost ¼ mile to the west. The view however from the south to the west and from the west to the south of the intersection was obstructed by a hedge or row of small trees of a height estimated by witnesses to be from 12 to 30 feet. Vision through the hedge was difficult. The hedge was about 25 feet south of the east and west road. The east end was 42 feet west of the east edge of the north and south road. The radial area was not otherwise described." (Emphasis supplied.)

In Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, a city street intersection case, this court held that the trial court erroneously directed a verdict against the

plaintiff who had the directional right-of-way. The plaintiff looked before entering the intersection and a jury could have concluded the defendant was not in the radius of danger. In that case this court said: "The general rule governing the type of case at bar is that when the injured party fails to look at all, or looks straight ahead without looking to either side, *or is in such a position that he cannot see*, or, in other words, when he takes no precaution at all for his own safety, it is usually a question for the court." (Emphasis supplied.)

A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because he is on the right of the other car. His favored position and the right to proceed arising thereunder may be forfeited because of excessive speed under the circumstances. See Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 140, 125 N. W. 2d 556, cited by the plaintiff.

In this case the undisputed facts show the plaintiff approached a blind, unprotected intersection where he could not see to the left until almost at the intersection and where he had to realize that any car approaching on his left at whatever speed could not see him until it was almost in the intersection, and he did so at a speed which left him no alternative but to enter the intersection irrespective of whatever his observations might disclose when he reached a position where he could see to his left. Under these circumstances he was guilty of contributory negligence more than slight as a matter of law in that he took no precautions whatever for his safety. We hold that a driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely ob-

structed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. The trial court's determination was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKY RANDALL, APPELLANT.
193 N. W. 2d 766

Filed January 28, 1972. No. 38035.

1. **Criminal Law: Trial: Courts: Instructions.** In the absence of a request for a cautionary instruction with relation to previous similar offenses, it is not error for the trial court to fail to give such an instuction.
2. **Criminal Law: Infants: Kidnapping: Parent and Child.** The gist of the crime of child stealing is the malicious, forcible, or fraudulent removal of a child from the custody of its legal custodian, with the intent to unlawfully detain or conceal it from such custodian or parent, and consent of the child is immaterial and does not constitute a defense.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lovell, Raymond & Hippe, for appellant.

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

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

WHITE, C. J.

This is a prosecution for child stealing of Diana Kuntz, a child 11 years of age, with the intent to unlawfully conceal the child from her parents. The defendant was convicted by a jury, sentenced by the court, and appeals therefrom. We affirm the judgment and sentence of the trial court.

Diana Kuntz, the prosecuting witness, testified that she was 11 years of age on January 14, 1971; that she was a slight acquaintance of the defendant, Ricky Randall; and that she met him, had driven around with him, and spent the day of January 14, 1971, with him. Her testimony establishes that Diana and the defendant, along with others, left in a motor vehicle, traveled to the States of Wyoming and Montana for a period of 3 days, and later Diana was returned to the home of her parents. The trial court admitted evidence, over objection, that during the period of time Diana and Randall were in Wyoming they engaged in sexual intercourse; and that they shared a room together at Newcastle, Wyoming. The court also admitted evidence as to an incident of sexual intercourse between Diana and the defendant in Montana.

Summarizing the evidence of the State, it is substantially undisputed, as the defendant so states in his brief, it shows that the defendant, Randall, Diana Kuntz, and two other parties left Scottsbluff, picked up a girl in Morrill and took a trip in the defendant's car from there westerly through Wyoming, where they left one man at Newcastle, then into Montana, and back into Wyoming, over a period of 3 days. The evidence also substantiates the undisputed fact that Diana Kuntz had given her consent to the trip.

The evidence shows that the defendant did not return Diana Kuntz to her parents. The law officers did. The evidence also reveals as undisputed the testimony of Diana Kuntz' father about a phone call that he engaged in with the defendant, while the defendant and Diana were on the trip in question. It is as follows: "Q. Did you hear the conversation that occurred when Diana apparently handed the phone to someone named Rick to speak? A. Yes. Q. And what conversation did you hear at this time? A. He identified himself as Rick Randall and then I spoke up and asked him where they were at and he wouldn't give me no answer then, but

we kept talking to him, and then he told me that they were married and they was going to go to Arizona to live, and I kept talking to him and I said, 'Where are you at, in South Dakota?' And he said, 'Yes, we're in South Dakota.' And I said, 'Rapid City?' He said, 'Yes.' And I said, 'Are you going to bring my daughter home?' Well, he said, 'If you drop all charges and everything,' he says, 'I'll bring her home.' And I said, 'I don't have nothing to do with that,' I says, 'You just bring her home,' and I says, 'We'll be waiting for you tomorrow and you bring her home.' Well, he said, 'I'll think of it.' And we kept talking and I don't know all just the words that we said, but we—where they landed up, I believe that they went up to South Dakota and got married, but they wasn't even in South Dakota; they were in Rock Springs, Wyoming. Q. Did you specifically request that he return your daughter to your home? A. Yes. Q. What did he respond to your request? A. He said, 'If you drop all charges.'"

The main assignment of error is that the trial court erred in failing to instruct the jury, by way of a cautionary instruction, that the evidence relating to crimes committed by the defendant outside the jurisdiction of Scotts Bluff County were received for the limited purpose of showing the intent of the defendant to conceal the child from her parents. There are two answers to this contention. First, there is no showing of the commission of separate independent crimes by the defendant. The circumstances of staying at the hotel, and engaging in sexual intercourse, and the facts surrounding the 3-day trip, were all part of the chain of events and the circumstances that began with the defendant's departure from Scottsbluff, Nebraska, and finally led to his capture in Rock Springs, Wyoming. Very simply, they were not separate and independent other crimes, they were simply the essential facts of the case directly bearing on the defendant in taking 11-year-old Diana with him and away from her parents. Second, the de-

fendant tendered no instruction bearing upon this issue. In the absence of a request for a cautionary instruction with relation to previous similar offenses, it is not error for the trial court to fail to give such an instruction. Taylor v. State, 114 Neb. 257, 207 N. W. 207; Buckley v. State, 131 Neb. 752, 269 N. W. 892.

The second assignment of error charges that it was error for the trial court to advise the jury that the consent of Diana Kuntz, age 11, was immaterial. This court has held that the gist of the crime involved here is the malicious, forcible, or fraudulent removal of a child from the custody of its legal custodian, with the intent to unlawfully detain or conceal it from such custodian or parent, and hence consent of the child is immaterial and does not constitute a defense. The fact that the child consented to leave her parents and go with the accused is immaterial. Bundy v. State, 114 Neb. 121, 206 N. W. 21. There is no merit to this contention.

The defendant contends that the trial court should have instructed the jury on the lesser included offense of contributing to the need for special supervision of a minor as defined in section 28-477, R. S. Supp., 1969. The trial court refused this request and it was without error. The answer to the defendant's contention is found in State v. LaPlante, 183 Neb. 803, 164 N. W. 2d 448, wherein this court very recently said as follows: "Defendant's last assignment of error is the failure of the trial court to instruct on the offense of simple assault. Such an instruction is not mandatory where the evidence is conclusive of the guilt of the defendant. Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. Further, in Davis v. State, 116 Neb. 90, 215 N. W. 785, this court stated the general rule in the following language: 'Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not

guilty, then it is not proper to give such an instruction.' See, also, In re Application of Flanders, 119 Neb. 761, 230 N. W. 684; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The evidence in the present case is such that defendant is either guilty of the crime charged or not guilty. The trial court did not err in failing to instruct on the lesser offense."

Without reiterating the testimony we recited at the beginning of this opinion, the evidence in this case is conclusive of the guilt of the defendant of the crime charged. We observe that the evidence in this case is of such a conclusive nature, almost wholly undisputed, as to warrant only a verdict of guilty of the greater offense. We feel that the evidence herein is so conclusive against the defendant that to submit the instruction on contributing to the delinquency of a minor to a jury would have been unconscionable under the circumstances. It not only was not mandatory to give the instruction but it was the only way, considering the nature of the evidence in this case, in which the trial court could have fairly and properly submitted the case to the jury. The assignment of error is without merit.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. SHONKWILER, APPELLANT.
194 N. W. 2d 172

Filed January 28, 1972. No. 38097.

1. **Criminal Law: Sentences: Probation and Parole.** A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.
2. ———: ———: ———. A statement by a defendant before sentencing that the Viet Nam war is immoral and that if drafted

he would not bear arms in that war does not constitute a justifiable reason for refusing probation to an otherwise qualified defendant.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Reversed and remanded with directions.

Mitchell & Beatty and Jerome J. Ortman, for appellant.

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

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

MCCOWN, J.

The defendant, David L. Shonkwiler, pleaded guilty to burglary in the district court for Dawson County, Nebraska, and was sentenced to not less than 1 nor more than 2 years in the Nebraska Penal and Correctional Complex. The defendant has appealed on the ground that the sentence imposed was an abuse of discretion, was arbitrary and unreasonable, and was excessive under the circumstances.

A codefendant, Melvin Lee Anderson, was an equal participant along with the defendant in the commission of the burglary involved here. Both of these young men were 19 years of age. Both were first offenders. Both pleaded guilty. Both were convicted at the same time and both were sentenced at the same time. Both made full financial restitution. Melvin Lee Anderson was placed on probation for a period of 2 years. David L. Shonkwiler received a 1 to 2 year penitentiary sentence. Upon motion in this court, the presentence investigation report was made a part of the record.

The burglary occurred on the 30th day of April 1970, some 2 weeks after the defendant became 19 years old. He was sentenced on February 19, 1971. At the time of sentencing, the defendant had completed three semesters at Kearney State College. He held various jobs and for all practical purposes was putting himself

through college. He lived in Kearney with one of two older brothers, both of whom were also attending Kearney State College. His father was a minister and member of the Berean Fundamentalist Church, and is now a teacher at the Montana Institute of the Bible in Billings, Montana. His mother is a school teacher in Billings. The defendant has one sister who, with her husband, is a missionary in Mexico City. In addition to his two older brothers, he has one younger brother living with his parents in Montana.

Complete restitution of $129.67 had been made for the burglary. All but $18.35 of this amount was for a broken window and damage to the back door of the tavern involved. The conviction here was the defendant's first felony conviction. His only prior conviction of any kind was a $15 fine for littering in the City of Kearney on March 20, 1970. His record in high school and in college was good and he had had no problems with school authorities.

At the time the guilty pleas were taken and the matter referred to the probation office for presentence investigation, the court advised both young men that they should be completely honest with the probation officer. The defendant Shonkwiler was. In addition to matters which will be referred to later, Shonkwiler advised the probation officer that the same two young men had broken windows in two establishments and obtained some merchandise from a third, all on the evening of March 13, 1970. Restitution was also made for all of these incidents, although no charges were ever filed. The codefendant Anderson advised the court at time of sentencing that he did not advise the probation officer of the March 13th incidents because he didn't think they would find out that he was in on it and conceded that he was less than truthful. The same probation officer made the presentence investigation and report on each of the two young men and recommended both of them for probation.

Without going into the details of the presentence investigation report as to Melvin Lee Anderson, it showed that he was also a first felony offender but that he had several minor misdemeanor convictions while defendant Shonkwiler had only the one. Anderson had even been convicted on a misdemeanor count in Broken Bow, Nebraska, and fined $100 in August of 1970, while he was free on bond on the charge involved here. It should also be sufficient to state that in all other factors relevant to probation, the record of David L. Shonkwiler as revealed in the presentence investigation reports, was at least as good, if not better, than that of his codefendant.

The record discloses that the basis for the difference in sentencing of the two young men stemmed from the defendant's comments as to the Viet Nam war and his obligation for military service in that war. Shonkwiler expressed to the probation officer and to the court his conviction that the Viet Nam war was immoral and stated that he would refuse to bear arms in Viet Nam. The trial court interpreted his comments as a statement that he would not obey the laws of the United States; referred to him as an outlaw; and refused to entertain any additional testimony as to the nature and extent of his conscientious objections. The trial court proceeded on the assumption that any valid, legal conscientious objections must rest on religion.

The defendant Shonkwiler had a draft status of II-S, a student deferment, and his draft number was 182. With that number, it is uncertain whether he would be drafted under current conditions. Shonkwiler attempted to explain that he would not bear arms in any war, but would serve in any other way if he could; that he did not mean to disobey the United States laws; and that his beliefs, he thought, were within the definition of "conscientious objector" laid down by the Supreme Court. This court takes judicial notice of the fact that there are multiple avenues of establishing conscientious objection, and multiple avenues of service legally avail-

able as an alternative to the military duty of bearing arms.

"A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." ABA Standards Relating to Sentencing Alternatives and Procedures, Standard 2.3(c). The affirmative reasons justifying total confinement set out in the Standards are inapplicable here. The Advisory Committee for the ABA Standards, as well as the Model Penal Code, section 7.01, take the position that the starting point for every sentence should be probation or some other sentence not involving commitment or confinement. Particularly is this true in the case of first offenders and even more so when those first offenders are youthful. See commentary to Standard 2.3(e), pp. 72, 73, ABA Standards Relating to Sentencing Alternatives and Procedures. The district court clearly recognized these principles when it placed Melvin Lee Anderson on probation. The court, however, withheld similar treatment from the defendant Shonkwiler.

At least as early as 1905, this court expressed its view that where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced. See Keeler v. State, 73 Neb. 441, 103 N. W. 64. The law still continues to strive for even-handed justice. A statement by a defendant before sentencing that the Viet Nam war is immoral and that if drafted he would not bear arms in that war does not constitute a justifiable reason for refusing probation to an otherwise qualified defendant.

The order of probation entered with respect to the codefendant Anderson contains as one of its provisions

the condition that the defendant "shall not violate the ordinances of any municipality, the laws of any state or the laws of the United States." This is virtually a standard requirement of any probation order. Even if the statement here amounted to a declaration that the defendant would violate the law if ordered to bear arms in Viet Nam, he may never be faced with the prospect. If he were on probation and did violate the law in the future, it would constitute an immediate violation of the conditions of his probation as well as constituting a separate violation of the laws of the United States. While the defendant's attitude toward bearing arms in war may be abhorrent to some citizens, the law must and does extend its protection to conscientious objectors. The defendant and every other citizen is also guaranteed the constitutional right of free speech. The defendant's attitude toward the Viet Nam war has been publicly expressed by many thoroughly loyal American citizens and in no way reflects criminal tendencies. Neither does it furnish a justifiable basis for refusing probation under the circumstances present here.

The sentence of the district court is vacated and the cause is remanded to the district court with directions to place David L. Shonkwiler on probation under the same terms and conditions contained in the probation order of February 19, 1971, covering the probation of Melvin Lee Anderson.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., took no part in the consideration or decision in this case.

SPENCER and NEWTON, JJ., concur in the result only.

STATE OF NEBRASKA, APPELLEE, V. DONALD GEORGE ELROY MCDONALD, APPELLANT.
194 N. W. 2d 183

Filed January 28, 1972. No. 38099.

1. **Criminal Law: Trial: Confessions.** The trial court's finding

that an in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity.

2. ———: ———: ———. To be admissible, a confession must be free and voluntary, that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
3. **Criminal Law: Trial: Confessions: Courts: Instructions.** It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary.
4. **Criminal Law: Trial: Attorneys at Law: Fees.** It is not proper to allow an attorney's fee in criminal cases only for time spent in trial, and refuse to make any allowance for time or services reasonably and necessarily required and performed prior to trial.

Appeal from the district court for Adams County: FRED R. IRONS, Judge. Reversed and remanded.

Brock & Seiler, for appellant.

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

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

MCCOWN, J.

The defendant McDonald was found guilty by a jury of the crime of burglary and was sentenced by the court to 3 to 5 years imprisonment. The principal issue on appeal involves the admissibility of an in-custody statement obtained from the defendant.

The evidence implicated the defendant and another individual named Barada. While the defendant was in custody prior to trial, he was interviewed by the county attorney in the presence of a court reporter. The complete constitutional rights warnings were given to the defendant and he waived those rights. In response to preliminary questions, he stated that he "didn't do it." After some discussion of other indirectly related matters, the questioning was brought back to the particular burglary involved. After a couple of questions and an-

swers involving Barada's connection with the premises burglarized, the following dialogue occurred: "(Def.) Can we go off the record for a minute? (Co. Atty.) Well, I can't go off the record once we start but you may go ahead. (Def.) Well, I want to ask you this question: What are you going to do with me on this if I tell you the whole thing. It will implicate me. It is a fringe deal and it's like that dope deal. (Co. Atty.) Well, nothing happened to you on the dope deal, is that right? (Def.) Well, I am not asking you to make a deal or anything. I wanted your line of thinking because I did have hold of some of the stuff that he did get. (Co. Atty.) Some of the cash? (Def.) Well, the cash, no. (Co. Atty.) Well, tell me everything you know. * * *." The remainder of the statement accused Barada of the burglary but conceded that the defendant knew Barada was committing a burglary and that defendant received some of the proceeds.

During the trial, at a hearing outside the presence of the jury, the court reporter testified as to the statement taken from the defendant. The court reporter also testified that he had previously taken statements of the defendant about his activities in selling "dope" and the court reporter did not know of any charges brought against the defendant relating to those statements. Objections were made to the admission of the defendant's statement here on the ground that the statement was inadmissible because it was made as a result of an implied promise or inducement and therefore involuntary. The court overruled the objections but made no specific finding of any kind. The statement was thereafter introduced and read in full to the jury.

Under the procedures required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, the court must first make a judicial determination as to the voluntariness of a statement or confession by the defendant before permitting the jury to hear the alleged statement or confession. The trial court's finding that an

in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity. Sims v. Georgia, 385 U. S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593; State v. Holland, 183 Neb. 485, 161 N. W. 2d 862.

"To be admissible, a confession must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). See, also, State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66.

Where the question of the voluntariness of an oral or written confession is in issue, the court must properly instruct as to what constitutes a voluntary confession, whether requested or not. It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary. State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161.

Here the court instructed with respect to the required constitutional warnings and with respect to knowing and intelligent waiver of constitutional rights by giving N J I No. 14.52A. N J I No. 14.52 instructs as to when admissions or confessions may be considered as evidence of guilt and it also outlines the required findings the jury must make with respect to statements procured or induced by promises directly or indirectly made by persons in authority. That instruction was omitted. No similar or related instruction was given. The failure of the trial court to give this instruction amounted to a withdrawal of the issue of voluntariness from the jury's consideration and requires reversal. State v. Breaker, *supra*.

Since this case must be retried and the issues of inducements and promises and the voluntariness of statements be submitted to the court and jury, we point out that law enforcement officers should make sure that no promises are made which offer the defendant a benefit

or advantage which is dependent upon the defendant making or executing the statement or confession sought. County attorneys in particular should make certain that their position is unequivocal and forthright. We recognize the inherent problems in reconstructing factual situations in many cases and the obvious tendency of some witnesses to have convenient memories. In this case however, the facts as to what occurred at the time of taking the defendant's statement are not in dispute.

The defendant also asserts that the $450 attorney's fee allowed here was not reasonable. The complaint is that the court failed to allow a minimum hourly rate for the total number of hours spent, and that the established pattern for criminal cases in the district allows $150 per day for jury trial, with no allowance for preparation or other necessary time. The fee allowed was apparently based upon 3 days of jury trial.

The statute specifically provides that the fees for services performed in criminal cases shall be "reasonable fees." § 29-1803.03, R. S. Supp., 1969. A reasonable attorney's fee ordinarily rests in the sound discretion of the court. Many elements enter into the determination of the amount of such a fee. The time element in such cases is not ordinarily measured by the time actually spent, but by the time reasonably and necessarily required in the performance of the duties. See, Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607; Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698. It may be entirely proper to have a guideline standard daily schedule of fees for trial time. Nevertheless, it is not proper to allow an attorney's fee in criminal cases only for time spent in trial, and refuse to make any allowance for time or services reasonably and necessarily required and performed prior to trial.

The bare bones of the present record establish only that the attorney's fee was insufficient because of the refusal to allow any amount for services prior to trial. It does not furnish adequate evidence upon which to

redetermine a reasonable attorney's fee. The judgment of the district court fixing the attorney's fee for the original trial is vacated. Upon remand, the district court is directed to redetermine the amount of a reasonable attorney's fee herein in accordance with this opinion and make such allowance.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

DENNIS ADLER, APPELLANT, V. JERRYCO MOTORS, INC., A CORPORATION, APPELLEE.
193 N. W. 2d 757

Filed January 28, 1972. No. 38126.

1. **Workmen's Compensation: Evidence: Appeal and Error.** In a workmen's compensation proceeding a district court finding against a party will be set aside if the evidence compels a finding for that party.
2. **Workmen's Compensation: Employer and Employee.** Under the Workmen's Compensation Act recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

Healey, Healey, Brown & Burchard, for appellant.

Chambers, Holland, Dudgeon & Beam, Cline, Williams, Wright, Johnson & Oldfather, and Kevin Colleran, for appellee.

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

SMITH, J.

The Workmen's Compensation Court on original hear-

ing dismissed the claim of Dennis Adler against Jerryco Motors, Inc. After waiver of rehearing and on appeal to district court the claim again was dismissed. Adler appeals. The chief questions relate to our standard of review and to the connection between recreational or social activities and course of employment.

Adler suffered injuries in an accident on July 26, 1969, at Midwest Speedway in Lincoln while he was racing a Bultaco motorcycle owned by Jerryco. Jerome Biskup owned Jerryco which repaired and sold motorcycles at its place of business in Lincoln. He also was a member of a partnership that owned Midwest Speedway which held automobile and motorcycle races.

In 1967 Jerryco had desired to decrease its expenditures on racing programs. Adler with factory assistance had been racing a Triumph 650 motorcycle, winning almost every time. Jerryco engaged him February 1, 1967, at a monthly salary to manage its shop and racing program. Adler continued to race the Triumph with factory assistance and motorcycles owned by Jerryco. The Triumph decreased Jerryco's racing expenditures $1,000. The sums spent on the program were $4,000 in 1967, $2,000 in 1968, and less than $1,000 in 1969.

Midwest required no entry fee from Adler or others who concededly raced for Jerryco. Contrary to trade practice in an employee-employer relationship Biskup permitted Adler to keep prize money.

Jerryco advertising directly or indirectly referred to Adler. A Jerryco truck that hauled racing motorcycles to Midwest and nearby tracks displayed a caricature of Adler with his national racing number "47." "Jerryco" was the size of a signboard. The truck, as well as the Triumph and Adler's leathers, which Jerryco had not purchased, were orange and white, racing colors of Jerryco.

Jerryco once rented a booth at an automobile show in Pershing Auditorium at Lincoln. The Triumph stood on a pedestal 4 feet high, and a sign stated its high percentage of victories. Other indirect advertising oc-

curred on radio which described Jerryco to be, in Adler's words, " 'the place where the fast guys are the guys that win.' "

Biskup testified as follows: He had closely controlled the racing activity of Adler on Jerryco motorcycles. Adler was under a duty during employment hours not to prepare one for racing by him without specific permission. A similar requirement circumscribed the authority of Adler to drive the truck or to race a Jerryco motorcycle. He almost always requested permission which Biskup almost always granted. On July 26, 1969, Adler failed to do so, and Biskup knew nothing of plans for the race in which the injury occurred. Biskup would have denied permission, for Jerryco had cleaned the Bultaco to sell. The degree of control exercised by each man over motorcyclists who concededly raced for Jerryco is not detailed.

Adler denied close control. He had talked to Biskup on July 26, 1969, about the race prior to its start, both understanding he would enter. There were two Bultaco motorcycles, and the one for sale remained in the shop. Biskup did not subsequently contradict the testimony, and he produced no records to refute it.

The racing program indirectly advertised Jerryco motorcycles for sale. It also kept employees happy. Adler candidly admitted that his employment by Jerryco in no way depended upon his racing any motorcycle.

The district court may set aside a judgment of the Workmen's Compensation Court on rehearing only upon grounds of (1) no jurisdiction, (2) fraud, (3) insufficiency of the record to support the findings, and (4) inadequacy of findings to support the order. See § 48-184, R. R. S. 1943. This court on appeal may set aside the judgment of the district court only upon those grounds except subdivision (3) which reads: ". . . the findings of fact are not supported by the evidence as disclosed by the record, and, if so found, the cause shall be considered de novo upon the record." § 48-185, R. R. S. 1943.

The Legislature has prescribed two procedures for

processing workmen's compensation claims, carrying over rules that governed the compensation commissioner, whom the court superseded. See, §§ 48-177 to 48-185, R. R. S. 1943; Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352 (1939).

In Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), after waiver of rehearing a judgment for a compensation claimant was affirmed. We said that we will consider the cause de novo only where the findings of fact are not supported by the evidence as disclosed by the record.

Sections 48-184 and 48-185, R. R. S. 1943, are silent about findings that may require no evidentiary support. We construe the sections to remedy the omission. In a workmen's compensation proceeding a district court finding against a party will be set aside if the evidence compels a finding for that party. When we set aside a material finding because of the evidence we will consider the cause de novo.

Recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. 1 Larson, Workmen's Compensation, § 22.00, p. 349 (1968). See, also, § 48-151(6), R. R. S. 1943.

The district court found that the accident had not arisen out of or in the course of Adler's employment by Jerryco. The finding faces this evidence: Testimony to close control of Adler racing Jerryco motorcycles is weakened by admissions that Biskup almost always granted permission. It also clashes with normal duties of manager of the shop and racing program. Testimony of Biskup to his lack of knowledge and desires concerning the race on July 26, 1969, is not material in view of other evidence. The direct benefit to Jerryco from Adler racing Jerryco motorcycles at Midwest was substantial

enough to bring the activity within the course of employment under the above rule.

The evidence compels a finding that the injuries to Adler arose out of and in the course of his employment by Jerryco. The judgment is reversed and the cause remanded with directions to proceed in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROGER SIMONS, APPELLANT.
193 N. W. 2d 756

Filed January 28, 1972. No. 38153.

1. **Criminal Law: Larceny: Evidence: Trial.** In a prosecution for larceny in Nebraska a lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence.
2. **Criminal Law: Witnesses: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Gerald Buechler and Joseph D. Martin, for appellant.

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

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

McCOWN, J.

A jury found the defendant, Roger Simons, guilty of grand larceny. On appeal, the defendant asserts that the evidence is insufficient to support the judgment, and that there was no evidence of a lack of consent to the taking.

On the evening of April 5, 1971, the complaining witness, Cathy Bockman, accompanied a friend of hers, Sharon Michalski and one Dianna Lechleitner to an apartment occupied by the defendant, Roger Simons. The defendant and a man identified as Dick Price were in the apartment. When the complaining witness entered the defendant's apartment, she placed her purse which contained $150 in currency on the stove. Both of the other women knew the money was in the purse. At approximately 9:30 p.m., Cathy and Sharon left the apartment to pick up Cathy's husband but the purse was left on the stove. When they returned some time later, the three people were gone and the purse was gone. They found the purse across the hall in Sharon's apartment but the $150 was gone. Cathy Bockman, the complaining witness, then called the police. Charges were filed against the defendant Roger Simons and Dianna Lechleitner. A warrant was also issued for Dick Price but he was not found.

At the defendant's trial, Dianna Lechleitner testified that she saw the defendant and Dick Price take the money and they gave her $40 to "keep her mouth shut." She later turned the $40 over to the police and made a statement. The defendant's testimony was that Dianna Lechleitner and Dick Price had taken the money and that Price had given him $20 of it to apply on the rent.

The defendant's position apparently is that the testimony of an accomplice is insufficient as a matter of law to support a guilty verdict, and that there was no express testimony that the complaining witness did not consent to the taking.

The testimony of an accomplice is clearly sufficient where, together with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. See Leistritz v. State, 165 Neb. 220, 85 N. W. 2d 318.

In a prosecution for larceny in Nebraska a lack of

consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10.

In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence. State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181. While the evidence here was in conflict, it was clearly sufficient to go to the jury.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER LEGEAR, APPELLANT.
193 N. W. 2d 763

Filed January 28, 1972. No. 38176.

1. **Criminal Law: Guilty Plea: Trial.** The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty.
2. ———: ———: ———. The record of the arraignment at which a plea of guilty is entered must show that the court determined there was a factual basis for the plea.
3. **Criminal Law: Guilty Plea: Trial: Attorneys at Law.** The trial court may not rely upon generalized admissions or statements by defense counsel as a method for determining that there is a factual basis for a plea of guilty.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for unlawful sale of cannabis upon a plea of guilty. At the arraignment on October 5, 1970, the defendant pleaded not guilty. On March 25, 1971, the defendant appeared with private counsel and obtained leave to withdraw the plea of not guilty and enter a plea of guilty.

At this hearing the district judge advised the defendant as to his rights and addressed him personally to determine that the plea was voluntary and was entered intelligently and understandingly. Inquiry was made as to plea bargaining, and the county attorney advised the court that a separate charge for sale of LSD was to be dismissed in exchange for the plea of guilty in this case. The defendant acknowledged that this was his understanding of the plea bargain; that there had been no promise of leniency; and that the court was not a party to the plea bargaining and was not bound by it.

On May 17, 1971, when the defendant appeared for sentencing, the defendant's counsel moved for leave to withdraw the plea of guilty and for leave to withdraw as counsel for the defendant. Both motions were overruled and the defendant was sentenced to imprisonment for 3 to 5 years. The defendant is now represented by other counsel.

There was no evidence offered in support of either motion at the hearing on May 17, 1971. The showing made consisted of statements by the defendant and his counsel to the court at the hearing.

The defendant's counsel stated there had been an arrangement with the county attorney's office and the police that if the defendant could make a purchase of heroin, or assist in the identification of a person selling heroin, a recommendation for probation would be made; and that the defendant had made two attempts to carry out the arrangement but was unsuccessful. The defendant's counsel further stated the defendant had said that he was not satisfied with the course of the pro-

ceedings; that he thought he was not guilty; that he thought the State could not prove its case; and that he wanted another lawyer. The defendant's counsel further stated that he did not agree with the defendant's present position in the case.

The defendant stated that he did not feel guilty; that he would like to stand trial; that he was under the impression there would be a recommendation of probation; and that he did not understand a recommendation by the county attorney was not binding on the court.

The defendant contends that the motion to withdraw the plea of guilty should have been sustained because there had been a breach of a plea bargain and the record does not show that the trial court ascertained there was a factual basis for the plea.

The record fails to show any breach of a plea bargain. The bargain which was disclosed at the hearing on March 25, 1971, was fully performed. The arrangement for a recommendation of probation, not disclosed until the hearing on May 17, 1971, was conditioned upon the defendant making a purchase of heroin, or identifying a seller. The defendant did not perform his part of the arrangement so there was no basis for a withdrawal of the plea on this ground.

At the hearing on March 25, 1971, the trial court made no inquiry of the defendant to determine that there was a factual basis for the plea of guilty. The Standards Relating to Pleas of Guilty, promulgated by the American Bar Association, require that the court satisfy itself there is a factual basis for the plea. The standards further require that the record of the proceedings include the inquiry into the accuracy of the plea. See Standards Relating to Pleas of Guilty, Approved Draft, 1968, § 1.6, p. 30, and § 1.7, p. 34. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, decided February 11, 1971, we said the Standards Relating to Pleas of Guilty should be the minimum procedure for the taking of guilty pleas in this state.

Although the trial court is not required to determine that there is a factual basis for a plea of guilty by inquiring of the defendant, that may be the most satisfactory method in many cases. See McCarthy v. United States, 394 U. S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418. Inquiry of the county attorney or examination of the presentence report have been suggested as alternative methods in a proper case.

The record in this case suggests that the trial court relied upon defense counsel in determining that there was a factual basis for the plea. At the hearing on May 17, 1971, the trial court questioned the defendant's counsel as to whether he thought and believed the defendant was guilty at the time of the hearing on March 25, 1971. Although the defendant's counsel did not respond directly, his remarks implied that he had believed the defendant was guilty.

Reliance upon defense counsel as a method to determine the accuracy of the plea has been disapproved. See, United States v. Cody, 438 F. 2d 287 (8th Cir.); United States v. Tucker, 425 F. 2d 624 (4th Cir.). In the Tucker case the court said: "Nor do generalized admissions or statements by a defendant's counsel meet the requirement that the court be satisfied that there is a factual basis for the plea from the defendant's own admission that he engaged in conduct which constitutes the charged offense."

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion in this case.

It has long been the rule that an information must be sufficiently definite to apprise the accused of the specific nature of the offense with which he is charged. The defendant had the information served upon him and the statute read to him. He was thereby apprised

of the exact act with which he was charged and of the provision of the statute he was alleged to have violated. In addition, he had retained counsel of his own choosing and was undoubtedly fully advised of all the pertinent circumstances and law. Defendant, under these conditions, elected to enter a plea of guilty and entered into a plea bargain with the county attorney whereby the county attorney agreed to and did dismiss another pending charge. Experience with this type of case has demonstrated that after the county attorney has fulfilled his part of the bargain by dismissing additional charges, the defendants all too often feel that they are then in a position to renege on a plea of guilty. Such was obviously the case here. A defendant who voluntarily enters a plea of guilty under circumstances similar to the present one does so knowingly and voluntarily. He is fully aware of the exact acts charged as comprising the crime alleged and his plea of guilty is a direct admission that he did actually perform those acts. For the court to be required to inquire further into the facts pertaining to the offense would be to require a superfluous act and verges on the ridiculous.

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

STATE OF NEBRASKA, APPELLEE, V. LEON E. FELLMAN, APPELLANT.
193 N. W. 2d 775

Filed January 28, 1972. No. 37955.

1. **Criminal Law: Evidence: Trial.** Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only where the jury could properly find guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Trial: Witnesses: Courts.** The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the trial court.
3. ———: ———: ———: ———: ———. In a criminal prosecution where a State witness testified to hearsay on cross-

examination, discretion over objection to permit hearsay on redirect examination is limited.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

John J. Powers, for appellant.

Clarence A. H. Meyer, Attorney General, and E. D. Warnsholz, for appellee.

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

SMITH, J.

A dentist, Leon E. Fellman, participated in the Medicaid Program for welfare patients. In that connection an information charged him with obtaining money from the State by false pretenses. A jury found him not guilty on Count I and guilty on three counts. Fellman appeals. He asserts insufficient evidence to prove criminal intent and error in admission of evidence concerning his other Medicaid transactions.

The program theoretically followed these general lines. An indigent desiring dental treatment informed a county caseworker who referred him to his dentist. After examination the dentist filled out a report form stating his recommendations and checking a fee schedule. The county forwarded a report with estimated fees of $250 or more to the State for authorization. After receiving authority, the county forwarded the certified report together with a claim form to the dentist. On the claim form the dentist stated completion of services on a designated date and the amount of his claim. It was paid by a State warrant.

The Douglas County welfare division, suspecting irregularities, requested assistance of the local dental society early in 1969. The society's president appointed a committee of three dentists to work with Hubert J. Wegener, D.D.S., and chief of the local dental health department. After some investigation the committee

was replaced by the society's ethics committee which was composed of other dentists.

Approximately 165 dentists were participating in the program. Committee examinations represented a random sample of possibly irregular cases of 100 dentists. Wegener in reviewing the examinations did not find excessive discrepancies overall.

Wegener or Frederick A. Breeze, D.D.S., and chairman of the ethics committee, examined the four patients named in the counts that went to the jury: Roosevelt Collier, Count I; and Marie Mendenhall, Deanna Wiksell Glessman, and Janet Bandy, Counts II, III, and IV.

The State in 1967 and early 1968 paid Fellman's claims for services rendered Marie, Deanna, and Janet. Fellman in fact had not rendered some of the services. Discrepancies still existed in 1969 when the investigation began.

Irene Richter testified as follows. Dental secretary of Fellman since 1959, she had been handling all paper work, filling out forms, and transcribing his notes for reports. When she laid forms on his desk for signature, she knew that some claims included unperformed services. The State limited performance time to 90 days, and obtaining extensions would increase her paper work. She believed that Fellman would complete the work.

Janet refused to return to Fellman because she had no confidence in him. Deanna consulted another dentist because her girl friend was his patient. Collier failed to return for a partial denture that Fellman had ordered, received, and paid for in due course.

Marie testified to a conversation with Fellman on her last visit: "He told me . . . that he was in a lot of trouble over this and would I tell them anything to get them off of his back. . . . He had told me to tell, couldn't I tell them that the teeth were there in May and I just didn't pick them up."

Fellman, age 62, testified as follows. The foregoing testimony of Marie was false. His practice had been

heavy, and the number of welfare patients had exceeded his original estimate. He relied on Irene: "Q. You have heard . . . (Irene) testify . . . to her putting forms on your desk for your signature . . .? A. Yes. Q. Was that the custom at the time? A. Yes. Q. You did sign this claim form for the dentures (for Marie) when actually the work had not been done . . .? A. Yes, sir. Q. Did you realize it at the time . . .? A. I don't know whether I did or didn't . . .. I should have realized it . . .." At no time did he intend to cheat or defraud the State.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). Criminal intent of Fellman was an issue for the jury.

The evidentiary questions arose during the testimony of Breeze, a witness for the prosecution, as follows. Each member of the ethics committee examined only part of the cases. On recross-examination counsel elicited this repetitive answer: The ethics committee, conducting no general investigation, had only investigated Fellman and two other dentists.

On subsequent redirect examination Breeze testified: "Q. . . . how many patients of Dr. Fellman did your committee or you examine? . . . (Objections) BY THE COURT: Overruled. You opened it up. A. 56. Q. 56? A. Yes. Q. Of those patients . . . did you arrive at a percentage of discrepancies between the amount of work billed for and the amount of work the dentist did? . . . (Objections) BY THE COURT: . . . We are talking about Dr. Fellman. Limit your question to Dr. Fellman. Q. Did you arrive during the general investigation of Dr. Fellman specifically as to a percentage of discrepancy between the . . . work billed . . . and the . . . work done, from your sample? . . . (Objections overruled) A. The frequency with which we found irregularities that we could not explain away in any fashion was 72 per cent

of the cases we examined. . . . In Dr. Fellman's cases specifically . . .." At the conclusion of Breeze' testimony defense counsel unsuccessfully moved for a mistrial.

The court instructed the jury: "To determine the intent of the defendant in this case, you are to examine all the evidence, facts, and circumstances appearing in the case which may throw any light upon the alleged intent of the defendant."

Prior use of similar inadmissible evidence may be governed by theories of estoppel or waiver of objection in advance. See 1 Wigmore on Evidence, §§ 15 and 18, pp. 304 and 321 (3d Ed., 1940).

The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court. See State v. McClelland, 72 N. D. 665, 10 N. W. 2d 798 (1943). In a criminal prosecution where a State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination is limited. See Karnes v. State, 111 Neb. 435, 196 N. W. 676 (1923) (by implication).

The recross-examination of Breeze opened nothing, but there is a broader ground for decision. The testimony was repetitive, unambiguous, and harmless. It had no tendency to discredit Breeze before the jury or to exonerate Fellman. The prosecution on redirect examination over objections nevertheless stigmatized Fellman with testimony that reeked of incompetency. The rulings on Fellman's objections represented an abuse of discretion.

On Counts II, III, and IV the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

The majority opinion holds that evidence showing discrepancies in 72 percent of the cases handled by de-

fendant under the Medicaid Program was erroneously admitted.

Defendant was charged with obtaining money by false pretenses, i.e., by submitting false claims for remuneration. The charge is one requiring proof of an "intent to cheat and defraud." The questions eliciting the evidence were objected to as calling for incompetent, immaterial, irrelevant testimony, and for insufficient foundation.

Irregularities in claims submitted for work done under the program were investigated by the Ethics Committee of the Omaha District Dental Society of which the witness was chairman. There were six members of the committee participating in the investigation. Three worked on Wednesday and three on Thursday. Patients were examined and dental work found compared with defendant's reports of work done. Statements were signed as to irregularities present or absent in each case. The witness did not personally check each patient or report. On completion of the review, defendant was present for a session with the committee and another review of his patients. It appears defendant was kept fully apprised of the work of the committee and of its findings. He knew or could readily ascertain the nature of the claims he had signed and submitted. He could ascertain from his own records the work done. Under such circumstances, findings of the committee regarding irregularities and the extent of them could not have taken him by surprise.

The defendant claimed that the irregularities with which he was charged, six in number, resulted from mistake and that he had no intent to cheat or defraud. Under the circumstances, evidence of other similar offenses was certainly relevant and material on the question of intent. See, State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87; State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203. Was it hearsay and consequently incompetent as held in the majority opinion? The hearsay rule has many

exceptions and the present trend appears to be to narrow the operation of the rule. One evidence of this is the Uniform Composite Reports As Evidence Act. See, §§ 25-12,115 to 25-12,119, R. R. S. 1943. The act provides that any written report *or finding of facts* prepared by a distinterested expert containing conclusions resulting wholly *or partly* from written information furnished by the cooperation of several persons acting for a common purpose shall be admissible when testified to by one of the persons making such report or finding, if, in the opinion of the court, no substantial injustice will be done the opposite party. Here the evidence is based on reports made by members of a disinterested committee acting for a common purpose. The result was testified to by one of the committee members, its chairman, who, in such capacity, was necessarily in charge of the work done.

The act provides broadly for cross-examination of all persons involved in the making of the report or finding. It further provides that notice must be given before trial of the intention to use such report or finding. No such notice was given in the present case, but this requirement is qualified by the following language: "* * * except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice."

The evidence is obviously reliable which nullifies, in this case, the principal evil inherent in hearsay evidence. The right of a full cross-examination is preserved by the act. The defendant was fully aware of the nature of the reports and findings by virtue of records available to him and of having reviewed them with the committee. Under such circumstances, no substantial injustice could result to the defendant by the waiver of notice and the admission of this evidence other than that it was simply additional evidence of guilt. Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672, in referring to the act stated: "The act referred to gives the trial judge discretion to admit

such evidence if the trial court finds that no injustice would result from the failure to give such notice."

Although no cautionary instruction limiting this evidence to the question of intent was given, none was requested and assignments of error do not refer to this proposition. In any event, such instruction is not required in the absence of a request for it. See, Osborne v. State, 115 Neb. 65, 211 N. W. 179; 23A C. J. S., Criminal Law, § 1325 (5), p. 843.

The questioned evidence was properly admitted and I would affirm the judgment of the trial court.

WHITE, C. J., and CLINTON, J., join in this dissent.

SHIRLEY ANN GOREE, APPELLEE, V. MERLE RAY GOREE, APPELLANT.
194 N. W. 2d 212

Filed February 4, 1972. No. 38017.

1. **Annulment of Marriage: Fraud: Infants.** If a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof.
2. **Divorce: Evidence: Pleadings.** No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed in part and in part reversed.

Joseph H. Dea and Homer E. Hurt, Jr., for appellant.

Kerrigan, Line & Martin, for appellee.

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

McCOWN, J.

In this proceeding, Shirley Ann Goree was granted a decree of divorce and the sum of $20 per week child support. The cross-petition of the defendant, Merle Ray Goree, praying for an annulment of the marriage was dismissed. He has appealed, asserting that the granting of the divorce and the failure to grant the annulment were both erroneous.

Plaintiff and defendant had gone together since the plaintiff was a freshman in high school. They had had repeated sexual relations prior to 1969. The defendant entered military service on August 3, 1967. He served overseas in Thailand from December 7, 1968, until December 2, 1969, except for a 30-day leave from May 15, 1969, until June 15, 1969, during which time he returned to Nebraska. Plaintiff and defendant had sexual relations during his leave. After June 15, 1969, he was in Thailand until December 2, 1969, when he returned to the United States assigned to duty at Offutt Field, Omaha, Nebraska. He arrived in Nebraska on December 4, 1969. On that date, plaintiff and defendant resumed sexual relations.

The evidence indicates that in January of 1970, the plaintiff told the defendant she thought she was pregnant and that he was the father. They also discussed the possibility of marriage. On April 8, 1970, the plaintiff wrote to defendant telling him that he was going to be a father. Thereafter the plaintiff and defendant made arrangements for marriage and were married on June 19, 1970, at Wisner, Nebraska. After the marriage, the defendant returned to his station at Offutt Field and the plaintiff returned to the dormitory of the school she was attending in Fremont, Nebraska. The child was born on July 12, 1970.

The defendant's direct testimony was that he believed the plaintiff's statement that he was the father, but when the child was born on July 12, 1970, he was convinced that the baby was born too early for him to be the

father. The doctor who delivered the child stated his opinion that the baby was a full term baby. His first examination was on June 29, 1970, and at that time he estimated delivery in the latter part of July. In response to a question as to whether the baby could have been conceived on December 4, 1969, he said that he "would doubt it." He stated the foundation for his doubt to be that conception on that date would have made the delivery approximately 5 weeks early and he saw no signs of prematurity, although he did not care for the baby after it was born.

There was evidence that prior to December 4, 1969, the plaintiff had stated that she thought she was carrying the child of another man. There is testimony which would indicate that the defendant knew of the plaintiff's relationship with that man as early as May 1970. There is also testimony which would indicate that the defendant doubted he was the father as early as January 1970, and, in any event before the marriage. At or shortly after the birth at the latest, the defendant knew that plaintiff had had sexual relations with the other individual. One more critical factual issue must be mentioned. The plaintiff testified and the defendant admitted on cross-examination that he had intercourse with the plaintiff on two different occasions after the birth of the child.

In the posture of this case, the issues involved in the defendant's cross-petition for annulment will be discussed first. Both parties rely upon the case of Zutavern v. Zutavern, 155 Neb. 395, 52 N. W. 2d 254. That case held that "if a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof." Here there is an issue as to the truth or falsity of the

statement relied upon. There is also conflicting evidence as to whether the defendant believed or relied upon the statement in any event. The trial court, who saw and heard the witnesses, resolved those issues against the defendant. Even assuming that plaintiff's statement was false and fraudulent and that the defendant married her in reliance on the statement, under the circumstances of this record his continued sexual relations with her after the birth of the child would constitute ratification of the marriage. See Zutavern v. Zutavern, *supra*. The court's action in dismissing defendant's cross-petition for an annulment was entirely correct.

Plaintiff in her petition for divorce charged the defendant with extreme cruelty. The plaintiff testified that defendant threatened her if she would not go along with him in giving him an annulment instead of a divorce because he wanted to marry a Catholic girl. She also testified that he repeatedly stated that he was not the father of the child. The defendant admitted and confirmed this statement in his pleadings and on the witness stand. Two witnesses testified that sometime in July, August, or September of 1970, on one occasion the witnesses heard plaintiff and defendant shouting or arguing in angry voices but could not hear what was said. This was the sole and only corroboration of any kind to establish the basic allegation of extreme cruelty.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." That statute, word for word, has remained unchanged since 1866. The purpose of the statute was to prevent obtaining divorces by collusion or fraud. See Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926. It may well be that the statute has generated more collusion and fraud than it may have prevented.

In several jurisdictions there are statutes which expressly or impliedly require corroboration. However, at common law and in the great majority of the jurisdictions, it is held that in the absence of a statute to the contrary, there is no hard and fast rule requiring that there be corroboration of plaintiff's testimony concerning the ground for divorce. See Annotation, Necessity and Sufficiency of Corroboration of Plaintiff's Testimony Concerning Ground for Divorce, 15 A. L. R. 2d 170.

The variance in judicial rules adopted by the courts in the absence of statute suggests the wide variety of possible statutory or judicial solutions. The corroborative evidence statute involves issues which are clearly policy matters for legislative determination. The fact that the present statute has been in effect for over 100 years might well suggest a reexamination by the Legislature. Legislative divorce policy of an era before Nebraska became a state may or may not reflect her modern mood.

The trial court here reached a practical and reasonable solution. We are reluctant to upset that determination and to blot out a logical view of practical reality, but the statute leaves us no alternative. That portion of the judgment dismissing defendant's cross-petition is affirmed. The judgment granting plaintiff an absolute divorce is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

JOHN H. RUDDER, APPELLEE, V. AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, A FOREIGN CORPORATION, APPELLANT.
194 N. W. 2d 175

Filed February 4, 1972. No. 38019.

1. **Insurance: Contracts: Statutes.** Where an applicable statutory provision conflicts with the provisions of the insurance policy, the statute and not the insurance policy controls.

2. ———: ———: ———. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
3. ———: ———: ———. Rules of interpretation are resorted to for purpose of resolving an ambiguity in the statute, and not of creating it.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Merritt E. James, for appellant.

A. James McArthur, for appellee.

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

WHITE, C. J.

Plaintiff brings this action for a declaration of his rights and defendant's responsibilities under a policy of motor vehicle liability insurance issued to the plaintiff by the defendant, and certified under the Motor Vehicle Safety Responsibility Act, Chapter 60, article 5, R. R. S. 1943. This controversy was initiated when the defendant denied coverage for an accident, relying on an exclusionary clause of the policy. The district court rendered judgment on the pleadings in favor of the plaintiff, ruling that the exclusionary clause was without legal effect. We affirm the judgment of the district court.

The pleadings show that the policy, certified under the Motor Vehicle Safety Responsibility Act, was issued to the plaintiff on December 9, 1969. On January 11, 1970, plaintiff was involved in an accident for which claims for damages were made against him. At the time of this accident, plaintiff was driving a vehicle owned by his brother, members of the same household. The defendant denied coverage for the accident, relying on Section V c 1 of the policy, which provides: "This insuring agreement does not apply: 1. to any automobile owned by or hired, furnished or available for the

regular use of such named insured, spouse or any resident of the same household."

The exclusionary clause of the policy is in conflict with section 60-535, R. R. S. 1943, which provides: "Such motor vehicle liability policy shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him * * *." Where such an applicable statutory provision conflicts with the provisions of the insurance policy, the statute and not the insurance policy controls. Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179; State Farm Mut. Auto. Ins. Co. v. Pierce, 182 Neb. 805, 157 N. W. 2d 399.

The defendant seeks to avoid this result on the theory that section 60-535, R. R. S. 1943, was not intended to apply to an owner's, as opposed to an operator's, motor vehicle liability policy. Our attention is called to certain legislative history which is purported to signify that such a distinction was intended. We deem it necessary only to observe that in 1965 the Nebraska Legislature amended section 60-535, R. R. S. 1943, by substituting the opening and closing phrases, "such motor vehicle liability policy," for the prior phrases, "such operator's policy of liability insurance." It would thus appear that any distinction which may have existed between owners' and operators' policies was eliminated by the 1965 amendment.

The statute involved, section 60-535, R. R. S. 1943, is clear and unambiguous. It was designed to implement and effectuate the strong public policy considerations present in the Motor Vehicle Safety Responsibility Act, Chapter 60, article 5, R. R. S. 1943. By its terms and on its face, the statute clearly requires no interpretation. It obviously is directed toward the public protective purposes of the Motor Vehicle Safety Responsibility Act. Its mandatory requirement as to the breadth of the coverage implements this purpose. No rule of law is more

firmly established than the one that where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Contrary to the position of the defendant, a statute is not available for a construction as a matter of course, and if it is unambiguous, there is no room for construction. The court may not search for a meaning beyond the statute itself. Rules of interpretation are resorted to for purpose of resolving an ambiguity in the statute, and not of creating it. The rules of statutory construction, sought to be resorted to by the defendant, are not applicable. Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794; Peck v. Dunlevey, 184 Neb. 812, 172 N. W. 2d 613; State v. Sabin, 184 Neb. 784, 172 N. W. 2d 89.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

EDMUND HOLLSTEIN ET AL., APPELLEES, V. KENNETH D. ADAMS ET AL., APPELLANTS, IMPLEADED WITH UNITED STATES OF AMERICA ET AL., APPELLEES.

194 N. W. 2d 216

Filed February 4, 1972. No. 38030.

1. **Judicial Sales: Notice: Words and Phrases.** A judicial sale advertised for the front door of the courthouse may be held at the front of the steps on the first floor inside the courthouse.
2. **Judicial Sales: Notice: Words and Phrases: Time.** If a publication day falls upon a holiday, publication the preceding day in a weekly newspaper complies with the statutory requirement that publication be had upon the same day of the week as the first publication.
3. **Judicial Sales: Notice: Mortgages: Foreclosure.** A mortgagor in a foreclosure proceeding is not entitled to personal service of the published notice of sale.
4. **Judicial Sales: Courts.** Confirmation of a judicial sale is within the discretion of the trial court.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Charles A. Fisher and Charles F. Fisher, for appellants.

Edmund Hollstein, for appellees Hollstein.

Richard A. Dier, John A. Gale, Wade H. Ellis, Laurice M. Margheim, and Bump & Bump, for appellees United States of America et al.

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

SMITH, J.

The district court in this proceeding to foreclose a real estate mortgage confirmed the sale of the mortgaged property. The mortgagors, Kenneth D. and Anna R. Adams, appeal. They assert (1) noncomformity between the place of the sale and the place advertised, (2) irregular publication of the notice of sale, (3) absence of service of the notice upon them, and (4) inadequacy of the sale price.

The notice of sale was published in a weekly newspaper on November 25, December 3, 10, 17, and 24, 1970. The Thanksgiving holiday that year fell on November 26, the regular day of publication. The notice advertised the place of sale to be the front door of the county courthouse. No copy was served upon the Adamses, who were husband and wife.

Kenneth attended the sale. Cold weather caused the sheriff at the specified time to move the place of sale to the front of the steps on the first floor inside the courthouse. He received two bids, James Prokop submitting the higher bid. At the confirmation hearing the evidence of value was conflicting. No one submitted an upset bid.

A judicial sale advertised for the front door of the courthouse may be held at the front of the steps on the first floor inside the courthouse. See § 25-1536, R. R.

S. 1943; cf. Seymour v. Lawson, 111 Neb. 770, 197 N. W. 623 (1926).

If legal notice is required to be published more than 1 week, publication "shall be upon the same day of the week as the first publication." § 25-2228, R. R. S. 1943. The provision is not mandatory. If a publication day falls upon a holiday, publication the preceding day complies with the statute. Section 25-1529, R. R. S. 1943, requires notification in order to inform the public of the nature of the property, place, date, and terms of the sale. See Farmers Security Bank v. Wood, 132 Neb. 175, 271 N. W. 349 (1937). It is satisfied by substantial compliance. The complaint of the Adamses in this respect is not well taken.

A mortgagor is not entitled to personal service of the published notice of sale. See § 25-520.01, R. R. S. 1943. The statutory provision applied to the Adamses.

Confirmation of a judicial sale is within the discretion of the trial court. Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417 (1969). In the present proceeding the trial court acted well within its discretion.

The order of confirmation is affirmed.

AFFIRMED.

BERNARD F. BISHOFF, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. HERMAN PIEPER, AS MAYOR AND A MEMBER OF THE CITY COUNCIL OF HARVARD, NEBRASKA, AND AS AN INDIVIDUAL, ET AL., APPELLEES.
194 N. W. 2d 177

Filed February 4, 1972. No. 38047.

Pleadings: Evidence. Where a party affirmatively pleads the existence of a fact material to the issue, he assumes the burden of proving such fact.

Appeal from the district court for Clay County: NORRIS CHADDERDON, Judge. Affirmed.

Robert E. Paulick, for appellant.

John A. Bottorf and David J. Maser, for appellees.

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

NEWTON, J.

This is an action instituted by a resident taxpayer of the city of Harvard, Nebraska, against the city, the mayor, members of the city council, and the trustees of the William A. Farmer estate. Its purpose is to recover for the city and the trust the funds expended in paving a street or road on the eastern boundary of Harvard. Judgment was entered for defendants. We affirm the judgment of the district court.

This record fails to reveal whether the road in question is within, partly within, or without the city limits. No city funds were expended on the road so the action must fail as to the city and its officers.

It is alleged that the will of William A. Farmer bequeathed funds in trust for the purpose of assisting in the paving of streets within the city of Harvard. There is no competent evidence disclosing the nature of the trust; nor, as pointed out, is there any evidence that the street or road paved lies outside the city limits. No breach of trust appearing, the action must also fail as to the trustees.

Where a party affirmatively pleads the existence of a fact material to the issue, he assumes the burden of proving such fact. See Sack v. Sack, 156 Neb. 171, 55 N. W. 2d 505.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE THOMAS BEVINS, APPELLANT.

194 N. W. 2d 181

Filed February 4, 1972. No. 38096.

1. **Criminal Law: Intoxication: Intent.** Ordinarily voluntary intoxication is no justification or excuse for crime, but excessive intoxication by which a person is wholly deprived of reason may prevent one from having the intent charged.
2. **Criminal Law: Guilty Plea: Trial: Attorneys at Law.** It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Thomas D. Carey, for appellant.

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

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

NEWTON, J.

This is a post conviction proceeding. Defendant was convicted several years ago of breaking and entering into a Hinky Dinky store in Omaha, Nebraska. He was represented by the assistant public defender and now claims he was inadequately and incompetently represented. The district court refused to vacate defendant's sentence. We affirm that judgment.

The record reflects that defendant and a brother were caught red-handed while attempting to enter a safe in the store and were apprehended in the building. Defendant states he was too drunk at the time to have the required intent to commit the offense and called this to his attorney's attention. He was informed that having been caught in the store, he did not have a chance and

would receive a lighter sentence if he pled guilty. This was also the advice of his brother and they did plead guilty. The attorney does not recall the case, but it was stipulated that he had a fine reputation as a defense attorney in criminal cases.

The brother states he had to get defendant very drunk by visiting several taverns before he would consent to assist in the burglary. The probation officer's report shows defendant informed him that defendant and his brother had been driving around when they decided to burglarize the store. It is at complete variance with the brother's evidence.

There is also evidence of a police officer that when he entered the store, defendant and his brother ran from the front to the back, then up and down behind a counter, and finally into a back room and thence to the basement. He saw no evidence of intoxication.

Defendant had been previously convicted of a rape-robbery and of auto theft. His brother has six felony convictions.

Ordinarily voluntary intoxication is no justification or excuse for crime, but excessive intoxication by which a person is wholly deprived of reason may prevent one from having the intent charged. See Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761. The record here fails to sustain the contention of intoxication. It is highly questionable that it was even mentioned to defendant's lawyer. Certainly, the stories now told by the defendant and his brother are at complete variance to the one told by defendant to the probation officer soon after their arrest. Defendant then indicated the decision to commit the offense was one in which he participated and there is no mention of tavern-hopping, drinking, or intoxication. Lack of intoxication is verified by the arresting officer.

When men are caught in the actual commission of a crime and have no defense whatever, any competent lawyer will advise a plea of guilty and thereby seek a

more lenient sentence. There is no valid evidence of incompetence.

Furthermore, a lawyer is not required to be infallible. In McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763, it is stated: "It is no denigration of the right to trial to hold that *when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.*" (Emphasis supplied.)

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BUREN K. FULTON, APPELLANT.
194 N. W. 2d 187

Filed February 4, 1972. No. 38130.

Criminal Law: Appeal and Error: Fines. Where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

R. Stanley Ditus, for appellant.

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

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

SMITH, J.

Defendant pleaded guilty in county court to a charge of operating a motor vehicle upon public highways while he was under the influence of alcoholic liquor. The county court on March 13, 1971, imposed a fine of $100 and costs taxed at $22.50. It also revoked his operator's license for 6 months. Defendant voluntarily paid the

fine and costs, and surrendered his operator's license. On March 16 he perfected a purported appeal to district court. The county judge then returned the license to defendant. The district court dismissed the appeal. Defendant appeals.

Where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal. Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878 (1955).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THURMAN LITTLE COOK, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JACK RONALD TIMM, APPELLANT.

194 N. W. 2d 218

Filed February 4, 1972. Nos. 38139, 38147.

1. **Criminal Law: Burglary: Evidence.** While mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged.
2. ———: ———: ———. In order for a defendant's possession of stolen property to be sufficient to support a conviction, such possession must be recent, that is, not too remote in time from the crime.
3. ———: ———: ———. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
4. **Criminal Law: Trial: Aider and Abettor.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

Appeals from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison, Stanley A. Krieger, and Bennett G. Hornstein, for appellants.

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

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

SPENCER, J.

Defendants Thurman Little Cook and Jack Ronald Timm, along with Bobby Joe Young, were prosecuted and convicted for breaking and entering or entering without breaking an automobile. Cook and Timm were each sentenced to a term of 2 years imprisonment in the Nebraska Penal and Correctional Complex. They have perfected appeals to this court, predicated on the insufficiency of the evidence. We affirm.

Carl Edward Cull parked his automobile in a parking lot at Thirteenth and Douglas Streets in Omaha, Nebraska, at 12:30 p.m., February 1, 1971, and went to his place of employment. He told the attendant on duty that he was going to work until 8 p.m. The attendant told him that when he went off duty at 5:30 he would put the keys to the car either in the ashtray or above the visor. When Cull went for his car at 8:30 p.m., it was gone. He immediately started to walk back to his place of employment, and as he approached Fifteenth and Douglas Streets, three persons pulled up in his car and parked. Bobby Joe Young was driving the car. Defendant Cook was in the front passenger seat, and defendant Timm was in the back seat. The defendants got out of the car and started across Douglas Street to the north.

Cull stopped a police car which was cruising by and gave two officers the story. The police car then pulled up alongside the three men and the officers ordered them to stop. Defendant Cook kept on walking, and one of the officers went after him and brought him back to the

police car. As the police officers frisked the men, Cull's stereo tape deck, which had been in the glove compartment of his car, fell from under the jacket of one of the defendants. He thought it fell from defendant Cook's jacket, but one of the police officers testified that it fell from under defendant Timm's jacket. The keys to Cull's car were found on Bobby Joe Young. Both Cull and the police officer who testified stated that school papers and other articles were scattered throughout the car, indicating that it had been thoroughly ransacked.

Defendants' position seems to be posited on two points: A lapse of 8 hours between the parking of the car and the apprehension of the defendants; and an intimation that there is some question as to who had possession of the stolen property. In State v. Solano, 181 Neb. 716, 150 N. W. 2d 585, we held that while mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged.

Defendants imply that because 8 hours elapsed between the parking of the car and their apprehension, the possession of the stolen property is too remote within the Solano rule. The rule is that in order for a defendant's possession of stolen property to be sufficient to support a conviction, such possession must be recent, that is, not too remote in point of time from the crime. Giving defendants' argument its maximum reach, we interpret 8 hours as "recent" within the Solano rule. Actually, the jury could reasonably have inferred that the car was taken from the lot sometime after 5:30 p.m. when the attendant went off duty. The defendants were apprehended in possession of the stolen property at or near the scene of the crime, and the only logical inference from the evidence is that defendants' pos-

session of stolen property was continuous from the commission of the crime.

In their second point, defendants raise the question that there is a conflict in the evidence as to whether the tape recorder fell from under Cook's or Timm's jacket. Our answer is that it is immaterial in this case. There is sufficient evidence from which the jury might have inferred that defendants were present at the commission of the crime and participated in it. In Miller v. State, 173 Neb. 268, 113 N. W. 2d 118, we said: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto."

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 jury was fully instructed on aiding and abetting. In this case, the parties were caught in the immediate vicinity of the parking lot with the stolen property in possession of one of them, coupled with no explanation; with the additional facts that the car had been ransacked and that defendant Cook tried to take off across the street when they were ordered to stop and the officer had to go after him; and further that Young, who was one of the three parties, had the keys to the car in his possession.

We conclude that under the circumstances of this case, there were sufficient corroborating circumstances and evidence, beyond the mere naked possession of the recently-stolen property, to warrant the submission of the case to the jury and to sustain the verdicts of guilty in the case.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. REED, APPELLANT.
194 N. W. 2d 179

Filed February 4, 1972. No. 38173.

Criminal Law: Guilty Plea: Indictments and Informations. A plea of guilty induced by the filing of a habitual criminal charge 3 days before trial was not invalid where the defendant was represented by counsel and the circumstances show that the plea was voluntarily and understandingly entered.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

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

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for burglary upon a plea of guilty. He contends that the conviction should be reversed because his plea was coerced by the filing of a habitual criminal charge; the trial court failed to advise him of certain constitutional rights; and the trial court failed to ascertain that there was a factual basis for the plea.

At the arraignment on July 13, 1970, the defendant appeared with the public defender and pleaded not guilty. On January 22, 1971, 3 days before the case was set for trial, an amended information was filed which charged the defendant with being a habitual criminal. On January 25, 1971, the defendant appeared with private counsel, withdrew his plea of not guilty, and entered a plea of guilty to the burglary charge.

The plea was the result of a plea bargain. In return for the defendant's plea of guilty to the burglary charge,

the county attorney agreed to dismiss the habitual criminal charge, dismiss a separate burglary charge (referred to as Doc. 81, No. 435), and recommend a sentence of imprisonment for not to exceed 7 years. The terms of the plea bargain were disclosed in open court and the bargain was fully performed.

The defendant claims that his plea was involuntary because it was made to avoid the chance of a long sentence on the habitual criminal charge. This case is similar to North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, in which the defendant claimed that he was innocent but pleaded guilty to second degree murder in order to avoid the possibility of a death sentence. The United States Supreme Court held that such a plea was valid. See, also, Ford v. United States, 418 F. 2d 855 (8th Cir., 1969), 295 F. Supp. 1180; Meyer v. United States, 424 F. 2d 1181 (8th Cir., 1969); Hulett v. Sigler, 242 F. Supp. 705 (D. C. Neb., 1965).

Here the defendant was represented by counsel and the alternatives were discussed at length. The defendant's plea was the "product of a free and rational choice." North Carolina v. Alford, *supra.*

The fact that the habitual criminal charge was added by amendment just before the case was set for trial does not afford the defendant any basis for relief. It is within the discretion of the county attorney to decide whether such a charge should be filed, and the time of filing is of no consequence.

The plea was not involuntary even though induced by the filing of the habitual criminal charge. A threat or promise of illegal action may invalidate a plea, but a threat to prosecute when the facts warrant prosecution should not be considered coercive. Ford v. United States, *supra.*

The defendant did not admit that he was guilty of burglary, but did admit that he was found inside the building. Upon inquiry by the trial court, the county attorney stated that he believed he would be able to

obtain a conviction for burglary. The defendant's theory seemed to be that he would not be convicted upon trial because there was no evidence of a forced entry and nothing had been removed from the building at the time he was apprehended. These facts did not constitute a defense to burglary. Although it is the better practice to make a more complete inquiry into the factual basis for the plea, the record here is adequate to show that the trial court determined there was a factual basis for the plea.

The defendant complains that the trial court did not advise him specifically as to his privilege against self-incrimination, his right to trial by jury, his right to confront his accusers, and then obtain a waiver of each of these rights. The trial court did advise the defendant at length concerning his right to a jury trial or to a trial by the court; that no one could force him to plead guilty; and that no plea would be accepted which was not voluntary. The criteria is whether the defendant understood the relevant factors involved in a guilty plea. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The record here shows that the defendant's plea was voluntarily and understandingly entered.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN KECK, APPELLANT.
194 N. W. 2d 186

Filed February 4, 1972. No. 38197.

1. **Criminal Law: Sentences: Appeal and Error.** This court may reduce the sentence when in its opinion the sentence is excessive.
2. **Criminal Law: Sentences.** A technique for deterrence of crime is scaling of penal sanctions.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Joseph D. Martin, for appellant.

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

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

SMITH, J.

On pleas of guilty the district court sentenced Steven Keck to imprisonment as follows: Count I, 7 days for possession of cannabis; Count II, 2 to 5 years for sale of cannabis; Count III, 2 to 5 years for possession of "LSD," lysergic acid diethylamide; and Count IV, 2 to 5 years for sale of "LSD." The sentences were concurrent. Keck appeals. He assigns excessiveness of the sentences for error.

The offenses occurred in February and March 1971, and the court sentenced Keck on June 2, 1971. The controlling statutes were former sections 28-472.03, 28-472.04, 28-487, 28-489(1), 28-497, and 28-498, R. S. Supp., 1969. They prescribed imprisonment of not less than 2 nor more than 5 years for the offenses charged in Counts II, III and IV of the information against Keck.

We summarize a presentence report and a postsentence classification of Keck at the penal and correctional complex. Born June 21, 1952, he quit school after completing one semester of the 10th grade. He has been on good terms with his parents, who attend church regularly. He is single.

The prior conviction record of Keck listed two offenses: Minor in possession of alcoholic liquor and contributing to the delinquency of a minor. A judge of a court of limited jurisdiction had held Keck in contempt of court for calling the judge a derogatory name.

A counselor reported on Keck: ". . . he accepts the idea of furthering his education enthusiastically . . .. Prognosis: good."

A psychological evaluation of Keck read: "There is

evidence of an emotional shallowness in his relationship to others. Keck is relatively free of conflicts and does not show anxiety until actually in serious difficulty. His behavior has been characterized by lack of concern and anxiety about potential dangers and punishments. Keck is further characterized by easy morals, readily circumvented conscience, and fluctuating ethical values. . . . He can easily become hostile and aggressive in his behavior towards others with little or no sense of guilt. Often he behaves . . . as if social regulations did not apply to him. . . . His powers of reasoning seem adequate and no clinical defects in judgment are evident. . . . Prognosis is fair, but questionable."

This court may reduce the sentence when in its opinion the sentence is excessive. § 29-2308, R. R. S. 1943; State v. Dixon, 186 Neb. 143, 181 N. W. 2d 250 (1970). A technique for deterrence of crime is scaling of penal sanctions. State v. Pope, 186 Neb. 489, 184 N. W. 2d 395 (1971).

The psychological evaluation with all the other circumstances is insufficient for us to classify Keck a danferous offender. We decrease the sentences on Counts II, III, and IV to imprisonment for 2 years. The sentences on the four counts remain concurrent. So modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissents.

NEWTON, J., concurring.

I concur in the opinion of Smith, J. Defendant was convicted and sentenced under section 28-472.04 (3), R. S. Supp. 1969, which fixed a penalty of not less than 2 nor more than 5 years imprisonment. The penalty has since been reduced to not less than 1 nor more than 5 years. See § 28-4,125, R. S. Supp., 1971. In view of the statutory change and the fact that defendant's previous record was good, a reduction in the sentence imposed appears justified.

STATE OF NEBRASKA, APPELLEE, V. VINCENT P. MELVIN, APPELLANT.
194 N. W. 2d 178

Filed February 4, 1972. No. 38218.

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

Appeal from the district court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

John E. Dier, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Gary R. Welch, for appellee.

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

BOSLAUGH, J.

The defendant, Vincent P. Melvin, and John G. Ryan were convicted of burglary upon pleas of guilty. The charges arose out of an offense on May 14, 1971, in which both men participated.

The defendant was sentenced to imprisonment for 1 to 2 years. Ryan was sentenced to imprisonment for 1 year. The defendant appeals, claiming that his sentence was excessive and should not have exceeded that imposed on Ryan.

In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused. In this case, the defendant's record of previous offenses justifies a more severe sentence than that imposed on Ryan.

Ryan had been fined for disorderly conduct, disturbing the peace, petit larceny, speeding on two occasions, and driving without an operator's license. On March 4, 1971, he had been placed on 6 months' probation for

breaking and entering an automobile.

The defendant had been charged with writing insufficient fund checks on three occasions and had been sentenced to jail on two occasions for periods of 7 days and 30 days. In January 1971, he was sentenced to jail for 4 months for burglary and placed on probation for 1 year for destruction of property. Apparently, the present offense was committed only a short time after he had been released from jail on the previous burglary charge.

The record does not show an abuse of discretion. The judgment of the district court is affirmed.

AFFIRMED.

MARY CORNELIA MARCUS, APPELLANT, V. MR. AND MRS. JAMES D. HUFFMAN, APPELLEES.
194 N. W. 2d 221

Filed February 10, 1972. No. 37995.

1. **Parent and Child: Infants.** The custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. ———: ———. Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by that relationship or has forfeited that right.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Corrigan, Dowd & Naviaux, for appellant.

Robert T. Finn, for appellees.

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

MCCOWN, J.

This is a habeas corpus action in which the petitioner,

Mary Marcus, sought to recover possession of her infant son, Lawrence William Marcus, from the respondents, Mr. and Mrs. James D. Huffman. The district court for Holt County determined that Mr. and Mrs. Huffman should have custody of the child, denied the writ, and dismissed the case. The mother has appealed.

Petitioner Mary Marcus was married to one Tommy Marcus in California on October 13, 1967. Tommy Marcus is the son of Mrs. James D. Huffman, one of the respondents. Lawrence William Marcus, the child who is the subject of this controversy, was born on May 11, 1969. Andrew, an older illegitimate son of Mary Marcus, was adopted by Tommy Marcus after the 1967 marriage. On January 24, 1969, and prior to the birth of Lawrence William Marcus, Mary Marcus began divorce proceedings against Tommy Marcus in the Superior Court for San Diego County, California. Efforts at reconciliation under court supervision and otherwise followed and continued up to and after the birth of Lawrence. Some time prior to June 15, 1969, in connection with one of the efforts at reconciliation, Tommy Marcus made arrangements with his mother, Mrs. Huffman, to take the two children to Nebraska for a time while the Marcuses attempted reconciliation once more. They hoped thereafter to come to Nebraska and establish a home for themselves and the children. On June 15, 1969, James D. Huffman flew to Los Angeles. Mary Marcus and Tommy Marcus delivered the two children to him in the Los Angeles airport together with their clothing, and Mary Marcus advised him of the feeding habits of the children. James D. Huffman then brought both Marcus children back to O'Neill, Nebraska, together with a third child unrelated to any of them. Andrew Marcus at that time was a little over 3 years old and Lawrence was only a month old. The reconciliation efforts failed in approximately 2 weeks. Mary Marcus then borrowed some money from her mother and drove to O'Neill, Nebraska, with her 14-year-old sister

to get the children. They arrived on July 3, 1969. She went to the trailer house of the Huffmans in O'Neill, Nebraska, where she found Andrew playing in the yard and picked him up. She went into the house and told Mrs. Huffman that she had come for her children. Mrs. Huffman told her she could not have them, but she took Andrew anyway and started to drive back to her motel. She was arrested by the sheriff who advised her that she could be charged with kidnapping, but she was permitted to call her attorney in California. After some undisclosed discussions, the sheriff advised her that Mrs. Huffman had agreed that she could take Andrew but that she would be charged with kidnapping if she attempted to obtain Lawrence. Mary Marcus attempted to employ counsel in O'Neill, but was unable to do so. She then returned to California with Andrew.

On July 30, 1969, an interlocutory decree of divorce was entered by the Superior Court for San Diego County, California. That decree awarded Mary Marcus the care, custody, and control of the two children, restrained Tommy Marcus from having any contact with the minor children, and specifically provided that he should have no rights of visitation without specific order of the court. Final decree was entered July 22, 1970.

Mary Marcus testified that she telephoned on several occasions to inquire about the health of her son and to request his return. She had to leave messages at the trailer court for Mrs. Huffman to return the calls because she could not obtain the telephone number from the operator. Mr. Huffman testified that the Huffman telephone was changed to an unlisted number in June or July of 1969, because they had received many calls where there was only breathing on the other end of the line when they answered. Mary Marcus' telephone calls to the Huffmans were never returned or answered. She also wrote letters to the Huffmans on several occasions and telegraphed on several occasions. There was no response to her letters or telegrams. Mary Marcus sent

several gifts to Lawrence which were received by the Huffmans but there was no acknowledgment of them to her.

This action was begun on September 1, 1970, and order entered directing the issuance of the writ for production on September 4, 1970. Mary Marcus Townsend again came to Nebraska for the hearing on September 4, 1970, but the Huffmans had previously departed with Lawrence for a vacation in Arkansas. She returned again in October for this hearing.

At an undisclosed age somewhere between 11 and 14, Mary Marcus attempted suicide by slashing her wrists. At approximately age 16, she was kept in a juvenile home for 2 or 3 days for possession of a marijuana cigarette. At age 16, she became the mother of Andrew, an illegitimate child. She lived with Tommy Marcus before their marriage on October 13, 1967, when she was 17 years old. After the birth of her first child, she completed her high school education at an adult public high school in San Diego. This history of Mary Marcus' background prior to her marriage to Tommy Marcus comes solely from the testimony of Mary Marcus.

The only testimony other than her own relating to Mary Marcus' fitness to have the custody of her child came from Mr. Huffman. Mr. Huffman testified that on one occasion, a week or two after the birth of Lawrence when the Huffmans were visiting in the home of the Marcuses in May 1969, Mrs. Huffman got up and fed the baby and Mary Marcus stayed in bed until afternoon. On another occasion, Mary Marcus left the two children for approximately 20 to 30 minutes while she attempted to get Tommy Marcus to assist in caring for them. Mary Marcus married her present husband Richard Townsend, in Mexico on February 29, 1970, before the entry of her final decree of divorce, and remarried him in California on August 11, 1970.

The evidence is clear that Andrew, the older son of Mary Marcus, was clean, well-behaved, well-dressed, and

well-fed. Mr. Huffman conceded that was true in June of 1969, at the time he took possession of the children. At the time of trial in the fall of 1970, Andrew was approximately 4½ years old, and still in the custody of his mother. The evidence is undisputed that the apartment of the Townsends in California is adequate and attractive. Mr. Townsend is employed as a truck driver. Mary Marcus Townsend is a long distance telephone operator.

The evidence is also undisputed that the trailer house of the Huffmans is adequate and attractive and that they have provided a good home for Lawrence. Mr. Huffman was a construction inspector for the Bureau of Reclamation in the power transmission division. The evidence does indicate that Mr. Huffman is gone from home approximately 50 percent of the time except on weekends. The neighbors in O'Neill who testified had known the Huffmans for approximately 2 years. The Huffmans were married in 1963. Mrs. Huffman was divorced from a prior husband in 1961 or 1962, and had a daughter who was 10 years old at the time of trial.

Certain related and collateral facts are material and relevant. In the fall of 1969, the Huffmans filed a petition for their appointment as guardian of the person and property of Lawrence Marcus in the county court of Holt County, Nebraska. Decree was entered and appointment was made. Mary Marcus received no notice of the proceedings and none was published. Sometime in 1970, the Huffmans filed a petition for adoption. The grounds for adoption were abandonment. The petition, verified by James D. Huffman, contrary to his testimony in this action, asserted that Lawrence Marcus had been abandoned in the Los Angeles police department, and that Mr. Huffman had acquired him there. No relinquishment was filed from either parent. The adoption proceeding was later dismissed.

It is also noteworthy that Mrs. Huffman, although present in court for 2 days of the hearing, did not testi-

fy nor did Tommy Marcus testify although his actual appearance in court is not reflected by the record.

The district court found that Mary Marcus had not taken a real interest in her child as a natural mother would or should; that she had forfeited her preferential right to the custody of the child; and that she was not a fit and proper custodian for the child. The court thereupon denied the writ of habeas corpus and dismissed the case.

There is no question but that the governing rule is that the custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581.

Counsel for the respondents have vigorously asserted that because this is a habeas corpus action, the petitioner has the burden to establish fitness to perform the duties imposed by the parental relationship, even though the petitioner is the parent. They also argue that a parent must establish that the best interests of the child will be better served by the parent than by strangers. We cannot agree.

It is clear from our decisions over a long period of time that courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by that relationship or has forfeited that right. Ball v. Ball, 180 Neb. 145, 141 N. W. 2d 449; Hausman v. Shields, *supra*.

The respondents argue that the teenage premarital conduct here makes Mary Marcus permanently unfit to have custody of a child. That argument is unsupportable. If such a position were to be adopted by the courts, millions of parents would stand in danger of having their parental rights challenged.

The argument also completely disregards the fact that the California court granted exclusive custody to Mary Marcus, who was continuously a resident of California

and still is. There is no evidence to warrant the upsetting or reversal of that decree. While the decree may not be binding upon a Nebraska court, it is at least entitled to due weight, even if it is not accorded full faith and credit.

The evidence here is wholly insufficient to establish an abandonment of her child by Mary Marcus, nor a forfeiture of her parental rights. She borrowed the money from her mother to make the first trip to Nebraska to reclaim her children less than 3 weeks after the children were first brought to Nebraska. She was arrested and threatened with a charge of kidnapping if she attempted thereafter to take her child. She was unable to retain counsel in O'Neill, Nebraska, and was forced to return to California with only one of her children. She continued in her efforts to regain her other child by telegraph, telephone, and letters and all were unsuccessful. Following her remarriage, with the assistance of her new husband, she was able to retain counsel in Omaha, Nebraska, and commenced this action. She was required to return to Nebraska twice more before she could obtain a hearing upon her petition.

Meanwhile, the Huffmans, who always knew who and where the child's parents were, had completed proceedings for guardianship of the person and property of Lawrence Marcus, without notice to Mary Marcus and without any parental consents or relinquishments from either Mary Marcus or Tommy Marcus. It might be said that Mary Marcus continued the fight to regain the custody of her child against imposing obstacles. To say the least, the evidence flatly contradicts any assertion of abandonment or voluntary forfeiture of her parental rights.

The facts and circumstances here would be wholly insufficient to justify the State of Nebraska in attempting to take the child from the custody of Mary Marcus in a juvenile proceeding. If the State of Nebraska could not remove the custody of her child because of her premarital conduct, certainly a stranger should stand in

no better position. Even if her delivery of the child to Mr. Huffman in June of 1969 were treated as an act of relinquishment performed under circumstances of distress or discouragement, her right to the custody of her child was not lost beyond recall. Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783.

The evidence here was simply insufficient to establish that Mary Marcus Townsend was unfit to perform the duties of a parent or that she had forfeited that right.

The judgment of the district court is reversed and the cause remanded with directions to grant the writ of habeas corpus and return the custody of Lawrence Marcus to Mary Marcus Townsend.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., participating on briefs.

SMITH, J., concurring.

The majority opinion discourages continuing controversies over child custody. I would adapt the Uniform Child Custody Jurisdiction Act generally for judicial use at least on the basis of comity. The adaptation harmonizes with the majority opinion which properly respects the California decree. I concur that Lawrence' needs for a stable environment and a secure family relationship require return to his mother. See, 1968 Handbook of the National Conference of Commissioners on Uniform State Laws, 198 (1968); Bodenheimer, "The Uniform Child Custody Jurisdiction Act; A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand. L. Rev. 1207 (1969).

This court has been vigilant to protect property rights of minor children. See, Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186 (1959), 174 Neb. 471, 118 N. W. 2d 764 (1962). It ought to be no less vigilant respecting their personal rights. I would promulgate this prospective rule: In a custody proceeding, the trial court must appoint counsel for minor children. See, generally, Coyne, "Who Will Speak for the Child?" 383 Ann. Am. Ac. Pol. & Soc. Sc. 34 (1969); Inka and Per-

retta, "A Child's Right to Counsel in Custody Cases," 5 A.B.A. Family L. Q. 108 (1971); Kleinfeld, "The Balance of Power Among Infants, Their Parents and the State," 4 A.B.A. Family L. Q. 320, 409 (1970), 5 A.B.A. Family L. Q. 1, 64 (1971).

BOSLAUGH, J., dissenting.

The trial court found that the petitioner, the natural mother, had forfeited her preferential right to the custody of Lawrence William Marcus and awarded the custody to Mr. and Mrs. James D. Huffman. Mrs. Huffman is the paternal grandmother of Lawrence. The majority opinion holds the evidence insufficient to sustain that finding and awards the custody to the petitioner.

The record in this case leaves much to be desired. This may be due in part to the fact that the petition was filed on September 1, 1970, while the respondents were in Arkansas on vacation. The respondents returned to Nebraska on September 20, 1970. The alias writ was served on Mrs. Huffman on September 23, 1970. The hearing commenced on October 6, 1970.

The petitioner's case consists entirely of her testimony. The respondent's case is largely the testimony of James D. Huffman. His testimony is corroborated in part by testimony of the other witnesses called by the respondents. It is significant that the trial court who saw and heard the testimony of the petitioner found against her.

The petitioner has a history of what might be described as serious instability. She freely admitted that she had lived with her former husband, the father of Lawrence, before they were married, and had married Richard Townsend in Mexico before her divorce was final. She claimed a misunderstanding of the terms of her California divorce, but continued to use the name Marcus long after the marriage in Mexico. As I view the record, the evidence sustains the finding of the trial court.

The record indicates that Lawrence, when first brought to Nebraska, appeared to be nervous and insecure. Dur-

ing the time that he has been with the respondents this condition has gradually improved and he now appears to be well adjusted and a normal child. The result of our decision in this case is to return Lawrence to an environment that is less than satisfactory. I do not agree that this satisfies his need for a stable environment and a secure family relationship.

SPENCER, J., joins in this dissent.

WHITE, C. J., dissenting.

I join fully in the dissent of Judge Boslaugh herein. This is a habeas corpus action between the mother and the paternal grandmother and her husband. The care and custody of Lawrence William Marcus was voluntarily granted by the mother prior to the time of both an interlocutory and final divorce decree in the State of California. Lawrence William Marcus has been in Nebraska and has been cared for in this state for a period of approximately 2½ years since that time.

I feel it is necessary that we keep clearly in mind the precise rules of law that this court has laid down applicable to this situation. It is sometimes difficult to distinguish betwen the rules applicable in a habeas corpus action of this nature and the closely related rules that apply in a divorce proceeding or otherwise found in custody proceedings in this state. These questions were resolved in Reed v. Reed, 152 Neb. 819, 43 N. W. 2d 161. In that case, the mother, in a habeas corpus action against the father and paternal grandparents, urged the finality of a Kansas divorce decree finding her a fit and proper person for the custody of her child and awarding the custody to her. After holding under the facts in that case the divorce decree was not entitled to full faith and credit in a habeas corpus proceeding in this state and the fact alone that the custody of a minor child has been awarded in an action in another state does not prevent inquiry into the question in a proper action by a court subsequently acquiring jurisdiction of the parties in this state, this court stated as follows: "To

give full faith and credit to the decree of the Wyandotte County district court in awarding the custody of the child to its mother in the case before us would be contrary to the laws and public policy of this state where the enforcement thereof is sought. There is a further reason that full faith and credit should not be given the Kansas decree awarding the custody of the child to its mother. The best interests of the child and its future welfare under all circumstances is the vital question in the case and is superior to all other considerations where the question is raised upon a writ of habeas corpus."

In the Reed case, and in numerous cases following and affirming its holding, this court has consistently held that after the court's jurisdiction has been invoked by habeas corpus the child is a ward of the court and its welfare lies in the hands of the court. This power and responsibility is based upon the basic principle that the jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents, but has its origin in the protection that is due the incompetent or helpless. The historic jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the wishes of the parents, or the domicile of the child, but it arises out of the power that every state possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants.

The Reed case has never been overruled and has been followed successively in its various pronouncements with reference to the fundamental jurisdiction and duties of the court in the following cases, the latest of which was in 1971. They are as follows: Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846; Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581; Green v. Green, 178 Neb. 207, 132 N. W. 2d 380; State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615; Jones v. State, 175 Neb. 711, 123 N. W. 2d 633; Osterholt v. Osterholt, 173 Neb.

683, 114 N. W. 2d 734; Walker v. Gehring, 172 Neb. 398, 109 N. W. 2d 724; State ex rel. Hamilton v. Boiler, 159 Neb. 458, 67 N. W. 2d 426; Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525; Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383.

Of course, it is true, that the district court and this court are required to give due regard, as one of the considerations involved, to the natural rights of a mother who is a fit and proper person to have the custody and care of a child of tender years. It is further true, and this court has constantly reaffirmed the proposition, that the custody of a child of tender years cannot be wrenched away from a parent on the basis that somebody else can furnish a better home on a comparative financial basis. Nevertheless, we have adhered consistently to the rule, in a controversy for the custody of an infant of tender years in a habeas corpus proceeding, that the court will consider the interest of the child, and will make such order for its custody as will be best for its welfare, without reference to the mere wishes of the parties. Reed v. Reed, *supra.*

The majority opinion summarily reverses the discretion of the district court in this case, removes Lawrence William Marcus from a secure and loving home environment that he has been raised in for 2½ years since his early infancy, and sends him back to California without the retention of any power to supervise, to control, or to review the needs and the welfare of this small boy. In order to do so, under our decisions, it becomes necessary, and that is implicit in the majority opinion, to hold that the trial judge, who saw and observed the witnesses, and observed their demeanor and conduct in the courtroom, committed an abuse of discretion in retaining jurisdiction of this child for the time being and permitting it to remain with the people who have given it the love, attention, and care of a fine home during the

critical period when no one else was able or willing to do so.

The majority opinion is a persuasive and exhortatory appeal to a basic human emotion, the love and devotion of a mother for a child. However, an examination of the record in this case reveals significant facts directly relating to the welfare and best interest of Lawrence William, which indicate to me the good judgment of the district judge and demonstrate conclusively that he did not abuse his discretion in permitting the child to continue in the fine home with the loving care he is now getting, and retaining the court's jurisdiction to control and supervise the welfare of Lawrence William. Some of these facts are as follows: (1) Mary, the mother, is 20 years of age. What is her record of stability, responsibility, and morality since she reached the age of responsibility? (2) At the age of 16 she had her first child, illegitimate, born out of wedlock. (3) She was expelled from high school for having in her possession a drug. (4) It was necessary for the authorities to place her in a juvenile home not once, but twice; once for possession of drugs and once for running away from her home. (5) She lived with the father of Lawrence William, Tommy Marcus, before they were married and she has lived and resided with Richard Townsend, her present husband, during the period that she was married to Tommy Marcus, and for a long time before the final divorce decree on July 22, 1970. After knowing her present husband for a period of 1 month, she went to Mexico and engaged in a marriage ceremony with him in violation of the provisions of the California interlocutory decree. (6) Her present husband is 28 years of age and has been previously married; his wife was granted the divorce and given the custody of their minor child; he never sees this child; and does not make any child support payments toward the support of his own child. All of this appears from the mother's testimony herself. (7) Her first-born illegitimate child was only

in her possession, care, custody, and control for a period of 6 months during the first 2½ years of the child's life. (8) Lawrence William was born May 11, 1969; he has only been in her possession for a period of about 1 month since he was born. (9) By her own admission, she has attempted to commit suicide and demonstrated to the trial court the marks on her wrists resulting from that experience. (10) The evidence strongly supports the finding that during the period of about 1 month after Lawrence Williams' birth when she had possession of the child, he was not properly and adequately taken care of. She voluntarily relinquished the child to the Huffmans, and the evidence supports the finding that the child had a diaper rash, couldn't keep any food in his stomach, was unstable, was nervous, and was hyperactive. (11) The evidence, including medical, conclusively establishes that Lawrence William is a well-cared for, stable child and has developed into such after being with the Huffmans for the past 2½ years. It shows that from a highly nervous, "fussy," and unstable child, he has developed into a happy, normal child with all of the care, love, and attention of a fine home. There is testimony in the record and before the trial judge that the child's improvement since being with the Huffmans has been "fantastic" and that he is content and is secure. This testimony is corroborated by neighbors and friends of the Huffmans who have had an opportunity to observe the child during the period involved. The doctor's testimony in this case is that a change in environment would disturb Lawrence William. His testimony is to the effect that at the time he first saw the child on August 5, 1970, after the Huffmans brought him to O'Neill, he was hyperactive, nervous, and with excessive motion in his arms and legs. Friends and neighbors testified that since Lawrence has been with the Huffmans, he has become stable, is calm, and it appears to them that he is well-loved, well-nourished, and well-kept; and further that he was clean and

seemed to respond favorably to Mrs. Huffman, his grandmother.

In light of these circumstances, the record in this case falls far short of showing an abuse of discretion by the trial court in making the determination that it did. This is not a case of wrenching a child from a close and normal attachment to its natural mother that has developed over a period of time and granting the custody to some stranger merely because he is able to give it better, more convenient, and more luxurious surroundings. The disposition of the trial court was not on a comparative financial or comfort basis. It was directly related to the well-being and the best interest of Lawrence William, and based upon sound judgment with reference to the future of the child and the precarious nature of propelling it back into an unknown and previously unstable environment with a new "father" who fails to even support his own child. I am firmly of the conviction that considering the primary question before us, and that is the best interests of the child, the mother here has failed to demonstrate, under all of the circumstances, the minimum fitness from the standpoint of the stability of a proper home for a child, from the standpoint of a moral background, the capacity to adequately and physically take care of the child and give it the close attention and care a child of Lawrence Williams' age needs. In reaching these conclusions I am aided by the rule which we have unceasingly followed in this court, one particularly applicable in a child custody case, that a trial judge's discretion should not be interfered with except in rare circumstances in a custody proceeding because the trial judge saw and heard the witnesses, and observed their demeanor and conduct when testifying. His judgment in these circumstances should be given great weight and his discretion should not be overturned unless it appears to this court, on trial de novo, that the disposition was arbitrary,

capricious, unreasonable, and not supported by the evidence.

I am particularly fearful of the disposition and judgment in this case, because they make no recognition of the court's duty to supervise the prospective care of Lawrence William. Lawrence William is a ward of the court and his welfare lies in the hands of the court. Reed v. Reed, *supra*. The testimony of Mary Marcus, the relator, is entirely uncorroborated, furnished the court without even the appearance or the deposition of her present husband, Richard Townsend. No provision is made to retain the district court's power to order an independent investigation of her circumstances and home conditions in California through the welfare authorities, a device used by courts in order to properly exercise their jurisdiction in custody matters.

SPENCER and BOSLAUGH, JJ., join in this dissent.

CLINTON, J., concurring.

The record clearly shows without contradiction that care of Lawrence William Marcus was temporarily entrusted to the Huffmans and some 3 weeks later they unjustifiably and wrongfully refused to return the child to his mother. This refusal was without color of right.

The dissenting opinions pay lip service to the principles regarding the natural rights of the parent but completely disregard them. They imply the state is all-powerful as far as child custody is concerned.

If the dissents correctly state the law then if I should leave my child with a babysitter, the babysitter may if she wishes refuse to return my child to me and I must resort to habeas corpus, and the court may in such action determine the parent's fitness as compared with that of the sitter.

Habeas corpus is not the appropriate vehicle in which to make such a determination. The Huffmans should gain no right through their wrongful refusal. In cases such as this the only issue should be whether the refusal to deliver the child was wrongful.

It is tragic that this case has taken so long to come to a conclusion. This is in some meaure owing to the inability of the mother to procure counsel and legal service when her possession of her child was wrongfully denied her. Counsel who ultimately took the case and fought her battle and that of the child is to be highly commended.

Delay in cases of this kind is intolerable. Disposition of such cases should be given priority by the courts and all concerned.

JOHN B. HEAVICAN, APPELLANT, V. EUGENE ARTHUR HOLBROOK, APPELLEE.
194 N. W. 2d 208

Filed February 10, 1972. No. 38021.

1. **Courts: Instructions: Pleadings: Evidence.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
2. **Trial: Ordinances: Pleadings: Evidence.** A party must plead and prove the existence of a municipal ordinance in order to have the benefit of the ordinance.
3. **Traffic Controls: Motor Vehicles: Statutes: Ordinances.** In the absence of a statute or ordinance, the meaning to be given to a traffic control signal is that which a reasonably prudent motorist would understand and apply.
4. **Traffic Controls: Motor Vehicles: Negligence.** As a general rule, a motorist who enters an intersection when the signal is in his favor is entitled to continue through the intersection even though the signal changes after he has entered the intersection.
5. ———: ———: ———. A motorist intending to make a left turn at an intersection, where left turns are controlled by a separate traffic signal light, may enter the intersection on a favorable signal and complete the turn even though the signal changes after he has entered the intersection.
6. ———: ———: ———. A motorist intending to make a left turn, who would otherwise have the right-of-way over through traffic, may lose the right-of-way by stopping in the intersection and yielding the right-of-way to through traffic before completing the turning movement.

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

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellant.

Joseph Meusey of Fraser, Stryker, Marshall & Veach, for appellee.

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

BOSLAUGH, J.

This action arose out of an automobile accident. The jury found that neither party should recover. The plaintiff appeals. There is no cross-appeal. The assignments of error relate to the instructions to the jury.

The accident happened at about 9:15 p.m., on April 4, 1968, at the intersection of Dodge Street and Seventy-second Street in Omaha, Nebraska. Dodge Street runs east and west. Seventy-second Street runs north and south. The weather was clear and the streets were dry. The plaintiff was driving north intending to proceed on Seventy-second Street through the intersection. The defendant was driving south intending to turn left and proceed east on Dodge Street.

Both streets have multiple lanes, including left turn lanes, with opposing traffic separated by islands or medians. The intersection is controlled by traffic signals with lights which appear in this sequence: Red; red with left turning green arrow; green; and yellow.

On the south side of the intersection there are four lanes approaching the intersection. The extreme right lane is for traffic intending to turn right. The next two lanes are for through traffic intending to proceed north on Seventy-second Street. The fourth lane is for traffic intending to turn west onto Dodge Street. On the north side of the intersection there are three lanes approaching the intersection, a left-turning lane and two regular traffic lanes.

The amended petition alleged that the defendant was negligent in failing to keep a proper lookout; in failing to keep his automobile under proper control; in turning in front of the plaintiff without ascertaining whether it was safe to do so; and in making a left turn contrary to section 35.28.150 (e) of the Omaha ordinances.

The answer alleged that the plaintiff was negligent in failing to maintain a proper lookout; in failing to maintain reasonable control of his automobile; in entering the intersection when the traffic light was red; in failing to yield the right-of-way to the defendant; and in operating his vehicle at an excessive speed.

The plaintiff testified that he approached the intersection in the through-traffic lane second from the right; that the traffic light was green; that there was another automobile in the same lane 2 car lengths or more ahead of him; that after he had entered the intersection the defendant's automobile "darted" in front of him; that he swerved to the right and didn't have time to apply his brakes; that the impact occurred; and that he was injured.

The defendant testified that he approached the intersection from the north in the left-turn lane; that he used his left turn signal to signal his intention to make a left turn; that there were two or three cars ahead of him; and that the traffic light was red. When the traffic light changed to the green arrow, the automobiles ahead of the defendant entered the intersection and made left turns. The defendant followed these automobiles into the intersection and then stopped because the traffic light had changed to green for through traffic. After the traffic light had changed to red for northbound traffic, the defendant started to make his turn. The defendant first saw the plaintiff's automobile when it was 5 or 10 feet away. The front of the defendant's automobile was then in the through-traffic lane first from the right for northbound traffic. The evidence was in conflict and presented questions for the jury.

The plaintiff contends that the trial court erred in instructing the jury in reference to section 35.28.150 of the Omaha ordinances without also instructing in reference to the other ordinances relating to left turn traffic signals.

The general rule is that a party must plead and prove the existence of a municipal ordinance in order to have the benefit of the ordinance. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832. Here the plaintiff failed to plead or prove the ordinances relating to left turn traffic signal lights. As a consequence, the trial court had no duty to instruct the jury in reference to the ordinances.

The plaintiff further contends that the second paragraph of instruction No. 15, which read as follows, was erroneous:

"The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn."

The instruction given was based upon section 39-751, R. R. S. 1943, prior to its amendment in 1969 and 1971. See § 39-751, R. S. Supp., 1969, and § 39-751, R. S. Supp., 1971. At the instruction conference held in chambers, the plaintiff objected to instruction No. 15 and advised the trial court that he did not believe the second paragraph was applicable to the intersection involved in this case.

The effect of the instruction as given was to advise the jury that the plaintiff was required to yield the right-of-way to the defendant if the plaintiff had not entered the intersection and the defendant was in the intersection turning across the plaintiff's line of travel and had signaled his intention to turn. The instruction as given was misleading and not applicable to the facts

in this case unless qualified by other instructions to reflect the particular circumstances in this case.

The trial court instructed the jury generally in reference to the rules of the road at intersections controlled by traffic signal lights. None of the instructions given related specifically to the left turn traffic signal light at the intersection.

We have no statutes specifically relating to left turn traffic signal lights, but local authorities are authorized to regulate traffic by signaling devices. § 39-767, R. R. S. 1943. In the absence of a statute or ordinance, the meaning to be given to a traffic control signal is that which a reasonably prudent motorist would understand and apply. Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329.

The purpose of the left turn signal light here was to separate traffic turning left from through traffic. Thus, when the green arrow was lighted, traffic in the left turn lane was authorized to enter the intersection for the purpose of making a left turn. When the green arrow was not lighted, traffic in the left turn lane was not authorized to enter the intersection. The jury should have been instructed to this effect. It is the duty of the trial court to instruct the jury as to the issues presented by the pleadings and evidence. Zavoral v. Pacific Intermountain Express, *supra*.

As a general rule, a motorist who enters an intersection when the signal is in his favor is entitled to continue through the intersection even though the signal changed after he entered the intersection. Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251. The rule is applied generally to motorists entering the intersection on a left turn signal. Sibley v. Aetna Casualty & Surety Co., 163 So. 2d 464 (La. App.); Potts v. United States Fidelity & Guaranty Co., 135 So. 2d 77 (La. App.); Lasnetske v. Parres, 148 Colo. 71, 365 P. 2d 250. The right-of-way of the left turning motorist over through traffic entering on the green signal, however, exists only if the mo-

torist making the left turn entered the intersection on a favorable signal and the turning movement is continuous.

In this case the defendant testified that after the green arrow came on he followed two or three cars into the intersection but stopped because the green arrow was off and through traffic had entered the intersection. In Thomas v. Owens, 169 Neb. 364, 99 N. W. 2d 611, a case which arose out of a similar accident at the same intersection, this court said that the jury could find that a vehicle making a left turn, while moving very slowly and maintaining a position away from the line of travel of through traffic, had yielded the right-of-way to through traffic. The rule is applicable here where the defendant had stopped in the intersection and did not commence the turning movement until the plaintiff was entering or was about to enter the intersection.

Under the circumstances in this case, if the plaintiff entered the intersection on the green light, as he testified, he was not required to yield the right-of-way to the defendant who had stopped and yielded the right-of-way to through traffic. The failure to instruct with reference to the left turn traffic signal light permitted the jury to find that the defendant had the right-of-way over the plaintiff even if plaintiff had entered the intersection on the green light.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN J. MORITZ ET AL., APPELLANTS, V. GEORGE J. BUGLEWICZ ET AL., APPELLEES, GINN IOWA OIL COMPANY, INTERVENER-APPELLEE.
194 N. W. 2d 215

Filed February 10, 1972. No. 38039.

1. **Constitutional Law: Property: Eminent Domain.** The Constitution of Nebraska does not permit the taking of private property for a private use.

2. **Highways: Statutes.** A road established pursuant to section 39-1713, R. R. S. 1943, is a public road.
3. **Property.** Public policy favors the full utilization of land.
4. **Highways: Statutes: Constitutional Law.** Section 39-1713, R. R. S. 1943, which provides a procedure for establishing a public road to isolated land is constitutional.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart and Gerald P. Laughlin, for appellants.

Donald L. Knowles and Jerry M. Slusky, for appellees.

Gaines, Spittler, Neely, Otis & Moore, for intervener-appellee.

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

BOSLAUGH, J.

The Ginn Iowa Oil Company, the intervener, owns an irregular tract of land near Eighty-fourth and Frederick Streets in Omaha, Nebraska. The tract is bounded by Big Papillion Creek, land owned by the City of Omaha, and land owned by John J. Moritz and Marion J. Moritz, the plaintiffs. There is no access to any public road from the intervener's land, but at one point the land lies within approximately 5 feet of Frederick Street.

The intervener commenced proceedings under section 39-1713, R. R. S. 1943, to establish a public road across the plaintiff's property which would provide access to its land. The plaintiffs then commenced this action to enjoin the members of the County Board of Douglas County, Nebraska, from proceeding under the statute. The trial court found against the plaintiffs and they have appealed.

The issue presented is the constitutionality of the statute. The plaintiffs contend that the road which would be established would be for the private use of the intervener and would amount to a taking of the

plaintiffs' property for a private use. The Constitution does not permit the taking of private property for a private use. Welton v. Dickson, 38 Neb. 767, 57 N. W. 559; Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547.

Unlike the statute involved in Welton v. Dickson, *supra*, section 39-1713, R. R. S. 1943, provides for the establishment of a public road. Sections 39-1713 and 39-1716, R. R. S. 1943, provide specifically that the road established shall be a public road.

The fact that the intervener would be the principal user of the road does not make it a private road. "Whether a way be public or private does not depend upon the number of people who use it, but upon the fact that every one may lawfully use it who has occasion." Sherman v. Buick, 32 Cal. 241. See, also, State ex rel. Happel v. Schmidt, 252 Wis. 82, 30 N. W. 2d 220.

It is in the public interest that no land be unoccupied. Dillman v. Hoffman, 38 Wis. 559; Condry v. Laurie, 184 Md. 317, 41 A. 2d 66. The public policy that favors the full utilization of land, and supports the doctrine of ways of necessity, supports the constitutionality of the statute in this case.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GORDON MIDDLETON, APPELLANT.

194 N. W. 2d 568

Filed February 10, 1972. No. 38180.

1. **Criminal Law: Witnesses: Evidence: Juries: Appeal and Error.** The credibility of witnesses and the weight of evidence are for the jury to determine in a criminal case, and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.
2. **New Trial: Trial: Instructions: Appeal and Error.** The correctness of the ruling of a district court in giving or refusing in-

structions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

3. **Criminal Law: Sentences.** A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

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

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

CLINTON, J.

The defendant was tried and convicted by a jury on charges of possession and sale of a narcotic drug, cocaine, under the pertinent provisions of sections 28-451 to 28-472.06, R. S. Supp., 1969. Said sections have since been repealed and now have been replaced by the Uniform Controlled Substances Act, sections 28-4,115 to 28-4,142, R. S. Supp., 1971. Defendant was sentenced to concurrent terms of 3 to 5 years on each count.

Three issues are raised on appeal: (1) Sufficiency of the evidence to sustain the conviction; (2) refusal to give a requested instruction; and (3) excessiveness of the sentence.

We have carefully reviewed the record. The evidence is clearly sufficient to support the jury's verdict. The record presents only questions of credibility. These were for the jury to determine and resolve.

The issue of the refusal to give the requested instruction was not raised in the motion for new trial. The requested instruction did not pertain to an issue of proof of an element of the crime or defense, but only as to whether the testimony of a paid special investigator was to be weighed with more care than in the case of a wholly disinterested witness. The matter not having

been mentioned in the motion for new trial cannot be considered by this court. State v. Tolle, *post*, p. 823, 194 N. W. 2d 567.

The sentence imposed is severe but we cannot say it is excessive or the trial court abused its discretion. Sentence provided by the pertinent statute is "not less than two years nor more than five years." § 28-470, R. S. Supp., 1969. The defendant was sentenced on May 24, 1971. After his conviction and sentence the statute, as we have noted, was repealed and replaced. Under the new act the penalty for possession is 1 to 2 years. The penalty for distributing, which is the offense under the new statute corresponding to the crime of sale under the old, is 5 to 20 years. § 28-4,125(2) and (3), R. S. Supp., 1971.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM TOLLE, APPELLANT.
194 N. W. 2d 567

Filed February 10, 1972. No. 38182.

1. **Criminal Law: Evidence: Appeal and Error.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilty beyond a reasonable doubt.
2. **Motions, Rules, and Orders: New Trial: Appeal and Error: Instructions.** An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions.
3. ———: ———: ———: ———. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Joseph D. Martin, for appellant.

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

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

NEWTON, J.

A jury found defendant guilty of the unlawful sale of marijuana. He received an indeterminate sentence of imprisonment for 2 to 5 years. We affirm the judgment of conviction but reduce the sentence.

As assignments of error, defendant charges the evidence is insufficient to sustain the conviction, the failure to give a requested cautionary instruction regarding the testimony of private detectives, and excessiveness of the sentence.

The evidence was conflicting but two witnesses testified to the sale of marijuana by the defendant. A jury question was presented which was resolved unfavorably to defendant. We cannot agree that the evidence was materially lacking in probative force. "In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270.

Defendant's motion for new trial assigns as error "errors of law occurring at the trial," but fails to mention the failure to give the requested cautionary instruction. Under such circumstances, this assignment cannot be considered on appeal. "An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions." Drucker v. Goscar, Inc., 184 Neb. 475, 168 N. W. 2d 534. See, also, Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231. "The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged

in the district court by motion for a new trial." Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224. See, also, Miller v. State, 173 Neb. 268, 113 N. W. 2d 118; State v. Gau, 182 Neb. 114, 153 N. W. 2d 298.

Defendant was convicted and sentenced under section 28-472.04 (3), R. S. Supp., 1969, which fixed a penalty of not less than 2 nor more than 5 years imprisonment. The penalty has since been reduced to not less than 1 nor more than 5 years. See § 28-4,125, R. S. Supp., 1971. In view of the statutory change and the fact that defendant's record was good prior to the commission of this offense, the sentence is modified or reduced to imprisonment for not less than 1 year nor more than 5 years.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF FARMERS IRRIGATION DISTRICT AND SUN OIL COMPANY FOR ENTRY OF A COMPULSORY POOLING ORDER AS TO PRODUCTION FROM GOVERNMENT LOT 3, SECTION 18, TOWNSHIP 22 NORTH, RANGE 53 WEST OF THE 6TH P.M., SCOTTS BLUFF COUNTY, NEBRASKA, IN THE NORTH MINATARE FIELD.

FARMERS IRRIGATION DISTRICT ET AL., APPELLANTS, V. LEO SCHUMACHER ET AL., APPELLEES.

194 N. W. 2d 788

Filed February 18, 1972. No. 37956.

1. **Oil and Gas: Statutes: Words and Phrases.** Chapter 57, article 9, R. R. S. 1943, contemplates that a determination of the correlative rights of adjoining owners in a pool of oil or gas shall be determined on a fair, reasonable, and equitable basis.
2. **Oil and Gas.** Correlative rights must be determined and fixed on the basis of circumstances present in each individual case.
3. ———. A pooling order allocating shares in the production of a well, and costs encountered, may be made retroactive when equity and justice require.

4. ———. Ordinarily an adjoining owner is not justified in awaiting the successful outcome of drilling operations before entering into a pooling agreement or applying for a pooling order.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. Reversed and remanded with directions.

Robert J. Bulger, for appellants.

Lyman & Meister, Howard P. Olsen, and Frank Glebe, for appellees.

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

NEWTON, J.

This case arises out of an application of the appellants, Farmers Irrigation District et al., to the Nebraska Oil and Gas Conservation Commission for entry of a compulsory pooling order as to oil production from Government Lot 3, Section 18, Township 22 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska, located in what is known as the North Minatare Field. The application was filed January 16, 1967, and asks that the pooling order be made retroactive to October 15, 1964, the date of commencement of production from a well, known as the White Feather Petroleum Company, Inc., Emery No. 2, drilled on Government Lot 3. The commission entered a pooling order; determined the allocation between the two separate leases which cover a separate portion of Government Lot 3; made the allocation effective as to all production subsequent to October 15, 1964; and charged the working interest owners in the two leases with their allocated shares of all drilling completion, storage, supervision, transportation, and other costs necessary to the well. The appellees appealed to the district court for Scotts Bluff County, which court after trial reversed the order of the commission and determined that the Farmers Irrigation District and its lessee, Sun Oil Company, did not prove the facts

and allegations contained in their application to the commission and that any minerals owned by the Farmers Irrigation District and its lessee "cannot be pooled." We reverse the judgment of the district court and remand the cause with directions to the district court to affirm the order of the commission.

The Farmers Irrigation District is the owner of a strip of land 150 feet wide extending across the south part of Government Lot 3. This strip appears to contain approximately 4.19 acres. Sun Oil Company holds an oil and gas lease covering this tract. No well was drilled thereon. The appellees, other than White Feather Petroleum Company, Inc., are the owners of the balance of Government Lot 3, containing about 43.92 acres. White Feather is the holder of the oil and gas lease on that tract. White Feather drilled a producing well in the approximate center of Government Lot 3 which became productive about October 15, 1964. On about December 22, 1964, Sun gave notice to White Feather and others of its lease and claimed a proportionate share of the production from the Emery No. 2 well. Appellees then disputed ownership of appellants' land and thereby questioned their right to any of the oil produced. This resulted in the filing of an action on August 27, 1965, to determine ownership of the land. The action was decided in favor of appellees and reversed on appeal to this court. See Sun Oil Co. v. Emery, 183 Neb. 793, 164 N. W. 2d 644, decided January 31, 1969. Proceeds of production from the well have been held back and distribution awaits the outcome of this litigation.

Two questions are presented. First, were the interests of the parties subject to "pooling"? Second, may the pooling order be made effective retroactively to the date production commenced?

A determination of these questions will require a determination of the purpose and intent of the Oil and Gas Conservation Act found in Chapter 57, article 9, R. R. S. 1943. The act was adopted in 1959. See Laws

1959, c. 262, p. 899. Discussions of the act on the floor of the Legislature are not available, but a transcript of the proceedings before the Committee on Public Works reveals statements made by E. C. Reed, State Geologist, and Ken Monroe, representative of the oil industry. Both supported the act. When asked for a definition of correlative rights, they answered as follows: "Mr. Reed: It is about the only thing that is going to give the landowner any degree of protection. It is open to different interpretations. It has to do with the protection of each man's rights as opposed to another's rights in a fair consideration of the rights of everyone. You are not protecting correlative rights if you let one producer take oil out from under the adjoining person's land indiscriminately.

"Mr. Monroe: It all goes back to the early days of the oil industry when the law of capture was the way you operated an oil field. It was soon learned that this was infringing on the rights of others who had a mutual interest in this field. Correlative rights means 'mutual interest.'"

It is clear that the Legislature understood the protection of "correlative rights," as provided in the act, meant a restriction of the old common law rule of "capture." To ascertain to what extent this was done requires a detailed consideration of the language contained in the act. It must also be borne in mind that under the law of capture, there were no restraints on the drilling of wells. He who drilled was entitled to the oil produced. To protect himself, a neighbor under whose land the pool extended had to, and could, drill his own well.

Referring now to the various sections of Chapter 57, article 9, R. R. S. 1943, we find certain pertinent provisions. Section 57-901, R. R. S. 1943, provides: "It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to au-

thorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; *and that the correlative rights of all owners be fully protected;* * * *.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined *and subject further to the enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom.*" (Emphasis supplied.)

Section 57-902, R. R. S. 1943, prohibits waste and section 57-903, R. R. S. 1943, defines one form of waste as follows: "* * * waste shall also mean the abuse of the correlative rights of any owner in a pool due to nonuniform, disproportionate, unratable *or excessive withdrawals of oil or gas therefrom causing reasonably avoidable drainage between tracts of land or resulting in one or more owners in such pool producing more than his just and equitable share of the oil or gas from such pool;* * * *." (Emphasis supplied.) This section also defines correlative rights as follows: "Correlative rights shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practicable to do so without waste, *his just and equitable share of the oil or gas, or both, in the pool;* * * *." (Emphasis supplied.)

Section 57-905 (4), R. R. S. 1943, confers authority on the Oil and Gas Conservation Commission to prevent waste and to regulate the drilling, producing, and spacing of wells.

Section 57-906, R. R. S. 1943, requires a permit from the commission before a well may be drilled.

Section 57-907, R. R. S. 1943, authorizes the commission to limit the production of oil and gas from each

pool to an amount that can be produced without waste and further provides: "Whenever the commission limits the total amount of oil and gas which may be produced in any pool in this state to an amount less than that amount which the pool could produce if no restriction was imposed, the commission shall allocate or distribute the allowable production among the several wells or producing properties in the pool on a reasonable basis, preventing or minimizing reasonably avoidable drainage from each developed area not equalized by counter-drainage, *so that each property will have the opportunity to produce or to receive its just and equitable share,* subject to the reasonable necessities for the prevention of waste." (Emphasis supplied.)

Section 57-908, R. R. S. 1943, provides: "(1) When required to prevent waste, to avoid the drilling of unnecessary wells, *or to protect correlative rights,* the commission shall establish spacing units for a pool, * * *. (2) The size and the shape of spacing units are to be such as will result in the efficient and economical development of the pool as a whole, and that size shall be the area that can be efficiently and economically drained by one well. (3) * * * the commission *shall include in the order suitable provisions to prevent the production from the spacing unit of more than its just and equitable share of the oil* and gas in the pool." (Emphasis supplied.)

Section 57-909, R. R. S. 1943, provides: "(1) When two or more separately-owned tracts are embraced within a spacing unit, * * * the commission * * * shall be empowered to enter an order pooling all interests in the spacing unit * * *. Each such pooling order * * * shall be upon terms * * * *that are just and reasonable,* and that afford to the owner of each tract or interest in the spacing unit the *opportunity to recover or receive, * * *, his just and equitable share.* Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order shall be deemed, *for all purposes, the conduct of such operations upon each sepa-*

rately-owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract * * * shall, when produced, be *deemed for all purposes to have been produced from such tract by a well drilled thereon.*" (Emphasis supplied.) This section also provides sharing of the expense of drilling and producing.

In conformity with the authority conferred on it by section 57-911, R. R. S. 1943, the commission adopted Rule 313, subsection (b) of which is as follows: "All wells drilled to sources of supply at estimated depths in excess of two thousand five hundred (2500) feet for which no spacing pattern has been established by existing wells shall be drilled *on 40-acre legal subdivisions or equivalent lots* and not less than five hundred (500) feet from the boundaries of said legal subdivisions." (Emphasis supplied.)

The pooling order requiring a pooling of the interests of appellants and appellees was entered in conformity with the requirements of the act and under the authority expressly conferred in sections 57-908 and 57-909, R. R. S. 1943, and allocated production as therein directed. We conclude that the pooling order was valid and enforceable.

The primary question is the second mentioned. Can the order allocating production be made retroactive to the date production commenced? Under the common law rule of capture, appellees would have been entitled to all oil produced and appellants only remedy would have been to drill its own well. With the adoption of the Oil and Gas Conservation Act, a landowner could no longer so protect his interest. It became necessary to get a drilling permit and the act contemplates that there shall be only one well if that one can adequately pump out the oil in the pool. Here the appellants are entirely dependent for protection on the pooling order allocating to them a share in the production and the costs of production of appellees' well. The several sections of the

act consistently stress the protection of correlative rights. They are clearly designed to protect adjoining landowners under whose lands a pool may extend. To do so in a fair, reasonable, and adequate manner, and to permit an adjoining owner to obtain, recover, and receive his just and equitable share, the pooling order may be made retroactive to the time production started and, insofar as costs are concerned, to the start of drilling operations. Unless the order may be made effective retroactively, it may on occasion verge on the confiscatory.

We do not mean to say that this should be done in every instance. All pertinent factors affecting the particular case under review must be considered. There is ordinarily no good reason why an adjoining owner should not ask for a voluntary pooling agreement at the time his neighbor starts to drill and thereby share in the expense, as well as in production, whether or not the well proves successful. The statutes clearly intend that rights shall be resolved upon an equitable basis. To permit an adjoining owner to sit back and await the successful outcome of drilling operations without asking for a pooling agreement would place the entire risk and the entire expense upon the party drilling in the event of an unsuccessful operation. This would ordinarily be inequitable and not justify a retroactive order. Section 57-909, R. R. S. 1943, contemplates that when an adjoining owner fails to enter into a voluntary pooling agreement, a spacing and pooling order may be entered on the application of any interested party. The drilling party may recover the share of the expense allocated to the adjoining owner by deducting it from the adjoining owner's share of the oil or gas produced. This enhances the risk taken by the drilling party who may encounter a dry well and is a factor which must also be considered in weighing equities. In this case, due to the early notice of a claim to pooling rights given appellees by appellants, and to the obvious delaying tactics pursued by

appellees, although proceedings before the commission were not commenced as early as they might have been, we are inclined to believe that limiting the pooling order to the date of commencement of such proceedings is not justified and that the order should be made retroactive at least to the date notice of appellants' claim was given. This occurred very soon after completion of the well and in view of the fact that the commission's order allocated drilling, as well as production expense, to appellants, we find the order to be fair and equitable. We direct that such order be reinstated and adhered to. The judgment of the district court is reversed and the cause remanded with directions to enter judgment as herein directed.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I believe the majority opinion is seriously erroneous in several important particulars, some of which I will enumerate forthwith. (1) It misreads, misinterprets, and misapplies the "pooling" provision of the Oil and Gas Conservation Act and disregards and seems to make inapplicable the statutory requirement of establishment of "spacing units" as a precondition for pooling. (2) It ignores and permits the commission to ignore that body's own rules with reference to the establishment of "spacing units." (3) It apparently replaces the spacing unit determination called for by the statute with a privately given "notice of claim." (4) It takes from the owner proceeds of oil lawfully produced from the owner's well and gives it to another under the guise of "pooling" all contrary to well-established and fundamental principles of oil and gas property law. 58 C. J. S., Mines and Minerals, §§ 134 a, (2), b, pp. 213, 215, 218. (5) It violates fundamental principles of property law pertaining to ownership of oil and gas heretofore announced by this court and which have become rules of property law. (6) It creates confusion by using the term "pool" which is defined in the statute, when it

should be referring to "spacing unit." A pool is the reservoir. § 57-903(6), R. R. S. 1943. A spacing unit is that portion of the pool (established by act of the commission after hearing) which can be drained by one well and the production of which is to be shared where there exists separate ownership of tracts within the spacing unit. (7) It interprets the oil and gas act—or I presume the rule requiring the permit to drill—as preventing an owner of oil and gas from protecting his interests by drilling a well to prevent drainage. This is nonsense. See commission Rules 303 and 313(d). Permits are granted administratively and routinely, and where required unorthodox location hearings are one of the most common types of hearing. The commission cannot arbitrarily deny a permit despite the apparent implication in the majority opinion. (8) It cites no authority for its interpretation of the act and ignores respectable and weighty authority from other jurisdictions. (9) It ignores some of the issues raised by the parties.

The effect of the opinion will be to create confusion in the oil and gas industry insofar as the industry is involved with the sections of the statutes discussed in the opinion. I believe that the best way to attempt to lessen the confusion and point out errors in the majority opinion is to write an opinion as I believe it should be. This I now do.

This case arises out of an application of the appellants, Farmers Irrigation District et al., to the Nebraska Oil and Gas Conservation Commission for entry of a compulsory pooling order as to oil production from Government Lot 3, Section 18, Township 22 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska, located in what is known as the North Minatare Field. The application was filed January 16, 1967, and asks that the pooling order be made retroactive to October 15, 1964, the date of commencement of production from a well, known as the White Feather Petroleum Company, Inc., Emery No. 2, drilled on Government Lot 3. The com-

mission entered a pooling order; determined the allocation between the two separate leases which cover separate portions of Government Lot 3; made the allocation effective as to all production subsequent to October 15, 1964; and charged the working interest owners in the two leases with their allocated shares of all drilling completion, storage, supervision, transportation, and other costs necessary to the well. The appellees appealed to the district court for Scotts Bluff County, which court after trial reversed the order of the commission and determined that the Farmers Irrigation District and its lessee, Sun Oil Company, did not prove the facts and allegations contained in their application to the commission and that any minerals owned by the Farmers Irrigation District and its lessee "cannot be pooled." I would reverse the judgment of the district court and remand the cause with directions to the district court to remand to the commission for further proceedings not inconsistent with this dissenting opinion.

The Farmers Irrigation District is the owner of a strip of land 150 feet wide extending across the south part of Government Lot 3. This strip appears to contain approximately 4.19 acres. Sun Oil Company holds an oil and gas lease covering this tract. No well was drilled thereon. The appellees, other than White Feather Petroleum Company, Inc., are the owners of the balance of Government Lot 3, containing about 43.92 acres. White Feather is the holder of the oil and gas lease on that tract. White Feather drilled a producing well in the approximate center of Government Lot 3 which became productive about October 15, 1964. On about December 22, 1964, Sun gave notice to White Feather and others of its lease and claimed a proportionate share of the production from the Emery No. 2 well. Proceeds from production were apparently thereafter held in suspense and distribution awaited ultimate outcome of this and other litigation.

Farmers and Sun base their claim of right to a retro-

active pooling order upon application of subsection (b) of Rule 313 of the commission. Rule 313 is entitled "LOCATION OF WELLS." Subsection (b) reads as follows: "All wells drilled to sources of supply at estimated depths in excess of two thousand five hundred (2500) feet for which no spacing pattern has been established by existing wells shall be drilled *on 40-acre legal subdivisions or equivalent lots* and not less than five hundred (500) feet from the boundaries of said legal subdivisions." (Emphasis supplied.)

The appellants contend that this rule establishes a spacing unit or drilling unit for the purposes of sections 57-908 and 57-909, R. R. S. 1943. The appellees contend that since the rules of the commission were not introduced into evidence in the trial court neither that nor this court can take notice of the commission rules. I would reject both contentions. Some of the appellees also take the position that Rule 313(b) does not have the effect of establishing a spacing unit for a pool or a portion thereof. As already indicated, I think this is correct.

For the reasons I set forth hereafter, I would hold that the trial court and this court can and should take judicial notice of the general rules of the commission provided they are properly adopted and promulgated. Section 57-911(5), R. R. S. 1943, is in part as follows: "All rules, regulations and orders issued by the commission shall be in writing, shall be entered in full and indexed in books to be kept by the commission for that purpose, and shall be public records open for inspection at all times during reasonable office hours and shall be filed as provided by Chapter 84, article 9." Section 84-906, R. R. S. 1943, provides in part as follows: "No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed; and, unless otherwise specifically provided by law, such filing of any rule shall, except where notice by publica-

tion is insufficient in law, *be sufficient to give notice of the contents of such rule to any person subject thereto or affected thereby.*" (Emphasis supplied.)

"In ascertaining matters of fact or of law to be judicially noticed, the judge may resort to, or obtain information from, any source of knowledge which he feels would be helpful." 31 C. J. S., Evidence, § 12, p. 833. My investigation discloses that the rules were adopted and filed in conformity with the statutes. The original rules of which Rule 313(b) is a part were filed and approved in accordance with Chapter 84, article 9, R. R. S. 1943, on January 12, 1960. This court has long taken judicial notice of properly promulgated regulations of federal administrative agencies. Larson v. First National Bank, 66 Neb. 595, 92 N. W. 729; Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401; 31 C. J. S., Evidence, § 39, p. 978. No different rule should apply to the regulations of our own state administrative agencies. The statute cited would appear to make it mandatory. "State courts may take judicial notice of the rules and regulations of the various departments of the state government." 31 C. J. S., Evidence, § 39, p. 980. The general rules of the commission properly adopted and filed in accordance with the foregoing statutes are legislative facts of which judicial notice may be taken. State v. Freeman (Okla.), 440 P. 2d 744; H. F. Wilcox Oil & Gas Co. v. State, 162 Okla. 89, 19 P. 2d 347, 86 A. L. R. 421.

I now examine the contention of the appellants that the adoption of Rule 313(b) had the effect of establishing a spacing unit by virtue of which the appellants were, under the compulsory pooling order of the commission entered on June 22, 1967, entitled to share in the production from the Emery No. 2 well as of the date of first production. This question requires an examination of the Oil and Gas Conservation Act. One of the underlying purposes of the act is "enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common

owner may obtain his just and equitable share of production therefrom." § 57-901, R. R. S. 1943. The act also prohibits waste which includes the abuse of the correlative rights of any owner. §§ 57-903, 57-908, R. R. S. 1943. Section 57-905(4)(c), R. R. S. 1943, grants authority to the commission to regulate "the spacing of wells." Section 57-905(7), R. R. S. 1943, gives the commission the authority to promulgate and enforce rules and regulations to effectuate the purposes of the act.

Sections 57-908 and 57-909, R. R. S. 1943, are the sections which pertain to the establishment of "spacing units" and the "pooling of interests." The first-mentioned section provides that to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights the commission shall establish spacing units for a pool, which units are to be of substantially uniform size and shape for the entire pool. The size and shape may vary in different zones of the pool as established by the commission. A spacing order must specify the size and shape of each unit and the location of the well. Rule 338 of the commission is as follows: "The Commission may upon its own motion or upon the motion of any interested party *and after notice and hearing* establish spacing units of a specified and approximate uniform size and shape for each pool within this State." (Emphasis supplied.)

Section 57-909, R. R. S. 1943, provides that when two or more separately owned tracts are embraced within a spacing unit, their owners may voluntarily pool their interests and, in the absence of voluntary pooling, authorizes the commission upon application or on its own motion to enter an order for the pooling of interests in the unit. This section states in part: "Each such pooling order shall be made only after notice and hearing, and shall be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to

recover *or receive,* without unnecessary expense, his just and equitable share. . . . Each such pooling order shall make provision for the drilling and operation of *the authorized well* on the spacing unit, and for the payment of the reasonable actual cost thereof, including a reasonable charge for supervision. As to each owner who refuses to agree upon the terms for drilling and operating the well, the order shall provide for reimbursement for his share of the costs out of, and only out of, production from the unit representing his interest, excluding royalty or other interest not obligated to pay any part of the cost thereof." (Emphasis supplied.) It is not necessary for the purposes of this opinion to refer to other provisions of this section.

The above statutes make it clear that Rule 313(b) does not and could not establish "spacing units" for the various producing pools in the state. It appears to be merely a well location rule under section 57-905(4)(c), R. R. S. 1943. Section 57-908, R. R. S. 1943, obviously contemplates an order establishing spacing units for "a pool," not one general order establishing uniform units for all pools in the state known and unknown. Rule 338 of the commission, which I have previously quoted, recognizes this obvious statutory intention. An administrative agency is bound by its own rules. 73 C. J. S., Public Administrative Bodies and Procedure, § 107, p. 428.

In Carter Oil Co. v. State, 205 Okla. 541, 240 P. 2d 787, the Supreme Court of Oklahoma had before it a rule similar to Rule 313(b). It there held that such a rule did not establish a "spacing unit," but merely established the location of a drilling site, and said: "Unit lines must be established by a proper procedure." The pertinent portions of the Oklahoma statutes are sufficiently similar to our own to make the above case valuable as a precedent.

There is, however, another reason why I could not interpret Rule 313(b) as contended for by the appel-

lants and still uphold its validity. The commission has been granted by the Legislature both legislative and quasi-judicial or adjudicatory powers. In adopting rules it acts legislatively. It need give public notice only to the extent the statute requires it. 1 Am. Jur. 2d, Administrative Law, § 162, p. 965; 2 Am. Jur. 2d, Administrative Law, § 277 et seq., p. 107; 2 Am. Jur. 2d, Administrative Law, § 588, p. 418. In deciding issues involving parties, as in the case of establishing spacing units or making compulsory pooling orders, it acts in an adjudicatory manner and due process requires notice to the interested parties and an opportunity to be heard. Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508. The interpretation of administrative regulations is a function of the courts. 2 Am. Jur. 2d, Administrative Law, § 656, p. 517.

The next question to be answered is does the commission, where no spacing unit has previously been established, have authority under section 57-909, R. R. S. 1943, to enter a pooling order which is effective retroactively to a date prior to the filing of the application? The statutes themselves grant no such power. The commission is a creature of statute and its power and authority is limited by the statutory provisions creating it. Continental Oil Co. v. Oil Conservation Comm., 70 N. M. 310, 373 P. 2d 809; Carter Oil Co. v. State, *supra;* Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S. W. 2d 173; Union Pacific R. Co. v. Oil & Gas Conservation Comm., 131 Colo. 528, 284 P. 2d 242.

In determining the question we must take cognizance of the vested rights of the owners in the production from the Emery No. 2 well. "Under the law of capture, an owner of land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him

for drainage." Baumgartner v. Gulf Oil Corp., 184 Neb. 384, 168 N. W. 2d 510. In Wood Oil Co. v. Corporation Comm., 205 Okla. 537, 239 P. 2d 1023, the Supreme Court of Oklahoma held, under a statute similar to ours, that the right of an owner to drill wells and take from pools below the oil and gas that he may be able to reduce to possession, including that which may migrate from the land of others, is subject to the reasonable exercise of the power of the state to prevent waste and secure equitable apportionment of landowners of the migratory oil and gas underlying the land. It further held that the lessee had title absolute to the oil produced by it prior to the pooling. This is consistent with the prior pronouncement of this court in Baumgartner v. Gulf Oil Corp., *supra.*

The question here involved was before the Supreme Court of Oklahoma in Wood Oil Co. v. Corporation Comm., *supra.* The court there held that the commission had no authority to enter a pooling order effective prior to the establishment of the spacing unit. There is some confusion in the language of the opinion because the court seems to refer to establishment of the spacing unit and entry of the pooling order interchangeably. Statutes which authorize compulsory pooling of interests in a spacing unit are not self-executing. A person seeking to avail himself of the benefits must apply to the appropriate board or commission. Gruger v. Phillips Petroleum Co., 192 Okla. 259, 135 P. 2d 485. Appellants in this case took no steps to avail themselves of the compulsory pooling provision for almost 2 years.

A reading of our statutes leads me to believe that the date of application or motion for the establishment of the spacing unit is the time beyond which the pooling may not be retroactive. No doubt the commission can on proper application and notice establish spacing units and pooling in the same proceeding. This leads to a consideration of the order of the commission in this case. It does not specifically purport to create a

spacing unit consisting of Government Lot 3. This, however, is the obvious intent of the order and any technical deficiencies in the journalization thereof could be corrected on the remand of this case. Since there was no lawfully established spacing unit prior to January 16, 1967, the commission erred in making its pooling order retroactive to October 15, 1964.

The judgment of the trial court in this case does not give specific reasons for its decision. Accordingly I would examine the evidence in support of the application to determine its sufficiency. I have carefully reviewed the expert testimony presented to the trial court in support of the appellants' claim that the oil underlying their portion of Government Lot 3 was draining to and being produced by the Emery No. 2 well. This testimony was not contradicted. It clearly supports the conclusion that sands underlying the appellants' tract were productive of oil. Apparently substantially the same evidence was introduced before the commission except for a change in the calculated percentages estimated to be underlying the two tracts. The commission allocated production based upon the relative percentage of recoverable oil originally in place under each tract. The evidence shows that the Emery No. 2 well is located high on the structure, and that the water drive is from the south and west pushing the oil onto and across the appellants' tract and then onto that of the appellees to be produced from the well. Under these circumstances we could not say as a matter of law that an allocation of the production of the well based upon the relative percentages of the recoverable oil originally in place underlying each of the tracts is erroneous.

I would remand the cause to the district court with directions to remand to the commission. The commission should determine the just and equitable share of the owners in the production of the White Feather Petroleum Company, Inc., Emery No. 2 well from and after

January 16, 1967, and the just and equitable charges to Sun Oil Company for drilling, completion, operation, storage, supervision, transportation, and other costs. I now take note of a problem which would arise on the remand to the commission. Section 57-909(2), R. R. S. 1943, provides that the order for reimbursement to the drilling working interest owner by the nondrilling working interest owner for costs shall be "out of, and only out of, production." The statute refers to "reasonable actual cost" but seems to contemplate only the situation where the spacing unit is established and the pooling order entered before the well is drilled. Where, as here, there is compulsory pooling with reference to an existing producing well, the matter is more complex. It would seem clear enough that Sun Oil Company should not be charged with a share of production costs attributable to the period in which it does not share in the production. As to drilling and completion costs, the problem would arise in connection with the valuation of the well investment. How should such costs be determined? Section 975, 5 Summers Oil and Gas (Perm. Ed.), p. 126, treats of this question and without citation of authority makes suggestions as to how the well investment should be valued. Since the question is not now before the court, I would not undertake to lay down a rule, but would call attention to the fact that the statute does not completely cover the matter. The commission, of course, could if necessary receive additional evidence necessary to make the above determination.

One other matter should be noted. The same parties were before this court in Sun Oil Co. v. Emery, 183 Neb. 793, 164 N. W. 2d 644. There this court determined that Farmers acquired fee title to its strip of land by its deed as against the contention that it held only an easement. As shown by the transcript here the district court, following that decision of this court, quieted the title of Farmers and its then lessee. The application to the Oil and Gas Conservation Commission involved here

was apparently filed prior to the commencement of the action involved in Sun Oil Co. v. Emery, *supra*. In their answer in the district court the appellees denied appellants' title. Appellants complain that the order of the district court in this case which contained a general finding for the appellees is contrary to the decision in the quiet title action previously mentioned because of the general finding in favor of the appellees. The appellees in their brief concede the ownership of Farmers and Sun in the minerals underlying the 4.19-acre tract. If the decree in the instant case is in conflict with the quiet title judgment it appears simply to have been an oversight in the journalization of the judgment. This matter could be corrected and clarified by the district court on the remand.

SMITH and MCCOWN, JJ., join in this dissent.

HARRIETTE MANDELBERG, APPELLEE AND CROSS-APPELLANT, V. LOUIS MANDELBERG, APPELLANT AND CROSS-APPELLEE.
195 N. W. 2d 148

Filed February 18, 1972. No. 38001.

1. **Divorce: Actions.** Nebraska has recognized the divisibility of divorce actions since 1894 where a foreign divorce is involved.
2. **Divorce: Actions: Jurisdiction: Property.** This action for alimony and a division of property was not barred by the Colorado divorce decree rendered on constructive service, and the district court for Box Butte County, Nebraska, had jurisdiction to entertain it.
3. **Divorce: Actions: Property.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that

time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Reddish, Fiebig & Curtiss, for appellant.

Atkins, Ferguson, Nichols & Hahn and Dennis M. Coll, for appellee.

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

SPENCER, J.

This action by Harriette Mandelberg against Louis Mandelberg seeks a division of property, attorneys' fees, and costs. The basic issue presented is: Can a wife obtain a foreign divorce in which there is no appearance by the husband and in which alimony is reserved, and thereafter return to Nebraska and obtain alimony or a division of property? The trial court allowed plaintiff one-third the value of the property, payable in 10 annual installments, but refused to allow attorneys' fees. The incidental questions presented are the fairness of the division, if division is permissible, and whether or not attorneys' fees are allowable. We affirm.

The parties, who first met while attending the University of Colorado, were married in Denver, Colorado, November 17, 1949. Plaintiff, who had been a Denver resident, returned with the defendant to Alliance, Nebraska, where defendant entered the family business. The business is principally an automotive parts corporation but also involves certain machine operations on internal combustion engines in which there is little or no competition. There is also substantial real estate rental income.

The marriage of the parties was a stormy one. In 1957, they adopted Lawrence A. Mandelberg, who was born March 26, 1957. In the fall of 1965, plaintiff returned to Denver, taking the child with her, and on March 7, 1966, she filed a petition for divorce in the district court for Box Butte County, Nebraska. In June the parties reconciled and plaintiff returned to Alliance. They remained together until August 1967, at which time the plaintiff again took the child and returned to Denver. In June 1968, she filed for divorce in the district court for Arapahoe County, Colorado. Defendant did not make an appearance in the Colorado proceeding, and a decree of divorce, specifically reserving the matter of the division of property and allowances, was entered. The defendant was aware of the proceedings for the divorce, paid the attorneys' fees of $1,000 for it, and on November 14, 1969, married his present wife. He is estopped to question the validity of the divorce proceedings. The plaintiff, who has not remarried, brought this action December 20, 1968. Lawrence A. Mandelberg has been living with his father since December 27, 1969, and the question of custody is not involved herein.

It will serve no useful purpose to detail the problems of the parties during the marriage. The trial judge found that the plaintiff failed to prove the defendant at fault. We believe that the record will support a finding of extreme cruelty on the part of the defendant, but in the context of this case do not disturb the trial court's finding. It is undisputed that plaintiff has had severe emotional problems and has needed psychiatric help during the course of the marriage. She was hospitalized for a period of time in 1964 in the Hastings State Hospital; received counseling at Methesda Hospital in Denver; and was residing at the hospital during the time of the trial herein.

The main question presented is the jurisdiction of the district court for Box Butte County to maintain this action. The Colorado court had no personal jurisdiction

of the defendant and consequently was powerless to enter a personal judgment against him. No jurisdiction existed to award alimony and that issue was specifically reserved by the Colorado court.

The authorities are divided as to the divisibility of divorce actions, that is, one action as to the marital status of the parties and the other the right to alimony or division of the property. If it were an open question in Nebraska, we probably would consider divisibility, at least where constructive service is involved, to be the preferable rule. However, the question is not an open one. This court early recognized the divisibility of divorce actions. In Cochran v. Cochran (1894), 42 Neb. 612, 60 N. W. 942, it was held that district courts, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute and permitted a divorced wife to maintain an action for alimony. Doubt was subsequently cast on this holding in Eldred v. Eldred (1901), 62 Neb. 613, 87 N. W. 340. This doubt, however, was resolved in Bodie v. Bates (1914), 95 Neb. 757, 146 N. W. 1002, where the court, after analyzing the two cases, said: "We think our holding in Cochran v. Cochran is sound and should be followed; and, in so far as it conflicts therewith, Eldred v. Eldred is overruled."

Bodie is a much stronger case than the instant one, for there the defendant was personally served. The Arkansas court held it did not have jurisdiction to take cognizance of the real estate in Nebraska without the consent of the parties to consider the same in fixing alimony. Bodie involved the division of the Nebraska property. In the instant case the Colorado court had no personal jurisdiction of the defendant, the right to alimony could not be adjudicated in that action. It did, however, specifically reserve the question for future determination. The present action for alimony and a division of property was not barred by the Colorado

divorce decree, and the district court for Box Butte County had jurisdiction to entertain it.

The rule for determining the division of property in a divorce is as follows: " 'In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.' " Diers v. Diers, 185 Neb. 552, 177 N. W. 2d 503.

In determining the value of the corporate stock the trial judge used the values shown in the corporate balance sheet as of December 31, 1968, except for the real estate. With respect to the real estate, he used the actual tax value for 1969, or the defendant's opinion of the value where he deemed it appropriate. While ordinarily value for tax purposes has little probative value, in two instances herein it was corroborated to some extent by rentals. It was only used by the trial judge where he considered the defendant's opinion as not credible. We have reviewed the trial court's computations and believe them to be fair and equitable under the circumstances. In view of the plaintiff's apparent mental instability, the setting off of one-third of the property to the plaintiff is reasonable under the circumstances.

With reference to the allowance of attorneys' fees, we

do not believe them to be proper under the circumstances of this case, particularly where the defendant did pay attorneys' fees for the securing of the Colorado divorce.

We affirm the judgment of the trial court.

AFFIRMED.

KENNETH B. SHEAR, APPELLANT, V. COUNTY BOARD OF COMMISSIONERS, ROCK COUNTY, NEBRASKA, APPELLEE.
195 N. W. 2d 151

Filed February 18, 1972. No. 38027.

1. **Courts: Jurisdiction: Quo Warranto: Mandamus: Injunction: Public Officers and Employees.** The district court has jurisdiction to determine a plaintiff's right to assume and hold the office of county assessor under plaintiff's petition for a writ of mandamus praying for appropriate injunctive relief.
2. **Actions: Quo Warranto: Public Officers and Employees.** In an action to establish the plaintiff's alleged right to assume the office of county assessor, he has the burden of proving every essential element to establish his legal right to assume the office.
3. **Courts: Legislature: Statutes: Administrative Law: Constitutional Law.** In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution.
4. **Legislature: Public Officers and Employees: Counties.** The Legislature has complete power and authority to prescribe the qualifications for the office of county assessor, limited only by the requirement that such conditions of eligibility shall not be unreasonable.
5. **Legislature: Statutes.** It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

Appeal from the district court for Rock County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert T. Finn, for appellant.

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

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

MCCOWN, J.

This is an action in mandamus by the plaintiff Kenneth B. Shear to require the County Board of Commissioners of Rock County, Nebraska, to install him in the office of county assessor. After hearing, the district court found the office of county assessor to be vacant and denied the issuance of a restraining order or a permanent writ of mandamus. The plaintiff has appealed.

The plaintiff, Kenneth B. Shear, was elected to a 4-year term as county assessor of Rock County, Nebraska, at the election on November 3, 1970. A certificate of election was issued to him on November 6, 1970. No action to contest the election was filed. On January 5, 1971, the plaintiff presented a bond and oath of office which the defendant board refused to accept. The plaintiff did not hold a county assessor certificate from the state Tax Commissioner as required by section 77-423, R. S. Supp., 1969. The board indicated to the plaintiff that the office of county assessor would be declared vacant and someone else would be appointed to fill the vacancy. This action was then commenced by the plaintiff.

The plaintiff raises two primary issues. He contends that the court had no jurisdiction to try his right to assume the office of assessor in this proceeding because an election contest or a quo warranto proceeding are exclusive remedies for testing the right to hold elective office. He also contends that the provisions of sections 77-415 to 77-428, R. R. S. 1943, and R. S. Supp., 1969, and in particular section 77-423, R. S. Supp., 1969, are unconstitutional.

Sections 77-421 and 77-422, R. S. Supp., 1969, require

the Tax Commissioner to hold examinations for certification as county assessor and to issue a county assessor's certificate to the successful applicants.

Section 77-423, R. S. Supp., 1969, provides: "No person shall on or after January 1, 1970, assume the office of assessor or deputy assessor in any county of this state unless he shall hold a county assessor certificate."

It is apparently the plaintiff's position that unless an election contest is filed within the statutory time, the successful candidate at the election for county assessor must be permitted to assume office whether he meets statutory qualifications or not, and thereafter a quo warranto action is the exclusive remedy to remove him. Quo warranto is, of course, a proper remedy to test the right to hold office. Cases relied on by the plaintiff such as State ex rel. Barton v. Frantz, 55 Neb. 167, 75 N. W. 546, and School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561, did not contemplate a statute such as section 77-423, R. S. Supp., 1969.

The plaintiff's argument is that the district court has no jurisdiction to determine the issues raised in this case except in a form of action entitled "quo warranto." Determining the correct title and form of a proceeding under common law pleadings is no longer the critical legal issue it was in the Nineteenth Century. The district court had jurisdiction to determine the plaintiff's right to assume and hold the office of county assessor. That jurisdiction could be and was properly invoked by the plaintiff by a petition for a writ of mandamus which prayed for appropriate injunctive relief. In an action to establish the plaintiff's alleged right to assume the office of county assessor, he has the burden of proving every essential element to establish his legal right to assume the office

The plaintiff's second major contention is that sections 77-421, 77-422, and 77-423, R. S. Supp., 1969, are unconstitutional. The attack rests on the assertion that there is an unconstitutional delegation of legislative

power to the state Tax Commissioner, and that the statutes create an unreasonable classification. The first two challenged statutes require the Tax Commissioner to hold examinations of applicants for certification as county assessors and to issue certificates of successful completion. Section 77-423, R. S. Supp., 1969, then forbids any person to assume the office of assessor or deputy assessor in any county of this state unless he shall hold such a county assessor's certificate. A portion of section 77-421, R. S. Supp., 1969, provides: "Examination shall be written, or both written and oral, shall be of such character as fairly to test and determine the qualifications, fitness and ability of the person tested actually to perform the duties of county assessor. The Nebraska County Assessors Association shall assist the Tax Commissioner in preparing such examination."

The Nebraska Constitution provides that the Tax Commissioner shall have jurisdiction over the administration of the revenue laws of the state, and with other state officers, shall have power to review and equalize taxation of property within the state. He shall have such other powers and perform such other duties as the Legislature may provide. See, Constitution of Nebraska, Article IV, section 28. This is clearly a constitutional grant of power dependent only upon implementing legislative action. In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. Even if the statute here were construed as a delegation of authority to an administrative agency to formulate rules and regulations to carry out an expressed legislative purpose or to implement such a pur-

pose, the standards set forth are sufficiently definite to be within the designated limitations of the expressed legislative intent.

The Legislature has complete power and authority to prescribe the qualifications for the office of county assessor, limited only by the requirement that such conditions of eligibility shall not be unreasonable. See State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N. W. 2d 892. It is clearly reasonable to require testing as to the fitness and ability of a person to perform the duties of the particular public office to which he seeks election or appointment. Fortunately or unfortunately, the statutory requirement of tests for certification of qualifications for the office of county assessor does not extend to other elective offices. That fact does not create an unconstitutional discrimination against prospective candidates for the office of county assessor. There is no constitutional requirement that the statutory qualification requirements must be identical for all elective offices of county government.

The legislation here was general legislation and not local or special legislation. It is clearly competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. See Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES WILLIAM ALCORN, APPELLANT.

194 N. W. 2d 798

Filed February 18, 1972. No. 38077.

1. **Criminal Law: Evidence: Verdicts: Juries.** Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Receiving Stolen Goods: Intent.** In a prosecution for receiving stolen property where facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, a jury may properly find that defendant possessed guilty knowledge.
3. **Criminal Law: Receiving Stolen Goods: Words and Phrases.** The word "receiving" in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or apparent legal power to dispose.
4. **Criminal Law: Aider and Abettor.** Conviction of the principal is not necessary for conviction of an aider or abettor.
5. **Criminal Law: Aider and Abettor: Receiving Stolen Goods.** In a prosecution for receiving stolen property, conviction of the defendant does not depend upon conviction of the thief.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Robert V. Burkhard, for appellant.

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

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

SMITH, J.

A jury found James William Alcorn guilty of the offense of receiving stolen property. On appeal he asserts insufficiency of the evidence of guilty knowledge and receiving.

On April 1 or 2, 1970, someone broke into the warehouse of Aaron Ferrer and Sons Company, a scrap metal dealer in Omaha. Stolen were 8 or 9 rolls of hard-

drawn, stranded copper wire. The manager informed the police and other scrap dealers, of whom the Alter Company in Council Bluffs, Iowa, was one.

On Saturday, April 4, 1970, Alcorn was a passenger in a Chevrolet automobile owned and operated by Chester Holliman. The latter was an employee of a meat packing company and a brother-in-law and close friend of Alcorn. The trunk of the Chevrolet contained 8 to 10 rolls of hard-drawn, stranded copper wire that weighed 800 pounds and had a market value of $400 to $500. Holliman and Alcorn proceeded to the Alter yard where they began unloading the rolls onto Alter's receiving dock. The Alter manager identified the rolls by their color, and he called the police.

The thief had entered the Ferrer warehouse by breaking a hole in an overhead door. The hole, 3½ feet in diameter, was located 2 feet above the bottom of the door. Ferrer had installed the "ADT" burglary alarm which an opening of the door but not the making of a hole, would activate. Near the inside of the door stood a forklift and an empty bucket of the skid type for storage of the rolls. The bucket with a capacity of 10 rolls had been full. One roll lay outside the door.

Hard-drawn, stranded copper wire was used principally in electrical transmission lines and occasionally in telephone lines. A scrap dealer seldom purchased the wire from anyone except such a company or another scrap dealer. The green color of the wire distinguished it from the red color of ordinary copper. There was no other direct physical evidence that the rolls in the Chevrolet were the rolls stolen from Ferrer.

Ferrer employed Alcorn from March 2 to April 5, 1970, to work chiefly in the warehouse. Alcorn had experience operating a forklift. At work on April 3 he heard other employees speaking of the breaking into the warehouse.

Alcorn, previously convicted of a felony, testified as follows. He had not heard anyone at work on April

3 say what the thief had stolen. Holliman ordinarily visited him early each Saturday. On April 4, 1970, he was awakened by Holliman. He subsequently rode with Holliman to the Alter yard without noticing that something was causing the rear of the car to ride low to the ground. En route he knew nothing of Holliman's destination or purpose. He first learned of the contents of the trunk when Holliman opened it. At the time Alcorn did not think of the Ferrer burglary. He asked Holliman why the latter did not sell the rolls to Ferrer. Holliman replied that Alter paid the better price. Holliman also said he had found the rolls in a South Omaha street.

A jury in a separate trial acquitted Holliman.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

In a prosecution for receiving stolen property where facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, a jury may properly find that defendant possessed guilty knowledge. State v. McKee, 183 Neb. 754, 164 N. W. 2d 434 (1969).

The word "receiving"' in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or of apparent legal power to dispose. See A.L.I., Model Penal Code, Tent. Dr. No. 2, § 206.8, Comment 2, p. 94 (1956).

Conviction of the principal is not necessary for conviction of an aider or abettor. See, State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970); Pigman v. United States, 407 F. 2d 237 (8th Cir., 1969). In a prosecution for receiving stolen property, conviction of the defendant does not depend upon conviction of the thief. See Norton v. State, 119 Neb. 588, 230 N. W. 438 (1930).

The evidence of guilty knowledge and receiving on

the part of Alcorn is sufficient to sustain the verdict. Other contentions of Alcorn are not well taken.

The judgment is affirmed.

AFFIRMED.

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21. Compliance with mandatory provisions of cited statute requiring administrative agency to adopt appropriate rules of procedure for notice and hearing necessary to give validity to its action when notice and hearing essential to due process. First Fed. Sav. & Loan Assn. v. Department of Banking ---- 562
22. Revocation of license to operate motor vehicle under point system ministerial act. Westenburg v. Weedlun 679
23. When records disclose that any person has accumulated total of 12 or more points within 2 years, Director of Motor Vehicles required by statute to summarily revoke license and privileges of such person to operate motor vehicle in this state. Westenburg v. Weedlun ---------- 679
24. Ministerial administrative authority vested in Director of Motor Vehicles by statute requires he apply applicable violation sections of motor vehicle statute to information properly furnished to him. Westenburg v. Weedlun ---------- 679
25. County committee for school district reorganization not a governing body within ambit of cited statute. State ex rel. Medlin v. Choat ---------- 689
26. Although county superintendent of schools nonvoting member of county school district reorganization committee, must be included in maximum number permitted by cited statute. State ex rel. Medlin v. Choat ---------- 689
27. In order to justify courts in declaring invalid as delegation of legislative power a statute conferring particular duties or authority upon administrative officers, must clearly appear beyond reasonable doubt that duty or authority so conferred is power that appertains exclusively to legislative department, and

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2. Nebraska, recognizing humanitarian aspects and purposes of adoption statutes, gives them liberal rather than strict construction. Neil v. Masterson ... 364
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1. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. Rules stated for sufficiency of affidavit of tip from informant. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Holloway ... 1
2. Recital of some of underlying circumstances in affidavit for search warrant essential if magistrate performs his detached function; mere affirmance of belief or suspicion not sufficient. State v. Holloway 1

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Aider and Abettor.

1. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were principal offender. State v. Cook ... 788
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Annexation.

1. Under cited statute, city of first class may annex contiguous lands, urban or suburban in character, and not agricultural lands rural in character. Webber v. City of Scottsbluff ---------- 282
2. Power of city to annex land contiguous to city and within boundaries of rural fire protection district not limited by provisions of cited statute. Webber v. City of Scottsbluff ---------- 282
3. Section 18-1717, R. R. S. 1943, enacted with emergency clause on April 29, 1967, provides for 1-year limitation period in which party may contest any annexation or contest any act done prior to such date, pursuant to such annexation which was made pursuant to any statute of Nebraska which has been on April 29, 1967, declared unconstitutional. Nebraska Mil-Nic, Inc. v. City of Grand Island ----- 656

Annulment of Marriage.

1. In Nebraska, voidable marriage legally valid for all civil purposes until nullity so pronounced. Ballew v. Ballew ---------- 397
2. Under divorce decree providing alimony payments shall terminate upon remarriage of wife, right of divorced wife to receive such payments terminated upon remarriage and not revived by annulment of her remarriage on grounds which rendered remarriage voidable. Ballew v. Ballew ---------- 397
3. If a man induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is father of child with which she is pregnant, when unknown to him her condition caused by another, marriage may be annulled for fraud, if not ratified with knowledge thereof. Goree v. Goree -------- 774

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1. On appeal from order of railway commission fixing rates for common carriers, only questions for determination are whether or not commission acted within scope of its authority and whether or not order entered reasonable and not arbitrarily made. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. 30
2. Motion for change of venue in criminal case addressed to sound discretion of trial court; its ruling thereon not disturbed unless abuse of such discretion disclosed. State v. Goham ---------- 34
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3. Prejudicial error for district court to submit to jury essential issue of fact without evidentiary support. Todd v. Boals ---------- 51
4. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
5. Upon appellate review of workmen's compensation case in Supreme Court, cause considered de novo only where findings of fact not supported by evidence as disclosed by record. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
6. In cases involving child custody determinations in juvenile and other courts, findings of trial court, both as to evaluation of evidence and matter of custody, not disturbed unless clear abuse of discretion or decision against weight of evidence. State v. Randall ---------- 64
7. Unless statute requires to contrary, findings of fact of administrative board ordinarily not set aside unless arbitrary, capricious, or unreasonable. School Dist. of Omaha v. State Board of Education ------ 76
8. When indigent defendant has made known to court he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by court or lack of action on part of his attorney. State v. Myles ---------- 105
9. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles ---------- 105

10. Discretion of lower court with respect to awarding or changing custody and support of minor children subject to review; but determination of court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Hanson v. Hanson ---------- 108
11. Plaintiff taxpayer, appealing under provisions of cited statute, has burden of proving levy complained of in fact excessive and illegal. Werth v. Buffalo County Board of Equalization ---------- 119
12. Where defeated party undertakes to perfect appeal from adverse ruling of county superintendent of schools and orders transcript in accordance with cited statute, and transcript incomplete or deficient in form, all other requirements having been met, failure to furnish proper transcript will not defeat appeal. Cherry v. Lofgren ---------- 133
13. Lemburg v. Neilsen, 182 Neb. 747, 157 N. W. 2d 381, overruled. Cherry v. Lofgren ---------- 133
14. Duly authenticated transcript of proceeding to be reviewed must be filed in district court, but if required transcript furnished and filed, deficient in form through no fault of appellant, should not defeat his right to appeal. Cherry v. Lofgren ------ 133
15. While petition may be attacked at any stage of proceedings on grounds of insufficiency to state cause of action, where attack delayed until appeal, pleading liberally construed. Bader v. Hodwalker ----- 138
16. Conviction under section 28-472.03, R. S. Supp. 1969, will be affirmed where record sufficient to sustain conviction under section 28-470, R. S. Supp. 1969. State v. Smith ---------- 152
17. Trial court's order in child support case not overturned unless abuse of discretion by trial court found. Benton v. Benton ---------- 205
18. Supreme Court may reduce sentence when in its opinion sentence excessive. State v. Nuss -------- 220
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19. Courts on appeal cannot deny change of school district boundaries under statute enacted after board entered order granting change in school district boundaries under statute then in effect. Kaup v. Sweet ---------- 226
20. Statute governing transfer of certificates of public convenience and necessity permissive in terms, not mandatory, and order of railway commission pertaining to transfer will be sustained unless appears

to be unreasonable and arbitrary. Schmer v. Abler _ 245
21. Question of whether legal sanity of accused established beyond reasonable doubt at trial one of fact to be determined by trial court when jury waived; where substantial evidence to sustain finding of trial court on that issue, that determination not disturbed on appeal. State v. Klatt ---------- 274
22. Not province of Supreme Court to pass on credibility of witnesses or weigh evidence in criminal case. State v. Warner ---------- 335
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23. Sentence imposed within statutory limits will not be disturbed for excessiveness in absence of abuse of discretion. State v. Saxon ---------- 338
State v. Black Bear ---------- 670
24. On appellate review of workmen's compensation case in Supreme Court, it will not be considered de novo if findings of fact are supported by evidence. Bole v. S. M. S. Trucking Co. ---------- 341
25. Where default has been regularly entered, within discretion of trial court as to whether default judgment shall be set aside; in absence of showing of abuse of discretion, Supreme Court will not interfere. Michaelis v. Michaelis ---------- 350
26. Where irreconcilable conflict in evidence on material issue, Supreme Court will, in determining weight of evidence of witnesses, consider fact that trial court observed them and their manner of testifying and must have accepted one version of facts rather than other. Zadina v. Weedlun ---------- 361
27. Defendant who has appealed conviction cannot secure second review of identical propositions advanced in such appeal by resort to post conviction procedure. State v. Franklin ---------- 363
28. Determination of what is consistent with public interest, or public convenience and necessity, one peculiarly for determination of railway commission; if evidence sustains findings of commission, Supreme Court cannot intervene. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---------- 369
29. Where sentence imposed within statutory limits, will not be disturbed in absence of abuse of discretion. State v. Gutierrez ---------- 383
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State v. Williams ---------- 708
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30. Statute provides that Supreme Court may reduce sentence rendered by district court against accused when in its opinion sentence excessive, in which event it renders such sentence as may be warranted by evidence. State v. Leadinghorse ---------- 386
31. Where punishment of offense created by statute left to discretion of district court to be exercised within certain prescribed limits, sentence imposed within such limits not ordinarily disturbed where no abuse of discretion. State v. Leadinghorse ---------- 386
State v. Andersen ---------- 605
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32. As prerequisite to examination in Supreme Court, evidence adduced on summary judgment hearing must be embodied in bill of exceptions. Scarpello v. Continental Assur. Co. ---------- 395
33. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395
34. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Garza ---------- 407
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35. In construing penal statute, Supreme Court will give it interpretation which meets constitutional requirements if can reasonably be done. State v. Neal -- 413
36. Penal statute presumed constitutional and unconstitutionality must be clearly established before Supreme Court authorized to declare it void. State v. Neal ---------- 413
37. One may not complain of alleged misconduct of adverse counsel if, with knowledge of alleged misconduct, does not ask for mistrial but consents to take chances of favorable verdict. Johnson v. Nebraska Public Power Dist. ---------- 421
38. To require new trial, must be shown that alleged

improper argument such as to prejudice substantial rights of party. Johnson v. Nebraska Public Power Dist. ---------- 421

39. When evidence in condemnation proceedings conflicting, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421

40. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all reasonable inferences that can be reasonably deduced from proof. Kohler v. Ford Motor Co. ---------- 428

41. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Belek v. Travelers Ind. Co. ---------- 470

42. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491

43. Judgment of trial court fixing amount of alimony not disturbed on appeal unless good cause shown. Schuman v. Schuman ---------- 500

44. Motion for continuance addressed to sound discretion of court; in absence of showing of abuse of discretion, ruling on motion for continuance not disturbed. Jindra v. S. M. S. Trucking Co. ---------- 502

45. Where defendant in criminal case invokes appellate jurisdiction of Supreme Court, no post conviction remedy then available to him; post conviction remedy cumulative, not concurrent. State v. Moore ---------- 507

46. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis ---------- 522

47. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

48. On appeal to Supreme Court from order of railway commission within commission jurisdiction, questions for determination are sufficiency of evidence to sup-

port findings, adequacy of findings and conclusions to support order, and reasonableness or arbitrariness of order. Abler v. Herman Bros., Inc. ---------- 530

49. In post-divorce custody proceeding, determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within discretion of trial court; on appeal, Supreme Court will not disturb determination except to remedy abuse of discretion. Lueders v. Lueders ---------- 539

50. Upon appeal from county board of equalization on ground that property value in excess of actual value, sole issue to be determined is actual value of property. Chudomelka v. Board of Equalization ------- 542

51. Ordinarily Supreme Court will take note only of those assigned errors which are discussed. Revised Rules of Supreme Court, 1967, Rule 8a2(3). State v. Lilja ---------- 550

52. Suspension of sentence and granting of probation discretionary with trial court and in absence of abuse of discretion, trial court's determination will not be disturbed. State v. Jurgens ---------- 557
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53. When appeal taken from railway commission's denial of certificate of public convenience and necessity, only questions to be decided by Supreme Court whether commission acted within scope of its authority and if order complained of reasonable and not arbitrarily made. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

54. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647

55. Ordinary burdens of trial insufficient for Supreme Court to classify otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. - 647

56. No formal offer to prove required to obtain review of ruling of trial court excluding answer of witness to question, where question itself clearly indicates what party expected to prove by witness. George Rose Sodding & Grading Co., Inc. v. City of Omaha 683

57. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed wit-

nesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686
58. If reasonable competent evidence to support findings of fact in trial court shown, judgment, order, or award will not be modified or set aside for insufficiency of evidence. Mid-America Pipeline Co. v. Warren ---------- 710
59. Death of defendant pending review on appeal of criminal conviction abates not only appeal but also all proceedings had in prosecution from its inception. State v. Campbell ---------- 719
60. In workmen's compensation proceeding, district court finding against party will be set aside if evidence compels finding for that party. Adler v. Jerryco Motors, Inc. ---------- 757
61. Where defendant in criminal action has voluntarily paid fine imposed upon him, he waives right of appeal. State v. Fulton ---------- 787
62. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821
63. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821
State v. Tolle ---------- 823
64. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence insufficient to support finding of guilty beyond reasonable doubt. State v. Tolle ---------- 823
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1. Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of

governmental immunity. Webber v. Andersen ---- 9
2. In warrantless search, controlling factor whether officer had reasonable grounds before search to make arrest; essential test whether facts available at moment of search would warrant man of reasonable caution to believe action taken appropriate; existence of probable cause must be determined by practical, not by any technical, standard. State v. Oltjenbruns ---------- 694

Assumption of Risk.

1. Where one, knowing and comprehending danger, voluntarily exposes himself to it, although not negligent in so doing, deemed to have assumed risk and precluded from recovery for injury resulting therefrom. Hollamon v. Eagle Raceway, Inc. ---- 221
2. One who participates in sport of stock car racing assumes ordinary risks of that sport. Hollamon v. Eagle Raceway, Inc. ---------- 221
3. When one knows that dangerous condition exists, appreciates its dangerous nature and deliberately exposes himself to such danger, he assumes risk of injury from it. Jeffrey v. Retzlaff ---------- 372
4. Ordinarily, question of negligence, contributory negligence, and assumption of risk are for jury; where evidence of assumption of risk so clear that reasonable minds can reach no other conclusion, directed verdict for defendant proper. Jeffrey v. Retzlaff -- 372

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1. Charge of inadequate representation can prevail only if can be said that what was or was not done by defendant's attorney for client made proceedings farce and mockery of justice, shocking to conscience of court. State v. Goham ---------- 34
2. Applicability of workmen's compensation statute providing attorney's fees and penalty for waiting time for delinquent payments turns largely on facts of each case. Marshall v. Columbus Steel Supply ---- 102
3. When indigent defendant has made known to court he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by court or lack of action on part of his attorney. State v. Myles ---------- 105
4. Under cited statute, when judgment over $50, attorney fees fixed at sum of $10 plus 10 percent of judgment in excess of $50. Potts v. Mahood ---- 142

5. Attorney not deemed ineffective to point of impairment of constitutional rights of client by viewing his advice retrospectively. State v. Hatten ---- 237
6. One may not complain of alleged misconduct of adverse counsel if, with knowledge of alleged misconduct, does not ask for mistrial but consents to take chances of favorable verdict. Johnson v. Nebraska Public Power Dist. ---- 421
7. To require new trial, must be shown that alleged improper argument such as to prejudice substantial rights of party. Johnson v. Nebraska Public Power Dist. ---- 421
8. Claim for attorneys' fee after judgment in favor of plaintiff in action on fidelity policy or bond may be presented by motion at subsequent term of court. Beshaler v. Helberg ---- 584
9. For post conviction relief on ground of ineffective assistance of counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Mason ---- 675
10. Function of prosecutor's opening statement to generally state nature of case; within discretion of prosecutor how much or how little to comment specifically upon evidence to be offered. State v. Oltjenbruns ---- 694
11. Not proper to allow attorney's fee in criminal cases only for time spent in trial and refuse allowance for time or services reasonably and necessarily required and performed prior to trial. State v. McDonald ---- 752
12. Trial court may not rely upon generalized admissions or statements by defense counsel as method for determining his factual basis for plea of guilty. State v. LeGear ---- 763
13. No denigration of right to trial to hold when defendant waives his state court remedies and admits guilt, he does so under law then existing; further, he assumes risk of ordinary error in either his or his attorney's assessment of law and facts. State v. Bevins ---- 785

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2. Auctioneer operating as market agency under Fed-

eral Packers and Stockyards Act and who sells mortgaged cattle at request of mortgagors not relieved from liability for conversion by terms of act. State Securities Co. v. Norfolk Livestock Sales Co., Inc. _ 446

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1. Where initial permission to use insured vehicle given by one having proper authority to give permission to person operating it at time of accident, for purposes of liability coverage, such operation with express or implied permission of named insured, even though specific or express terms of permission given violated. Hull v. Allstate Ins. Co. _____ 130
2. Tests authorized by statute to be used in determining alcoholic content present in body fluid of person must be performed according to methods approved by Department of Health. State v. Parrott _____ 213
3. Possibility that stolen truck might be abandoned later not defense to charge of auto theft. State v. Warner _____ 335
4. In automobile liability insurance policy, word household in omnibus clause extending liability available to insured to other members of household means those who dwell under same roof and compose a family. State Farm Mut. Auto. Ins. Co. v. Selders _ 342
5. Statute requires uninsured motorist insurance for protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. State Farm Mut. Auto. Ins. Co. v. Selders _____ 342
6. Purpose of statute to give same protection to person injured by uninsured motorist as he would have if had been injured in accident caused by automobile covered by standard liability policy; provisions to be liberally construed to accomplish such purpose. State Farm Mut. Auto. Ins. Co. v. Selders _____ 342
7. Conditions affecting visibility of motorist impose upon driver duty to use degree of care commensurate with existing circumstances. Hacker v. Perez 485
8. Circumstantial evidence sufficient to sustain charge of unlawful speed and may be sufficient to overcome direct evidence. Hacker v. Perez _____ 485
9. Operator of motor vehicle who would otherwise have right-of-way under statutory regulations if operates it at lawful rate of speed may forfeit right-of-way if operates vehicle at unlawful rate. Hacker v. Perez _____ 485

10. Statute granting right-of-way to driver of emergency vehicle, over other drivers using highway, does not relieve him from responsibility of driving with due regard for safety of all persons on highway, and does not protect him from consequences of arbitrarily exercising such right-of-way. Winston v. Davis ---------- 522
11. Rules stated as to duty of driver of vehicle upon highway to yield right-of-way to law enforcement vehicles when operated on official business, and when provision shall not operate to relieve driver of law enforcement vehicle from duty to drive with due regard for safety of others. Winston v. Davis - 522
12. Rule for determination of right-of-way at intersections stated. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
13. Operator of automobile approaching or entering intersection required to see another automobile approaching or entering intersection which has been favored with right-of-way under statutory rules of road and failure to see such favored automobile negligence as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
14. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ------ 606
15. Rule stated as to duties of driver approaching unprotected intersection at speed as will afford reasonable opportunity for effective observations for cars approaching on intersecting road or when view completely obstructed. Where facts undisputed, negligence may be found as matter of law. Hodgson v. Gladem ---------- 736

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Bills and Notes.
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1. Reasonable interpretation of statutes dealing with regulation and control of savings and loan associations necessarily implies power of Department of Banking to approve or disapprove establishment and operation of branch offices of savings and loan associations chartered and operating under laws of Nebraska. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
2. Legislative standards for granting of application for initial establishment of savings and loan association operation under cited statute also apply to application to establish branch office. First Fed. Sav. & Loan Assn. v. Department of Banking ----- 562
3. Approval by Department of Banking necessary before savings and loan association, chartered and operating under laws of Nebraska, may establish branch office. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
4. Properly conducted existing local savings and loan associations have interests and rights which are affected by establishment of other local savings and loan associations or branches sufficient to make all such associations interested parties entitled to constitutional due process. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
5. Due process of law requires notice and opportunity

to be heard, as matter of right and not by let or leave of administrative officers or agencies, when rights, duties, or privileges of interested parties involved by exercise of quasi-judicial power pursuant to terms of statute. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562

Burglary.

1. In prosecution for burglary, witness who only receiver of stolen property or accessory after the fact not accomplice of defendant. State v. Holoubek -- 163
2. Trailer which is used as office may be subject of burglary under cited statute. State v. Warner ---- 335
3. While mere possession of stolen property standing alone insufficient to justify conviction of burglary, such possession of property is circumstance which, taken in connection with other incriminating evidence in case may be considered by jury in determining question of guilt or innocence of defendant so charged. State v. Cook ---------- 788
4. In order for defendant's possession of stolen property to be sufficient to support conviction, such possession must be recent, that is, not too remote in time from crime. State v. Cook ---------- 788
5. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. State v. Cook ---------- 788

Carriers.

1. Lowest rates published or charged, for substantially same kind of service, prima facie evidence of reasonable rate for services under investigation. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. -------- 30
2. Railway commission empowered to fix joint-line freight rates. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ---------- 30
3. In fixing rates, railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ---------- 30
4. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where circumstances substantially similar.

Howard McLean Co. v. Chicago, B. & Q. R. R. Co. _ 30
5. On appeal from order of railway commission fixing rates for common carriers, only questions for determination are whether or not commission acted within scope of its authority and whether or not order entered reasonable and not arbitrarily made. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. _ 30
6. Under Article X, section 7, Constitution of Nebraska, and cited statute, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in charging of fares by common carriers, vested in railway commission. Allen v. Omaha Transit Co., Inc. ---------- 156
7. Cited statute delegates to railway commission quasi-judicial power to determine issue of unjust discrimination in charging of fares by common carriers under standards therein set out, and vests railway commission with quasi-judicial power to examine facts and determine questions of law. Allen v. Omaha Transit Co., Inc. ---------- 156
8. Statute governing transfer of certificates of public convenience and necessity permissive in terms, not mandatory, and order of railway commission pertaining to transfer will be sustained unless appears to be unreasonable and arbitrary. Schmer v. Abler ---------- 245
9. Generally held that necessity of obtaining approval of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler -------- 245
10. Railway commission does not have authority to determine validity of contracts for purchase of certificates of public convenience and necessity. Schmer v. Abler ---------- 245
11. Existence of dispute regarding enforceability of contract for transfer of certificate of public convenience and necessity does not deprive railway commission of power to approve transfer. Schmer v. Abler -- 245
12. Railway Commission authorized to regulate rates and services and have general control of common carriers within state as Legislature may provide by law, and is not amenable to legislative interruption or limitation of its status or powers except by specific legislation. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---------- 369

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17. Under Constitution of Nebraska, railway commission has plenary power to regulate common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
18. Constitutionally created powers and duties of railway commission include regulation of rates, service, and control of common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
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Not every denial of request by accused for continuance violates due process; denial may honor due process, although failure of evidence or defense without counsel results. Answer must be found in circumstances, particularly in reasons presented at time request denied. State v. Kirby ---------- 380

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1. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Ne-

braska Public Power Dist. ---------- 421
2. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ---------- 421
3. Evidence in eminent domain case as to valuation for future uses must be limited to adaptability of land that may be reasonably expected in immediate future. Johnson v. Nebraska Public Power Dist. ---- 421
4. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. 421
5. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. -- 421
6. When evidence in condemnation proceedings conflicting, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421
7. Constitution of Nebraska does not permit taking of private property for private use. Moritz v. Buglewicz 819

Employer and Employee.

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Entrapment.

1. Where person has no previous intent nor purpose to violate law but does so only because persuaded or induced to commit act by law enforcement agents, he is entitled to defense of unlawful entrapment because law as matter of policy forbids conviction. State v. Smith ---------- 511
2. Where person already has readiness or willingness to violate law, mere fact that officer provides what appears to be favorable opportunity for such violation, or merely seeks to collect evidence of offense, not unlawful entrapment and no defense. State v. Smith ---------- 511

Equity.

1. Where court of equity properly acquired jurisdiction in suit for equitable relief, will make complete adjudication of all matters properly presented and involved in case and ordinarily grant such relief, legal or equitable, as required and thus avoid unnecessary litigation. Sechovec v. Harms ---------- 70
2. In suit where specific performance granted, all damages growing out of defendant's breach of contract litigable in specific performance action; separate subsequent actions to recover different elements of such damages for same breach cannot be maintained. Sechovec v. Harms ---------- 70
3. Where court of equity obtains jurisdiction of cause for any purpose, may retain it for all and proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Freeman v. Rose ---------- 176
4. Court of equity will not grant injunctive relief unless shown that injury has been or will be suffered by party seeking such relief. Muchemore v. Heflin ---- 217
5. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Muchemore v. Heflin 217
6. Generally held that necessity of obtaining approval of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler ------- 245
7. Where evidence, in action for reformation of written instrument, sharply and irreconcilably conflicting, becomes necessary to apply well-known rule of equity that evidence must be clear, convincing, and satisfactory, and in consequence, deny reformation. State Farm Mut. Auto. Ins. Co. v. Selders -------- 342
8. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686

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reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
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3. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur -------- 313
4. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
5. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
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2. Motion to withdraw plea of guilty sustained only if defendant proves withdrawal necessary to correct manifest injustice and defendnat must establish such ground by clear and convincing evidence. State v. Johnson ---------- 26
3. Lowest rates published or charged, for substantially same kind of service, prima facie evidence of reasonable rate for services under investigation. How-

ard McLean Co. v. Chicago, B. & Q. R. R. Co. ------ 30
4. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
5. Workmen's Compensation Act does not require objective symptoms of injury produced at time of accident be observed by others or their existence be proved by independent testimony. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
6. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
7. Upon appellate review of workmen's compensation case in Supreme Court, cause considered de novo only where findings of fact not supported by evidence as disclosed by record. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
8. Whether child neglected within purview of statute question of fact; each case determined from all facts and circumstances of each particular case. State v. Randall ---------- 64
9. Before witness permitted to testify as to testimony of witness at former trial, must be shown that witness able to recall and relate substance of entire testimony upon subject or topic involved. State v. Christiansen ---------- 73
10. Admission of incompetent evidence not prejudicial where same fact established by testimony of complaining party. State v. Christiansen ---------- 73
11. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles ---- 105
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12. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles -- 105
13. Discretion of lower court with respect to awarding or changing custody and support of minor children subject to review; but determination of court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Hanson v. Hanson ---------- 108
14. Workmen's compensation claimant, unaided by pre-

sumption, bears burden of proof that his employment in fact caused compensable injury. Conn v. ITL, Inc. ---------- 112

15. Workmen's compensation claimant with atherosclerosis which was personal risk and cause of otherwise compensable injury may recover under these circumstances: Employment risk greater than that of ordinary nonemployment life was cause of injury. Conn v. ITL, Inc. ---------- 112

16. Plaintiff taxpayer, appealing under provisions of cited statute, has burden of proving levy complained of in fact excessive and illegal. Werth v. Buffalo County Board of Equalization ---------- 119

17. Testimony by expert witness as to weight of exhibit weighed on laboratory scale admissible without prior evidence as to accuracy of scale. State v. Smith ---- 152

18. General rule as to opinion of lay witness that witness may testify only to facts perceived by his senses and may not give opinion or conclusion. Shamburg v. Folkers ---------- 169

19. Lay witness may testify to relevant opinion based upon facts perceived by him if opinion of kind normally formed by person constantly and correctly and witness cannot accurately, adequately, or with reasonable facility describe fundamental facts upon which opinion based; in substance such process under these circumstances description. Shamburg v. Folkers ---------- 169

20. Unnecessary to repeat same objection to further testimony of same nature by same witness in order to save error; however, failure to object to identical or substantially same incompetent testimony by another witness waives erroneous ruling in admission of testimony of first witness. Shamburg v. Folkers 169

21. Where evidence insufficient to sustain verdict in favor of plaintiff, duty of trial court to dismiss action on motion of defendant. Sinnett v. Dial Constr. Co. 190

22. Physical facts sufficient to bar recovery for negligence only when indisputably demonstrate that collision out of which cause of action arose not caused by party charged. Meyer v. Lang ---------- 202

23. Ordinarily, custody of minor children awarded to mother in divorce action not disturbed unless by changed circumstances affirmatively shown that mother unfit person to have custody or that best interests of children require such action. Benton v. Benton ---------- 205

24. Trial court's order in child support case not overturned unless abuse of discretion by trial court found. Benton v. Benton ---------- 205
25. Courts take judicial notice of ordinary costs of living and dental, medical, and other familiar costs of living. Benton v. Benton ---------- 205
26. Refusal of trial court in criminal case to direct prosecutor to accept offer by defendant to stipulate to essential element of alleged offense ordinarily constitutes no ground for new trial. State v. Narcisse 209
27. Testimony of alleged victim in criminal prosecution for sodomy with human being insufficient for conviction unless corroborated in accordance with rules pertaining to other sexual offenses. State v. Narcisse ---------- 209
28. Summary judgment extreme remedy and should be awarded only when issue clear beyond all doubt; any reasonable doubt touching existence of genuine issue of material fact resolved against moving party. Hollamon v. Eagle Raceway, Inc. ---------- 221
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29. Summary judgment authorized when moving party entitled to judgment as matter of law, clear what truth is, and no genuine issue remains for trial. Hollamon v. Eagle Raceway, Inc. ---------- 221
30. Burden of proof in post conviction hearing on petitioner. State v. Hatten ---------- 237
31. Attorney not deemed ineffective to point of impairment of constitutional rights of client by viewing his advice retrospectively. State v. Hatten ---------- 237
32. Burden of establishing unconstitutionality of statute on one attacking its validity, because statutes presumed constitutional and unconstitutionality must be clearly established. Evans v. Metropolitan Utilities Dist. ---------- 261
33. Defendant in criminal action presumed sane until defendant produces evidence of insanity at time of alleged crime; if any evidence produced, State must then sustain burden of producing evidence that defendant sane at time of crime beyond reasonable doubt. State v. Klatt ---------- 274
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to be determined by trial court when jury waived; where substantial evidence to sustain finding of trial court on that issue, that determination not disturbed on appeal. State v. Klatt ---------- 274

36. In action for construction of will, extrinsic evidence admissible to show attendant circumstances under which will made and to enable court to place itself in situation of testator. Hays v. Johnson ---------- 307

37. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur ---------- 313

38. Where classification or degree of crime depends upon determination of certain minimal value of property and there is market for that type of property, State must present proof by competent evidence that market value of property at time and place of crime charged equal to or exceeded designated minimal value. State v. Hayes ---------- 325

39. Not province of Supreme Court to pass on credibility of witnesses or weigh evidence in criminal case. State v. Warner ---------- 335
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40. Where evidence, in action for reformation of written instrument, sharply and irreconcilably conflicting, becomes necessary to apply well-known rule of equity that evidence must be clear, convincing, and satisfactory, and in consequence, deny reformation. State Farm Mut. Ins. Co. v. Selders ---------- 342

41. Conviction obtained through use of false testimony, known by State to be such, in violation of Fourteenth Amendment to Constitution of United States. State v. Ford ---------- 353

42. Resolution of conflicts and inconsistencies in testimony of witness question of fact for jury; jury's function to determine which, if any, of inconsistent statements of witness is true. State v. Ford ------ 353

43. In sex crime, testimony on direct examination concerning victim's complaint should be confined to fact that complaint was made, and details of event, including identity of person accused, not proper subjects of inquiry unless complaint spontaneous, unpremeditated statement so closely connected with act as to be part of res gestae. State v. Juarez ------ 354

44. Statement relating to startling event or condition

made while declarant under stress of excitement caused by event or condition generally admissible as exception to hearsay rule, whether treated as part of res gestae or as spontaneous declaration or excited utterance. State v. Juarez ---------- 354

45. Where question asked of witness, and answer responsive to question and received without objection, and motion then made by counsel to strike out such evidence on ground of incompetency, discretionary with court whether to sustain motion or not. State v. Masek ---------- 358

46. Where irreconcilable conflict in evidence on material issue, Supreme Court will, in determining weight of evidence of witnesses, consider fact that trial court observed them and their manner of testifying and must have accepted one version of facts rather than other. Zadina v. Weedlun ---------- 361

47. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Small 379
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48. Proof that exhibit remained in custody of law enforcement and court officers sufficient to prove chain of possession. State v. Gutierrez ---------- 383

49. Conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification; each case must be considered on own facts. State v. Moss ---------- 391

50. As prerequisite to examination in Supreme Court, evidence adduced on summary judgment hearing must be embodied in bill of exceptions. Scarpello v. Continental Assur. Co. ---------- 395

51. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395

52. Where divorce decree requiring periodic alimony payments contains no provisions as to remarriage, re-

marriage of divorced wife establishes prima facie case which requires court to terminate alimony in absence of proof of some extraordinary circumstance justifying its continuation. Ballew v. Ballew ------ 397
53. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. City of Imperial v. Raile ---------- 404
54. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Garza ---------- 407
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55. In prosecution for rape, corroboration as to material facts and circumstances which tend to support testimony of complaining witness sufficient. State v. Garza ---------- 407
56. Question, summary in nature and including statement as to ultimate fact, although improper, not prejudicial where witness testified in detail as to facts constituting offense. State v. Garza ---------- 407
57. Failure to require opinion of medical expert witness be based upon reasonable medical certainty not prejudicial where witness testified to objective findings and answer expressed positive opinion. State v. Garza ---------- 407
58. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Nebraska Public Power Dist. ---------- 421
59. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ---------- 421
60. Evidence in eminent domain case as to valuation for future uses must be limited to adaptability of land that may be reasonably expected in immediate future. Johnson v. Nebraska Public Power Dist. ---------- 421
61. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. 421
62. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. -- 421
63. When evidence in condemnation proceedings con-

flicting, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421

64. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all reasonable inferences that can be reasonably deduced from proof. Kohler v. Ford Motor Co. ---------- 428

65. Entertainment of belated motion to strike testimony, no proper objection having been previously made, discretionary with trial court. Kohler v. Ford Motor Co. ---------- 428

66. Person charged with crime may be convicted on circumstantial evidence only. State v. Lowrey ------ 451

67. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451

68. Test by which jury shall determine sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Escamilla 457

69. In-court identification evidence admissible where such identification made on basis independent of tainted lineup. State v. Evans ---------- 474

70. Primary factor in determining whether independent basis for in-court identification exists is opportunity afforded witness to observe defendant under circumstances free from taint. State v. Evans ---------- 474

71. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Evans - 474

72. New cumulative evidence tendered in support of motion for new trial must be so potent that, by strengthening evidence already offered, new trial would probably result in different verdict. State v. Evans ---------- 474

73. New trial not ordinarily granted for newly discovered evidence which, when produced, will merely

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74. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. State v. Walker ---------- 482
75. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after offense committed. State v. Walker ---- 482
76. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Hacker v. Perez ---------- 485
77. Circumstantial evidence sufficient to sustain charge of unlawful speed and may be sufficient to overcome direct evidence. Hacker v. Perez ---------- 485
78. Question of whether pretrial photographic identification procedure impermissibly suggestive must be determined by evaluation of all surrounding circumstances. State v. Tramble ---------- 488
79. To justify conviction on circumstantial evidence, necessary that facts and circumstances essential to conclusion sought be proved by competent evidence beyond reasonable doubt, and when taken together must be of such character as to be consistent with each other and with hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Eickmeier _ 491
80. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491
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82. Evidence of crime, like one charged against an accused, admissible if tends to prove particular criminal intent necessary to constitute crime charged. State v. Moore ---------- 498
83. Whether other crimes too remote determinable by exercise of judicial discretion; limits of discretion

set by facts of each case. State v. Moore 498
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85. In order to warrant conviction on circumstantial evidence, circumstances taken together must be of such conclusive nature and tendency as to produce reasonable and moral certainty in minds of jury beyond reasonable doubt that accused committed offense charged. State v. Ortiz 515
86. Province of jury to determine circumstances surrounding, and which shed light upon, alleged crime; if, assuming as proved facts which evidence tends to establish, they can be accounted for upon no rational theory which does not include guilt of accused, proof cannot, as matter of law, be said to have failed. State v. Ortiz 515
87. Person of sound mind conclusively presumed to intend obvious and probable consequences of his voluntary act. State v. Ortiz 515
88. Photograph proved to be true representation of person, place, or thing which it purports to represent ordinarily proper evidence of anything of which it is competent and relevant for witness to give verbal description. State v. Ortiz 515
89. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis 522
90. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis 522
91. In stock transfer proceeding under Motor Carrier Act, railway commission in weighing public interest possesses discretion to decide whether evidence of allied employment and noncompetition agreement necessary. Abler v. Herman Bros., Inc. 530
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tween two operations. Andrews Van Lines, Inc. v. Smith ---------- 533
93. Either lay or expert witnesses may testify as to value of property if shown they have acquaintance with property and are informed as to state of market. Chudomelka v. Board of Equalization ---------- 542
94. Competency of witness to testify as to value is matter within discretion of trial court. Chudomelka v. Board of Equalization ---------- 542
95. Foundation for admission into evidence of body fluid test showing compliance with provisions of cited statute sufficient. State v. Lilja ---------- 550
96. Evidence of commission of other crimes than one for which defendant being tried incompetent, irrelevant, and immaterial, and ordinarily prejudicial to rights of defendant. State v. Murray ---------- 554
97. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged, even though such facts and circumstances may prove or tend to prove defendant committed other crimes. State v. Murray ---------- 554
98. Delivery of life insurance policy and acceptance of premiums raise presumption that all conditions precedent such as continued insurability met; this presumption sufficient to sustain plaintiff's burden of proof unless defendant introduces evidence to rebut it. Ortega v. North American Co. for L. & H. Ins. 569
99. Where evidence introduced by insurer wholly insufficient to rebut presumption that plaintiff in good health at date of issuance of policy, error for trial court to submit such issues to jury. Ortega v. North American Co. for L. & H. Ins. ---------- 569
100. If plaintiff without reasonable explanation testifies to facts materially different from his deposition concerning vital issue, change clearly being made to meet exigencies of pending action, evidence discredited and should be disregarded. Beshaler v. Helberg ---------- 584
101. Rule announced in United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, that in-court identification inadmissible if tainted by improper prior lineup or confrontation not retroactive. State v. Whited ---------- 592
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103. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
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106. No formal offer to prove required to obtain review of ruling of trial court excluding answer of witness to question, where question itself clearly indicates what party expected to prove by witness. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---------- 683
107. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686
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109. Under cited statute, guilty knowledge may be established by circumstantial rather than direct evidence. State v. Oltjenbruns ---------- 694
110. As general rule, evidence of other crimes not admissible to prove guilt of defendant of particular crime charged; are exceptions, however, to rule; such evidence relevant and admissible if tends to prove particular criminal intent which is necessary to constitute crime charged. State v. Hoffmeyer ---------- 701
111. Test of sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Morgan ---------- 706
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113. In workmen's compensation proceeding, district court finding against party will be set aside if evidence compels finding for that party. Adler v. Jerryco Motors, Inc. ---------- 757
114. In prosecution for larceny in Nebraska, lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Simons ---------- 761
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116. In criminal prosecution where State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination limited. State v. Fellman ---------- 767
117. No decree of divorce and of nullity of marriage shall be made solely on declarations, confessions, or admissions of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Goree v. Goree ------ 774
118. Where party affirmatively pleads existence of fact material to issue, he assumes burden of proving such fact. Bishoff v. Pieper ---------- 783
119. While mere possession of stolen property standing alone insufficient to justify conviction of burglary, such possession of property is circumstance which, taken in connection with other incriminating evidence in case may be considered by jury in determining question of guilt or innocence of defendant so charged. State v. Cook ---------- 788
120. In order for defendant's possession of stolen property to be sufficient to support conviction, such possession must be recent, that is, not too remote in time from crime. State v. Cook ---------- 788
121. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. State v. Cook ---------- 788
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123. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance.

Heavican v. Holbrook ---------- 814
124. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821
125. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence insufficient to support finding of guilt beyond reasonable doubt. State v. Tolle ---------- 823
126. In prosecution for receiving stolen property where facts known to defendant such that man of age, intelligence, and experience of defendant would know property to have been stolen, jury may properly find defendant possessed guilty knowledge. State v. Alcorn ---------- 854

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Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of governmental immunity. Webber v. Andersen ---------- 9

False Pretenses.

1. Gist of offense of obtaining money by false pretenses is obtaining money of another by false pretenses, with intent to cheat and defraud. State v. Bohannon 594
2. To sustain charge of obtaining money by false pretenses, must be reliance upon representations made, and pretense must be effective cause in inducing owner to part with his property; however, need not be sole moving cause. State v. Bohannon ---------- 594
3. If owner has knowledge of truth, offense of obtaining property by false pretenses not committed. State v. Bohannon ---------- 594
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2. Claim for attorneys' fee after judgment in favor of plaintiff in action on fidelity policy or bond may be presented by motion at subsequent term of court. Beshaler v. Helberg ---------- 584
3. Not proper to allow attorney's fee in criminal cases only for time spent in trial and refuse allowance for time or services reasonably and necessarily required and performed prior to trial. State v. McDonald ---------- 752

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1. In absence of fraud or misrepresentation, health defect existing but undetected on date of medical examination cannot later be advanced as breach of continued insurability clause. Ortega v. North American Co. for L. & H. Ins. ---------- 569
2. If medical examination made by insurer, either with knowledge of illness of applicant thereby disclosed or without discovery of pathological condition which in fact existed, and thereupon issues policy of insurance, should not be allowed to repudiate liability by reason of defective health of insured at time of examination, in absence of fraud or misrepresentation. Ortega v. North American Co. for L. & H. Ins. ---------- 569

3. Generally, applicant for insurance has no duty to inform insurer of new information about his health where insurer fails to inquire into existence of any new information after medical examination. Ortega v. North American Co. for L. & H. Ins. ---------- 569
4. Gist of offense of obtaining money by false pretenses is obtaining money of another by false pretenses, with intent to cheat and defraud. State v. Bohannon ---------- 594
5. To sustain charge of obtaining money by false pretenses, must be reliance upon representations made, and pretense must be effective cause in inducing owner to part with his property; however, need not be sole moving cause. State v. Bohannon -------- 594
6. If owner has knowledge of truth, offense of obtaining property by false pretenses not committed. State v. Bohannon ---------- 594
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v. LeGear ---------- 763
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1. Under provisions of cited statute, determination that

accused mentally incompetent to stand trial effective as of date of determination and operates to suspend criminal proceedings until disability removed; does not invalidate prior proceedings nor constitute finding or determination that accused insane or incompetent to stand trial or assist in own defense at any prior time. State v. Klatt ---------- 274

2. Defendant in criminal action presumed sane until defendant produces evidence of insanity at time of alleged crime; if any evidence produced, State must then sustain burden of producing evidence that defendant sane at time of crime beyond reasonable doubt. State v. Klatt ---------- 274

3. Verdict of finder of fact on issue of insanity will not be disturbed unless insufficient evidence to support findings. State v. Klatt ---------- 274

4. Question of whether legal sanity of accused established beyond reasonable doubt at trial one of fact to be determined by trial court when jury waived; where substantial evidence to sustain finding of trial court on that issue, that determination not disturbed on appeal. State v. Klatt ---------- 274

5. Motion for change of venue in criminal case addressed to sound discretion of trial court and its ruling not disturbed unless clear abuse of such discretion shown. State v. Klatt ---------- 274

6. Bald assertions of insanity, unsubstantiated by recital of credible facts and unsupported by record, wholly insufficient and justify summary dismissal of post conviction proceeding. State v. Virgilito ---- 328

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1. Secretary of Interior having failed to accept offer of retrocession embraced in Legislative Resolution 37, Eightieth Session, Nebraska Legislature, 1969, before withdrawn by Legislative Resolution 16, Eighty-second Session, Nebraska Legislature, 1971, 18 U. S. C. A., section 1162, still applicable in Nebraska. State v. Goham ---------- 34

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3. Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted State of Nebraska both civil and criminal jurisdiction of Indians in Nebraska. Robinson v. Sigler ---------- 144
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5. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
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1. Child custody statutes of Nebraska liberally construed to accomplish purposes of serving best interests of children involved. State v. Randall ___ 64
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3. Whether child neglected within purview of statute question of fact; each case determined from all facts and circumstances of each particular case. State v. Randall _____ 64
4. In cases involving child custody determinations in juvenile and other courts, findings of trial court, both as to evaluation of evidence and matter of custody, not disturbed unless clear abuse of discretion or decision against weight of evidence. State v. Randall _____ 64
5. Where parent has forfeited right to custody of children and custody awarded to someone other than parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change in custody. State ex rel. Sanders v. Doyle _ 453
6. In determining custody of children of tender years, court will give consideration to fact that children have formed natural attachment for person who has stood in relation of parents. State ex rel. Sanders v. Doyle _____ 453
7. Although preference of children as to custody not controlling, is factor that will be considered by court. State ex rel. Sanders v. Doyle _____ 453
8. Relinquishment of child for adoption made voluntarily and in accordance with provisions of statute not revocable. Kane v. United Catholic Social Services _____ 467
9. Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give necessary parental care and protection or when parent unfit by reason of lewd and lascivious behavior detrimental to health, morals, or well-being of child. Healey v. Naimie _____ 494
10. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parent, and consent of child immaterial and does not constitute

defense. State v. Randall ---------- 743
11. If a man induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is father of child with which she is pregnant, when unknown to him her condition caused by another, marriage may be annulled for fraud, if not ratified with knowledge thereof. Goree v. Goree ---------- 774
12. Custody of minor child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Marcus v. Huffman ---------- 798
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1. Court of equity will not grant injunctive relief unless shown that injury has been or will be suffered by party seeking such relief. Muchemore v. Heflin 217
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3. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
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2. Except as otherwise provided by statute, matter of granting hearing on issue of competency to stand trial rests in discretion of trial court. State v. Boston ---------- 388
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2. In absence of request, trial court not required to instruct in regard to lesser included offenses. State v. Warner ---------- 335
3. If court has instructed jury generally on law and has not withdrawn any essential issue from consideration by jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Russo ---------- 348
4. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451
5. Jury instructions must be considered collectively; if as whole they correctly state law, no error occurs, although one alone may be incomplete. State v. Black Bear ---------- 670
6. In absence of request for cautionary instruction with relation to previous similar offenses, not error for trial court to fail to give such instruction. State v. Randall ---------- 743
7. Duty of court not only to instruct as to what constitutes voluntary confession, but also to instruct jury to disregard alleged confession if found to be involuntary. State v. McDonald ---------- 752
8. Duty of trial court to instruct jury upon issues presented by pleadings and supported by evidence. Heavican v. Holbrook ---------- 814
9. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821
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1. Policy of insurance given effect according to ordinary sense of terms used, and, if clear, applied according to their plain and ordinary meaning. Lydick v. Insurance Co. of North America ---------- 97
2. Where insurance policy limits liability to direct loss or damage, general rule that if windstorm combines with hazard expressly excluded from policy coverage to produce loss, insured may not recover. Lydick v. Insurance Co. of North America ---------- 97
3. Where initial permission to use insured vehicle given by one having proper authority to give permission to person operating it at time of accident, for purposes of liability coverage, such operation with express or implied permission of named insured, even though specific or express terms of permission given violated. Hull v. Allstate Ins. Co. ---------- 130
4. Insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
5. Policy of insurance considered as any other contract to give effect to intention of parties at time made as expressed therein; language of it considered not in accordance with what insurer intended words to mean, but what reasonable person in position of insured would have understood them to mean. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
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7. Under exclusion in liability policy excluding from coverage injury to goods sold or work completed by named insured, if defect in product furnished or work completed by named insured causes damage to other property, no coverage for such damage to other property. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
8. Fire insurance policy legally issued in this state which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which conflict with state statutes to conform with

such statutes, subject to limitations set out in cited statute. Hiram Scott College v. Insurance Co. of North America ---------- 290

9. In automobile liability insurance policy, word household in omnibus clause extending liability available to insured to other members of household means those who dwell under same roof and compose a family. State Farm Mut. Auto. Ins. Co. v. Selders - 342

10. Statute requires uninsured motorist insurance for protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

11. Purpose of statute to give same protection to person injured by uninsured motorist as he would have if had been injured in accident caused by automobile covered by standard liability policy; provisions to be liberally construed to accomplish such purpose. State Farm Mut. Auto. Ins. Co. v. Selders -------- 342

12. Policy of insurance given effect according to ordinary sense of terms used, and if clear, will be applied according to their plain and ordinary meaning. Brander v. Eagle Raceways, Inc. ---------- 508

13. Delivery of life insurance policy and acceptance of premiums raise presumption that all conditions precedent such as continued insurability met; this presumption sufficient to sustain plaintiff's burden of proof unless defendant introduces evidence to rebut it. Ortega v. North American Co. for L. & H. Ins. - 569

14. In absence of fraud or misrepresentation, health defect existing but undetected on date of medical examination cannot later be advanced as breach of continued insurability clause. Ortega v. North American Co. for L. & H. Ins. ---------- 569

15. If medical examination made by insurer, either with knowledge of illness of applicant thereby disclosed or without discovery of pathological condition which in fact existed, and thereupon issues policy of insurance, should not be allowed to repudiate liability by reason of defective health of insured at time of examination, in absence of fraud or misrepresentation. Ortega v. North American Co. for L. & H. Ins. 569

16. Where evidence introduced by insurer wholly insufficient to rebut presumption that plaintiff in good health at date of issuance of policy, error for trial court to submit such issues to jury. Ortega v. North American Co. for L. & H. Ins. ---------- 569

17. Generally, applicant for insurance has no duty to inform insurer of new information about his health where insurer fails to inquire into existence of any new information after medical examination. Ortega v. North American Co. for L. & H. Ins. ---------- 569
18. Claim for attorneys' fee after judgment in favor of plaintiff in action on fidelity policy or bond may be presented by motion at subsequent term of court. Beshaler v. Helberg ---------- 584
19. Objectively reasonable expectations of beneficiary-insured regarding terms of his insurance contract ordinarily will be honored. Nile Valley Coop. G. & M. Co. v. Farmers Elevator Mut. Ins. Co. -------- 720
20. Applicable part of "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff construed to limit liability to that proportion of any loss which last reported value bears to actual value at time of report, provided liability does not exceed amount stated in schedule endorsement of policy. Nile Valley Coop. G. &. M. Co. v. Farmers Elevator Mut. Ins. Co. ---------- 720
21. Where applicable statutory provision conflicts with provisions of insurance policy, statute and not insurance policy controls. Rudder v. American Standard Ins. Co. of Wisconsin ---------- 778
22. Where words of statute plain, direct, and unambiguous, no interpretation needed to ascertain meaning. Rudder v. American Standard Ins. Co. of Wisconsin 778
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1. Ordinarily voluntary intoxication no justification or excuse for crime, but excessive intoxication by which person wholly deprived of reason may prevent one from having intent charged. State v. Bevins ----- 785
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1. Failure to reply to direct inquiry as to which test should be administered, as provided in Implied Consent Act, under circumstances enumerated, equivalent to refusal to take any tests. Johnson v. Dennis 95
2. Tests authorized by statute to be used in determining alcoholic content present in body fluid of person must be performed according to methods approved by Department of Health. State v. Parrott 213
3. Failure of officer to advise motorist subjected to breath or body-fluid test for intoxication that he could obtain additional test following that administered at direction of officer does not excuse motorist's failure to submit to such test. Zadina v. Weedlun ---------- 361
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Ordinarily voluntary intoxication no justification or excuse for crime, but excessive intoxication by which person wholly deprived of reason may prevent one from having intent charged. State v. Bevins ----- 785

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2. In suit where specific performance granted, all damages growing out of defendant's breach of contract litigable in specific performance action; separate subsequent actions to recover different elements of such damages for same breach cannot be maintained. Sechovec v. Harms ---------- 70

3. Summary judgment extreme remedy and should be awarded only when issue clear beyond all doubt; any reasonable doubt touching existence of genuine issue of material fact resolved against moving party. Hollamon v. Eagle Raceway, Inc. ---------- 221
Hiram Scott College v. Insurance Co. of North America ---------- 290
4. Summary judgment authorized when moving party entitled to judgment as matter of law, clear what truth is, and no genuine issue remains for trial. Hollamon v. Eagle Raceway, Inc. ---------- 221
5. Relief under Post Conviction Act limited to cases in which there was denial or infringement of rights of prisoner such as to render judgment void or voidable under Constitutions of this state or United States. State v. Bullard ---------- 334
6. Where default has been regularly entered, within discretion of trial court as to whether default judgment shall be set aside; in absence of showing of abuse of discretion, Supreme Court will not interfere. Michaelis v. Michaelis ---------- 350
7. Facts and circumstances in each case determine whether there has been abuse of discretion; among matters to be considered are promptness of motion to vacate, negligence or want of diligence of party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in administration of justice. Michaelis v. Michaelis ---------- 350
8. As prerequisite to examination in Supreme Court, evidence adduced on summary judgment hearing must be embodied in bill of exceptions. Scarpello v. Continental Assur. Co. ---------- 395
9. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395
10. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
11. Judgment creditor who brings creditor's suit obtains lien against fund from time of commencement of suit. Steven v. Ford ---------- 401
12. Where parent has forfeited right to custody of chil-

dren and custody awarded to someone other than parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change of custody. State ex rel. Sanders v. Doyle 453
13. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Belek v. Travelers Ind. Co. ---------- 470
14. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg -------- 584
15. Not sufficient for party seeking vacation of judgment or decree to show it was obtained by fraud of his adversary; petitioner must also show failure to obtain just decision not attributable to own fault or negligence. Flint v. Panter ---------- 615
16. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647
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18. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648
19. If reasonable competent evidence to support findings of fact in trial court shown, judgment, order, or award will not be modified or set aside for insuffiency of evidence. Mid-America Pipeline Co. v. Warren ---------- 710

Judicial Sales.

1. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781
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3. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Hollstein v. Adams ---------- 781

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2. When accused committed offense of murder, State of Nebraska was exercising exclusive jurisdiction over criminal acts in Indian territory in Nebraska. Robinson v. Sigler ---------- 144
3. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
4. No acceptance of Public Law 280 required of State of Nebraska; by its terms applied to Nebraska, and only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144
5. Where court of equity obtains jurisdiction of cause for any purpose, may retain it for all and proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Freeman v. Rose ---------- 176
6. Right of workman to sue railroad company for wrongful discharge not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement, provided he has elected to consider employment at end and does not seek reinstatement. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
7. Right of member to sue his union not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement as these procedures have no reference to disputes between member and union. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
8. Section of Uniform Interstate and International Procedure Act applies when tortious act or omission

occurs in state even though resulting injury occurs elsewhere. Von Seggern v. Saikin ---------- 315
9. Section of Uniform Interstate and International Procedure Act authorizes exercise of jurisdiction when tortious act or omission takes place without state but injury occurs within state and there is some other reasonable connection between state and defendant. Von Seggern v. Saikin ---------- 315
10. Appearance "general" if party appearing invokes power of court on any question other than jurisdiction. Kohler v. Ford Motor Co. ---------- 428
11. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647
12. Ordinary burdens of trial insufficient for Supreme Court to classify otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. ---- 647
13. Since action for alimony and division of property not barred by Colorado divorce decree rendered on constructive service, district court for Box Butte County, Nebraska, had jurisdiction to entertain it. Mandelberg v. Mandelberg ---------- 844

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1. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Gutierrez 383
2. To be constitutionally impermissible, exclusion of any given sector of population from jury duty must be purposeful or intentional. State v. Gutierrez ------ 383
3. Use of voter registration lists or poll books for jury selection systems constitutionally permissible. State v. Gutierrez ---------- 383
4. Nebraska system of selecting jurors clearly within constitutional limits. State v. Gutierrez -------- 383
5. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. 421
6. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. 421
7. When evidence in condemnation proceedings conflict-

ing, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421

8. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451

9. Test by which jury shall determine sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Escamilla 457

10. Province of jury to determine circumstances surrounding, and which shed light upon, alleged crime; if, assuming as proved facts which evidence tends to establish, they can be accounted for upon no rational theory which does not include guilt of accused, proof cannot, as matter of law, be said to have failed. State v. Ortiz ---------- 515

11. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522

12. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis ---------- 522

13. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

14. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. 606

15. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821
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1. Purpose of kidnapping in every instance to make possible to commit some other crime; very nature therefore embraces other crimes as well as that of kidnapping. Penalties of kidnapping intentionally more severe than other crimes which may be included because of consequences which often result from its perpetration. State v. Goham ---------- 34
2. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parents, and consent of child immaterial and does not constitute defense. State v. Randall ---------- 743

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1. Right of workman to sue railroad company for wrongful discharge not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement, provided he has elected to consider employment at end and does not seek reinstatement. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
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1. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" compensable under lease statutes. State v. Rosenberger ---------- 726
2. Value of tenant's interest resulting from "improvements" on school lands required to be determined prior to sale of land. State v. Rosenberger ---------- 726

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In prosecution for larceny in Nebraska, lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Simons ---------- 761

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1. Unless Legislature otherwise provides, funds properly expended by receiving high school district from state and federal aid includable in computation of per pupil costs under provisions of cited statute. Werth v. Buffalo County Board of Equalization -- 119
2. Establishment of school district boundaries purely legislative matter. Kaup v. Sweet ---------- 226
3. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261
4. Public corporation authorized by Legislature and organized pursuant thereto to carry out functions determined for public purpose and general welfare of people is arm or branch of government for this purpose and under plenary control of Legislature. Evans v. Metropolitan Utilities Dist. ---------- 261
5. Constitution not grant but rather restriction of legislative power; taxing power vested in Legislature without limit except as may be prescribed by Constitution itself; consequently, courts can enforce only those limits which Constitution clearly imposes. Evans v. Metropolitan Utilities Dist. ---------- 261
6. In proper construction of constitutional provisions, limitations or restrictions upon power of taxation can never be raised by implication, but intention to impose them must be expressed in clear, unambiguous language. Evans v. Metropolitan Utilities Dist. 261
7. Cited statute constitutional; Legislature may abrogate right of action for tort to happen in future. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
8. In order to justify courts in declaring invalid as delegation of legislative power a statute conferring particular duties or authority upon administrative officers, must clearly appear beyond reasonable doubt that duty or authority so conferred is power that appertains exclusively to legislative department, and conferring not warranted by provisions of Constitu-

tion. Shear v. County Board of Commissioners ---- 849
9. Legislature has complete power and authority to prescribe qualifications for office of county assessor, limited only by requirement that such conditions of eligibility shall not be unreasonable. Shear v. County Board of Commissioners ---------- 849
10. Competent for Legislature to classify for purposes of legislation, if classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest justice or expediency of diverse legislation with respect to objects to be classified. Shear v. County Board of Commissioners ---------- 849

Libel and Slander.
Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of governmental immunity. Webber v. Andersen ---- 9

Liens.
1. Lein of materialman for material furnished contractor not dependent upon contract existing between materialman and owner; lien given because material furnished used in construction of building or other structure. Paxton & Vierling Steel Co. v. Barmore 54
2. Cited statute makes no requirement concerning contract between materialman and contractor; if contract and delivery, or furnishing under it, sufficient to create indebtedness or liability, sufficient to create lien. Paxton & Vierling Steel Co. v. Barmore ---- 54
3. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
4. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
5. Judgment creditor who brings creditor's suit obtains lien against fund from time of commencement of suit. Steven v. Ford ---------- 401
6. Judgment creditor who intervenes in creditor's suit obtains lien against fund from date of intervention. Steven v. Ford ---------- 401

Limitations of Actions.
1. Fire insurance policy legally issued in this state

which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which conflict with state statutes to conform with such statutes, subject to limitations set out in cited statute. Hiram Scott College v. Insurance Co. of North America ---------- 290

2. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Kohler v. Ford Motor Co. -- 428
3. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626
4. Section 18-1717, R. R. S. 1943, enacted with emergency clause on April 29, 1967, provides for 1-year limitation period in which party may contest any annexation or contest any act done prior to such date, pursuant to such annexation which was made pursuant to any statute of Nebraska which has been on April 29, 1967, declared unconstitutional. Nebraska Mil-Nic, Inc. v. City of Grand Island ---- 656
5. Special statute of limitations, where applicable, controls over general statute of limitations because special statute one that more properly expresses legislative will. Nebraska Mil-Nic, Inc. v. City of Grand Island ---------- 656

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District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners ---------- 849

Marriage.

1. In Nebraska, voidable marriage legally valid for all civil purposes until nullity so pronounced. Ballew v. Ballew ---------- 397
2. Under divorce decree providing alimony payments shall terminate upon remarriage of wife, right of divorced wife to receive such payments terminated upon remarriage and not revived by annulment of her remarriage on grounds which rendered remarriage voidable. Ballew v. Ballew ---------- 397

Master and Servant.

1. Relation of master and servant cannot be defined in general terms with substantial accuracy. Todd v. Boals ---------- 51
2. General test in determining whether employee servant of original master, or of party to whom has been furnished, whether in particular service which he is engaged to perform he continues to be liable to direction and control of master, or becomes subject to that of party to whom he is lent or hired. Mid-America Pipeline Co. v. Warren ---------- 710
3. Rule stated as to relationship of employee between original master and new master to whom loaned. Mid-America Pipeline Co. v. Warren ---------- 710
4. Before new relationship from original master to new master can be made effective, servant must understand he is submitting himself to control of new master. Mid-America Pipeline Co. v. Warren _ 710

Mortgages.

1. Auctioneer operating as market agency under Federal Packers and Stockyards Act and who sells mortgaged cattle at request of mortgagors not relieved from liability for conversion by terms of act. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
2. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626
3. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Hollstein v. Adams ---------- 781

Motions, Rules, and Orders.

1. Motion to withdraw plea of guilty sustained only if defendant proves withdrawal necessary to correct manifest injustice and defendant must establish such ground by clear and convincing evidence. State v. Johnson ---------- 26
2. Entertainment of belated motion to strike testimony, no proper objection having been previously made, discretionary with trial court. Kohler v. Ford Motor Co. ---------- 428
3. Post Conviction Act requires that unless motion and files and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hear-

ing, determine issues, and make findings of fact and conclusions of law with respect thereto. State v. Reichel ---------- 464
4. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464
5. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Reichel -- 464
6. Motion for continuance addressed to sound discretion of court; in absence of showing of abuse of discretion, ruling on motion for continuance not disturbed. Jindra v. S. M. S. Trucking Co. ---------- 502
7. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522
8. Railway commission has jurisdiction to reconsider and vacate order on own motion within 30 days after mailing of copy of order and before appeal taken; upon expiration of 30 days from mailing copy of order, or upon appeal being perfected, power of commission to reconsider order on own motion terminates. Andrews Van Lines, Inc. v. Smith ---------- 533
9. Transfer of operating rights may be approved after notice and hearing if railway commission finds transaction will be consistent with public interest, does not unduly restrict competition, and applicant fit, willing, and able to perform service. Andrews Van Lines, Inc. v. Smith ---------- 533
10. Order of railway commission which fails to make findings of ultimate facts irregular and will be set aside upon appeal. Andrews Van Lines, Inc. v. Smith ---------- 533
11. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647
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summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. 647
13. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648
14. Rule for consideration of motion for directed verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648
15. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. State v. Tolle -- 823
16. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Tolle ---------- 823

Motor Vehicles.

1. Failure to reply to direct inquiry as to which test should be administered, as provided in Implied Consent Act, under circumstances enumerated, equivalent to refusal to take any tests. Johnson v. Dennis ---------- 95
2. Revocation of license to operate motor vehicle under point system ministerial act. Westenburg v. Weedlun ---------- 679
3. When records disclose that any person has accumulated total of 12 or more points within 2 years, Director of Motor Vehicles required by statute to summarily revoke license and privileges of such person to operate motor vehicle in this state. Westenburg v. Weedlun ---------- 679
4. Ministerial administrative authority vested in Director of Motor Vehicles by statute requires he apply applicable violation sections of motor vehicle statute to information properly furnished to him. Westenburg v. Weedlun ---------- 679
5. Under cited statute, possession of mini-bike without certificate of registration prima facie evidence of unlawful possession and concealment. State v. Oltjenbruns ---------- 694
6. When materials in plain sight within motor vehicle indicative of criminal offense, subsequent search justified and legal. State v. Oltjenbruns ---------- 694
7. In absence of statute or ordinance, meaning to be given to traffic control signal that which a reasonably prudent motorist would understand and apply.

Heavican v. Holbrook ---------- 814
8. As general rule, motorist who enters intersection when signal in his favor entitled to continue through intersection even though signal changes after he has entered intersection. Heavican v. Holbrook --- 814
9. Motorist intending to make left turn at intersection, where left turns controlled by separate traffic signal light, may enter intersection on favorable signal and complete turn even though signal changes after he entered intersection. Heavican v. Holbrook 814
10. Motorist intending to make left turn, who would otherwise have right-of-way over through traffic, may lose right-of-way by stopping in intersection and yielding right-of-way to through traffic before completing turning movement. Heavican v. Holbrook ---------- 814

Municipal Corporations.
1. Common law rule of governmental immunity not completely abrogated in this state by judicial pronouncement. Webber v. Andersen ---------- 9
2. Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of governmental immunity. Webber v. Andersen --- 9
3. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9
4. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen ----- 9
5. Word "airport" in clause "any city * * * owning or operating an airport" in Cities Airport Authorities Act, means airport qualified and licensed for public use. Elliott v. City of Plattsmouth ---------- 165
6. "Municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions. Evans v. Metropolitan Utilities Dist. ---------- 261
7. Under cited statute, city of first class may annex

contiguous lands, urban or suburban in character, and not agricultural lands rural in character. Webber v. City of Scottsbluff ---------- 282

8. Cited statute does not require that minutes of meeting of city council embody full text of ordinance enacted thereat; sufficient if minutes set forth fully proceedings thereon showing statutory requirements complied with and ordinance sufficiently identified therein and preserved in volume or file separate from minutes. Webber v. City of Scottsbluff ---- 282

9. Power of city to annex lands contiguous to city and within boundaries of rural fire protection district not limited by provisions of cited statute. Webber v. City of Scottsbluff ---------- 282

10. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile -------- 404

11. What is public good as relates to zoning ordinances affecting use of property primarily matter lying within discretion and determination of municipal body to which power and function of zoning committed; unless abuse of discretion clearly shown, not province of courts to interfere. J. W. Auto Parts, Inc. v. City of Omaha ---------- 624

12. Section 18-1717, R. R. S. 1943, enacted with emergency clause on April 29, 1967, provides for 1-year limitation period in which party may contest any annexation or contest any act done prior to such date, pursuant to such annexation which was made pursuant to any statute of Nebraska which has been on April 29, 1967, declared unconstitutional. Nebraska Mil-Nic, Inc. v. City of Grand Island ---- 656

Negligence.

1. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9

2. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen --------- 9

3. Duty of contractor engaged in construction work on public highway generally to warn public that highway dangerous to travel. Gorges v. Dobson Bros. Constr. Co. ---------- 19
4. Ordinarily no duty upon contractor engaged in construction work upon public highway to erect structure that will prevent forcible entry into area of construction. Gorges v. Dobson Bros. Constr. Co. - 19
5. Where act one which reasonable man would recognize as involving risk of harm to another, risk unreasonable and act negligent if risk of such magnitude as to outweigh what law regards as utility of act or of particular manner in which done. Johnson v. Municipal University of Omaha ---------- 24
6. Physical facts sufficient to bar recovery for negligence only when indisputably demonstrate that collision out of which cause of action arose not caused by party charged. Meyer v. Lang ---------- 202
7. When employee's injuries caused by willful negligence, may not recover compensation. Bole v. S. M. S. Trucking Co. ---------- 341
8. Manufacturer strictly liable in tort when article he places on market, knowing it is to be used without inspection for defects, proves to have defect that causes injury to person rightfully using article. Kohler v. Ford Motor Co. ---------- 428
9. Conditions affecting visibility of motorist impose upon driver duty to use degree of care commensurate with existing circumstances. Hacker v. Perez 485
10. Circumstantial evidence sufficient to sustain charge of unlawful speed and may be sufficient to overcome direct evidence. Hacker v. Perez ---------- 485
11. Operator of motor vehicle who would otherwise have right-of-way under statutory regulations if operates it at lawful rate of speed may forfeit right-of-way if operates vehicle at unlawful rate. Hacker v. Perez 485
12. Statute granting right-of-way to driver of emergency vehicle, over other drivers using highway, does not relieve him from responsibility of driving with due regard for safety of all persons on highway, and does not protect him from consequences of arbitrarily exercising such right-of-way. Winston v. Davis ---------- 522
13. Rules stated as to duty of driver of vehicle upon highway to yield right-of-way to law enforcement vehicles when operated on official business; and when provision shall not operate to relieve driver of law

enforcement vehicle from duty to drive with due regard for safety of others. Winston v. Davis --- 522
14. Rule for determination of right-of-way at intersections stated. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
15. Operator of automobile approaching or entering intersection required to see another automobile approaching or entering intersection which has been favored with right-of-way under statutory rules of road and failure to see such favored automobile negligence as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
16. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ------ 606
17. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
18. Not sufficient for party seeking vacation of judgment or decree to show it was obtained by fraud of his adversary; petitioner must also show failure to obtain just decision not attributable to own fault or negligence. Flint v. Panter ---------- 615
19. Rule stated as to duties of driver approaching unprotected intersection at speed as will afford reasonable opportunity for effective observations for cars approaching on intersecting road or when view completely obstructed. Where facts undisputed, negligence may be found as matter of law. Hodgson v. Gladem ---------- 736
20. As general rule, motorist who enters intersection when signal in his favor entitled to continue through intersection even though signal changes after he has entered intersection. Heavican v. Holbrook ------- 814
21. Motorist intending to make left turn at intersection, where left turns controlled by separate traffic signal light, may enter intersection on favorable signal and complete turn even though signal changes after he entered intersection. Heavican v. Holbrook 814
22. Motorist intending to make left turn, who would otherwise have right-of-way over through traffic,

may lose right-of-way by stopping in intersection and yielding right-of-way to through traffic before completing turning movement. Heavican v. Holbrook 814

New Trial.

1. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
2. Refusal of trial court in criminal case to direct prosecutor to accept offer by defendant to stipulate to essential element of alleged offense ordinarily constitutes no ground for new trial. State v. Narcisse 209
3. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Evans ------- 474
4. New cumulative evidence tendered in support of motion for new trial must be so potent that, by strengthening evidence already offered, new trial would probably result in different verdict. State v. Evans ---------- 474
5. New trial not ordinarily granted for newly discovered evidence which, when produced, will merely impeach or discredit witness who testified at trial. State v. Evans ---------- 474
6. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis ---------- 522
7. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522
8. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg ---- 584
9. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821
   State v. Tolle ---------- 823

10. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. State v. Tolle -- 823

Notice.

1. Court should not correct erroneous record of criminal sentence without affording parties hearing. State v. Cruse ---------- 331
2. Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
3. Properly conducted existing local savings and loan associations have interests and rights which are affected by establishment of other local savings and loan associations or branches sufficient to make all such associations interested parties entitled to constitutional due process. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
4. Due process of law requires notice and opportunity to be heard, as matter of right and not by let or leave of administrative officers or agencies, when rights, duties, or privileges of interested parties involved by exercise of quasi-judicial power pursuant to terms of statute. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
5. Compliance with mandatory provisions of cited statute requiring administrative agency to adopt appropriate rules of procedure for notice and hearing necessary to give validity to its action when notice and hearing essential to due process. First Fed. Sav. & Loan Assn. v. Department of Banking ----- 562
6. Notice that will and codicil being offered for probate sufficient to put party receiving notice upon inquiry to determine what documents being offered for probate. Flint v. Panter ---------- 615
7. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781
8. If publication day falls upon holiday, publication preceding day in weekly newspaper complies with statutory requirement that publication be had upon same day of week as first publication. Hollstein v. Adams ---------- 781
9. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Holl-

stein v. Adams ---------- 781

Oil and Gas.

1. Chapter 57, article 9, R. R. S. 1943, contemplates that determination of correlative rights of adjoining owners in pool of oil or gas shall be determined on fair, reasonable, and equitable basis. Farmers Irr. Dist. v. Schumacher ---------- 825
2. Correlative rights must be determined and fixed on basis of circumstances present in each individual case. Farmers Irr. Dist. v. Schumacher ---------- 825
3. Pooling order allocating shares in production of well, and costs encountered, may be made retroactive when equity and justice require. Farmers Irr. Dist. v. Schumacher ---------- 825
4. Ordinarily, adjoining owner not justified in awaiting successful outcome of drilling operations before entering into pooling agreement or applying for pooling order. Farmers Irr. Dist. v. Schumacher - 825

Ordinances.

1. Cited statute does not require that minutes of meeting of city council embody full text of ordinance enacted thereat; sufficient if minutes set forth fully proceedings thereon showing statutory requirements complied with and ordinance sufficiently identified therein and preserved in volume or file separate from minutes. Webber v. City of Scottsbluff ---------- 282
2. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. City of Imperial v. Raile ---------- 404
3. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
4. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance. Heavican v. Holbrook ---------- 814
5. In absence of statute or ordinance, meaning to be given to traffic control signal that which a reasonably prudent motorist would understand and apply. Heavican v. Holbrook ---------- 814

Parent and Child.

1. In cases involving child custody determinations in juvenile and other courts, findings of trial court,

both as to evaluation of evidence and matter of custody, not disturbed unless clear abuse of discretion or decision against weight of evidence. State v. Randall ---------- 64

2. Discretion of lower court with respect to awarding or changing custody and support of minor children subject to review; but determination of court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Hanson v. Hanson ---------- 108

3. Ordinarily, custody of minor children awarded to mother in divorce action not disturbed unless by changed circumstances affirmatively shown that mother unfit person to have custody or that best interests of children require such action. Benton v. Benton ---------- 205

4. Trial court's order in child support case not overturned unless abuse of discretion by trial court found. Benton v. Benton ---------- 205

5. Courts take judicial notice of ordinary costs of living and dental, medical, and other familiar costs of living. Benton v. Benton ---------- 205

6. Father primarily liable for support of his children independent of assets of wife and mother. Benton v. Benton ---------- 205

7. Measure of damages for action for wrongful death of minor child is pecuniary loss which parent sustains by reason of being deprived of child's services during his minority and loss of contributions that might reasonably be expected to be made after reaching his majority. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

8. Adoption and right to take property by descent or inheritance strictly statutory and exclusively within legislative control. Neil v. Masterson ---------- 364

9. Nebraska, recognizing humanitarian aspects and purposes of adoption statutes, gives them liberal rather than strict construction. Neil v. Masterson ------ 364

10. Adoption statute must be construed together with statutes of descent and distribution. Neil v. Masterson ---------- 364

11. Intention of statute that next of kin of adoptive parents shall have same right to inherit property from adoptive child as they would have from natural child of said adoptive parents. Neil v. Masterson -- 364

12. Where parent has forfeited right to custody of children and custody awarded to someone other than

parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change in custody. State ex rel. Sanders v. Doyle -- 453

13. In determining custody of children of tender years, court will give consideration to fact that children have formed natural attachment for person who has stood in relation of parent. State ex rel. Sanders v. Doyle ---------- 453

14. Although preference of children as to custody not controlling, is factor that will be considered by court. State ex rel. Sanders v. Doyle ---------- 453

15. Relinquishment of child for adoption made voluntarily and in accordance with provisions of statute not revocable. Kane v. United Catholic Social Services ---------- 467

16. Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give necessary parental care and protection or when parent unfit by reason of lewd and lascivious behavior detrimental to health, morals, or well-being of child. Healey v. Naimie ---------- 494

17. Child custody statutes of Nebraska to be liberally construed to accomplish purpose of serving best interests of children involved. Healey v. Naimie ---- 494

18. In post-divorce custody proceeding, determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within discretion of trial court; on appeal, Supreme Court will not disturb determination except to remedy abuse of discretion. Lueders v. Lueders ---------- 539

19. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parent, and consent of child immaterial and does not constitute defense. State v. Randall ---------- 743

20. Custody of minor child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Marcus v. Huffman ---------- 798

21. Courts may not properly deprive parent of custody of minor child unless affirmatively shown that such parent unfit to perform duties imposed by that relationship or has forfeited that right. Marcus v. Huffman ---------- 798

Parties.

1. In action which challenges legality in whole or part of levy made under provisions of nonresident high school tuition act, receiving school districts to which tuition claims paid from fund necessary parties. Werth v. Buffalo County Board of Equalization ---- 119
2. Where evidence insufficient to sustain verdict in favor of plaintiff, duty of trial court to dismiss action on motion of defendant. Sinnett v. Dial Constr. Co. ---------- 190
3. Summary judgment extreme remedy and should be awarded only when issue clear beyond all doubt; any reasonable doubt touching existence of genuine issue of material fact resolved against moving party. Hollamon v. Eagle Raceway, Inc. ---------- 221
4. Summary judgment authorized when moving party entitled to judgment as matter of law, clear what truth is, and no genuine issue remains for trial. Hollamon v. Eagle Raceway, Inc. ---------- 221
5. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
6. Appearance "general" if party appearing invokes power of court on any question other than jurisdiction. Kohler v. Ford Motor Co. ---------- 428
7. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all reasonable inferences that can be reasonably deduced from proof. Kohler v. Ford Motor Co. ---------- 428
8. District court may determine any controversy between parties before it, when can be done without prejudice to rights of others, or by saving their rights; but when determination of controversy cannot be had without presence of other parties, court must order them brought in. Bailey v. McCoy ---- 618

Partnerships.

1. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
2. Partnership may continue, although it admits partner or partner retires. Bailey v. McCoy ---------- 618
3. Agreement in many respects is law of partnership. Bailey v. McCoy ---------- 618

4. In service partnership agreement with provision that partners base payment for good will on annual income, word "income" ordinarily imports net profits. Bailey v. McCoy ---------- 618

Payment.

In absence of fraud, mistake, or duress, giving of check by debtor to creditor in payment of account, without clearly defined reservations, ordinarily creates an account stated. Hansen v. Abbott ------ 248

Penalties.

No person who as result of mental disease or defect shall undergo sentence for commission of offense so long as such incapacity endures. State v. Saxon -- 338

Plea Bargaining.

1. When defendant seeks to withdraw plea of guilty or nolo contendere allegedly made in reliance upon promise of prosecutor of recommendation favorable to defendant, which promise not kept, burden of proof on defendant to prove unfulfilled promise and reliance thereon. State v. Krug ---------- 551
2. Proper for court to grant charge and sentence concessions to defendants who plead guilty when interest of public in effective administration of criminal justice would be served. State v. Black Bear - 670

Pleadings.

1. General demurrer to cause of action for negligence must be based on pleading of facts and not mere allegations of conclusions of law. Webber v. Andersen ---------- 9
2. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles ---------- 105
3. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles -- 105
4. While petition may be attacked at any stage of proceedings on grounds of insufficiency to state cause of action, where attack delayed until appeal, pleading liberally construed. Bader v. Hodwalker ------ 138
5. Transfer from nonaccredited school district to accredited one states sufficient reason for transfer. Bader v. Hodwalker ---------- 138

6. Insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
7. Abuse of discretion for trial court to refuse to permit amendment in furtherance of justice. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
8. Liability of estate for inheritance tax may be determined upon petition of executrix filed in administration proceeding. Reller v. McArthur ---------- 313
9. Bald assertions of insanity, unsubstantiated by recital of credible facts and unsupported by record, wholly insufficient and justify summary dismissal of post conviction proceeding. State v. Virgilito -- 328
10. Post Conviction Act requires that unless motion, files, and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito ---------- 328
11. Facts and circumstances in each case determine whether there has been abuse of discretion; among matters to be considered are promptness of motion to vacate, negligence or want of diligence of party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in administration of justice. Michaelis v. Michaelis ---------- 350
12. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395
13. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Kohler v. Ford Motor Co. -- 428
14. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464
15. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion

for post conviction relief. State v. Reichel ------- 464
16. No decree of divorce and of nullity of marriage shall be made solely on declarations, confessions, or admissions of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Goree v. Goree ----- 774
17. Where party affirmatively pleads existence of fact material to issue, he assumes burden of proving such fact. Bishoff v. Pieper ---------- 783
18. Duty of trial court to instruct jury upon issues presented by pleadings and supported by evidence. Heavican v. Holbrook ---------- 814
19. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance. Heavican v. Holbrook ---------- 814

Post Conviction.

1. When indigent defendant has made known to court he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by court or lack of action on part of his attorney. State v. Myles ---------- 105
2. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles --- 105
State v. Hatten ---------- 237
State v. Rhodes ---------- 332
3. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles ---------- 105
4. Bald assertions of insanity, unsubstantiated by recital of credible facts and unsupported by record, wholly insufficient and justify summary dismissal of post conviction proceeding. State v. Virgilito ---------- 328
5. Post Conviction Act requires that unless motion, files, and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito ---------- 328
State v. Reichel ---------- 464
6. Standard for validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Cruse ---------- 331
7. Relief under Post Conviction Act limited to cases in

which there was denial or infringement of rights of prisoner such as to render judgment void or voidable under Constitutions of this state or United States. State v. Bullard ---------- 334
8. Defendant who has appealed conviction cannot secure second review of identical propositions advanced in such appeal by resort to post conviction procedure. State v. Franklin ---------- 363
9. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464
10. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Reichel -- 464
11. Where defendant in criminal case invokes appellate jurisdiction of Supreme Court, no post conviction remedy then available to him; post conviction remedy cumulative, not concurrent. State v. Moore -- 507
12. In absence of violation or infringement of constitutional right, no relief may be had under Post Conviction Act. State v. Whited ---------- 592
13. For post conviction relief on ground of ineffective assistance of counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Mason ---------- 675

Powers.

1. Power of Congress over Indian affairs plenary and cannot be limited by treaty. Robinson v. Sigler -- 144
2. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
3. Under Article X, section 7, Constitution of Nebraska, and cited statute, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in charging of fares by common carriers, vested in railway commission. Allen v. Omaha Transit Co., Inc. ---------- 156
4. Cited statute delegates to railway commission quasi-judicial power to determine issue of unjust discrim-

ination in charging of fares by common carriers under standards therein set out, and vests railway commission with quasi-judicial power to examine facts and determine questions of law. Allen v. Omaha Transit Co., Inc. ---------- 156

5. Generally, railway commission, in different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Allen v. Omaha Transit Co., Inc. ---------- 156

6. Railway commission does not have authority to determine validity of contracts for purchase of certificates of public convenience and necessity. Schmer v. Abler ---------- 245

7. Existence of dispute regarding enforceability of contract for transfer of certificate of public convenience and necessity does not deprive railway commission of power to approve transfer. Schmer v. Abler ---------- 245

8. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261

9. Public corporation authorized by Legislature and organized pursuant thereto to carry out functions determined for public purpose and general welfare of people is arm or branch of government for this purpose and under plenary control of Legislature. Evans v. Metropolitan Utilities Dist. ---------- 261

10. Constitution not grant but rather restriction of legislative power; taxing power vested in Legislature without limit except as may be prescribed by Constitution itself; consequently, courts can enforce only those limits which Constitution clearly imposes. Evans v. Metropolitan Utilities Dist. ---------- 261

11. In proper construction of constitutional provisions, limitations or restrictions upon power of taxation can never be raised by implication, but intention to impose them must be expressed in clear, unambiguous language. Evans v. Metropolitan Utilities Dist. ---------- 261

Principal and Agent.

1. Undisclosed principal ordinarily bound by contracts made on his account by agent acting within his authority. Mintken v. Nebraska Surety Co. ----- 215

2. Agent not authorized to endorse commercial paper

unless otherwise agreed or endorsement usually incident to performance of acts he is authorized to perform for principal. Farmers Union Coop Assn. v. Commercial State Bank ---------- 376
3. If agent within his authority receives cash for endorsement and delivery of commercial paper payable to principal, payer not responsible for payment of amount to principal or its application to principal's uses. Farmers Union Coop Assn. v. Commercial State Bank ---------- 376

Probable Cause.
1. In warrantless search, controlling factor whether officer had reasonable grounds before search to make arrest; essential test whether facts available at moment of search would warrant man of reasonable caution to believe action taken appropriate; existence of probable cause must be determined by practical, not by any technical, standard. State v. Oltjenbruns ---------- 694
2. Habeas corpus is writ of right but not writ of course, and probable cause for its allowance must be shown. Middlebrook v. Sigler ---------- 705

Probation and Parole.
1. Whether defendant sentenced or placed on probation matter within discretion of trial court. State v. Gutierrez ---------- 383
2. Suspension of sentence and granting of probation discretionary with trial court and in absence of abuse of discretion, trial court's determination will not be disturbed. State v. Jurgens ---------- 557
State v. Clifton ---------- 714
3. Sentence not involving confinement preferred to sentence involving partial or total confinement in absence of affirmative reasons to contrary. State v. Shonkwiler ---------- 747
4. Statement by defendant before sentencing that Viet Nam war immoral and if drafted he would not bear arms in that war does not constitute justifiable reason for refusing probation to otherwise qualified defendant. State v. Shonkwiler ---------- 747

Property.
1. Lien of materialman for material furnished contractor not dependent upon contract existing between materialman and owner; lien given because material

furnished used in construction of building or other structure. Paxton & Vierling Steel Co. v. Barmore 54
2. Cited statute makes no requirement concerning contract between materialman and contractor; if contract and delivery, or furnishing under it, sufficient to create indebtedness or liability, sufficient to create lien. Paxton & Vierling Steel Co. v. Barmore --- 54
3. Exclusion in liability policy excluding from coverage injury to or destruction of any goods sold or work completed by named insured out of which accident arises eliminates any coverage for injury to or destruction of product furnished or work completed by named insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
4. Under exclusion in liability policy excluding from coverage injury to goods sold or work completed by named insured, if defect in product furnished or work completed by named insured causes damage to other property, no coverage for such damage to other property. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
5. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
6. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur ---------- 313
7. Attempt to proceed in garnishment to reach property not subject to garnishment ineffective for any purpose. Steven v. Ford ---------- 401
8. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
9. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Nebraska Public Power Dist. ---------- 421
10. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ----- 421
11. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. -- 421
12. Upon appeal from county board of equalization on

ground that property value in excess of actual value, sole issue to be determined is actual value of property. Chudomelka v. Board of Equalization ----- 542

13. For purposes of taxation, terms actual value, market value, and fair market value mean exactly same thing; actual value to be determined by using applicable elements including those specified in cited statute. Chudomelka v. Board of Equalization -- 542
14. Either lay or expert witnesses may testify as to value of property if shown they have acquaintance with property and are informed as to state of market. Chudomelka v. Board of Equalization ---------- 542
15. Competency of witness to testify as to value is matter within discretion of trial court. Chudomelka v. Board of Equalization ---------- 542
16. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626
17. Constitution of Nebraska does not permit taking of private property for private use. Moritz v. Buglewicz ---------- 819
18. Since action for alimony and division of property not barred by Colorado divorce decree rendered on constructive service, district court for Box Butte County, Nebraska, had jurisdiction to entertain it. Mandelberg v. Mandelberg ---------- 844
19. Rule for determination of alimony and division of property in divorce cases stated. Mandelberg v. Mandelberg ---------- 844

Prosecuting Attorneys.

Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Smith ---------- 152

Public Lands.

1. Tenant on school lands has compensable interest in nature of property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding subsequent declaration of unconstitutionality of such statute for lack of due process. State v. Rosenberger ---------- 726
2. In event of sale of school lands to third person, tenant has right to compensation resulting from

"improvements" compensable under lease statutes. State v. Rosenberger ---------- 726
3. Value of tenant's interest resulting from "improvements" on school lands required to be determined prior to sale of land. State v. Rosenberger ------ 726
4. Title to school lands of this State held in trust for benefit of common schools and State required to administer them as trust property, subject to rules of law applicable to handling of trust estates. State v. Rosenberger ---------- 726

Public Officers and Employees.
1. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9
2. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen ----- 9
3. Statutory plans for voluntary dissolution of school district cease to be available when district becomes subject to statute requiring mandatory dissolution by county superintendent of schools and provisions of statute invoked. Nelson v. Robertson -------- 192
4. It is presumption of law that public officers will perform their public duties. Douglas County Bank v. Department of Banking ---------- 545
5. District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners -------- 849
6. In action to establish plaintiff's alleged right to assume office of county assessor, he has burden of proving every essential element to establish his legal right to assume office. Shear v. County Board of Commissioners ---------- 849
7. Legislature has complete power and authority to prescribe qualifications for office of county assessor, limited only by requirement that such conditions of eligibility shall not be unreasonable. Shear v. County Board of Commissioners ---------- 849

Public Service Commissions.

1. Railway commission empowered to fix joint-line freight rates. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ---------- 30
2. In fixing rates, railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ------- 30
3. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where circumstances substantially similar. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. - 30
4. On appeal from order of railway commission fixing rates for common carriers, only questions for determination are whether or not commission acted within scope of its authority and whether or not order entered reasonable and not arbitrarily made. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. - 30
5. Under Article X, section 7, Constitution of Nebraska, and cited statute, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in charging of fares by common carriers, vested in railway commission. Allen v. Omaha Transit Co., Inc. ------ 156
6. Cited statute delegates to railway commission quasi-judicial power to determine issue of unjust discrimination in charging of fares by common carriers under standards therein set out, and vests railway commission with quasi-judicial power to examine facts and determine questions of law. Allen v. Omaha Transit Co., Inc. ---------- 156
7. Generally, railway commission, in different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Allen v. Omaha Transit Co., Inc. ---------- 156
8. Cited statute requires railway commission to hold hearing on application or petition unless not opposed and disposition made by use of affidavits. Allen v. Omaha Transit Co., Inc. ---------- 156
9. Statute governing transfer of certificates of public convenience and necessity permissive in terms, not mandatory, and order of railway commission pertaining to transfer will be sustained unless appears to be unreasonable and arbitrary. Schmer v. Abler - 245
10. Generally held that necessity of obtaining approval

of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler ---- 245

11. Railway commission does not have authority to determine validity of contracts for purchase of certificates of public convenience and necessity. Schmer v. Abler ---- 245

12. Existence of dispute regarding enforceability of contract for transfer of certificate of public convenience and necessity does not deprive railway commission of power to approve transfer. Schmer v. Abler -- 245

13. Railway Commission authorized to regulate rates and services and have general control of common carriers within state as Legislature may provide by law, and is not amenable to legislative interruption or limitation of its status or powers except by specific legislation. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---- 369

14. Determination of what is consistent with public interest, or public convenience and necessity, one peculiarly for determination of Railway Commission; if evidence sustains findings of commission, Supreme Court cannot intervene. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---- 369

15. In stock transfer proceeding under Motor Carrier Act, personal appearance of applicant at hearing not necessarily condition precedent to approval of proposed transfer by railway commission. Abler v. Herman Bros., Inc. ---- 530

16. Subject to Motor Carrier Act, determination of factors relevant to public interest in stock transfer proceeding left primarily to railway commission. Abler v. Herman Bros., Inc. ---- 530

17. In stock transfer proceeding under Motor Carrier Act, railway commission in weighing public interest possesses discretion to decide whether evidence of allied employment and noncompetition agreement necessary. Abler v. Herman Bros., Inc. ---- 530

18. On appeal to Supreme Court from order of railway commission within commission jurisdiction, questions for determination are sufficiency of evidence to support findings, adequacy of findings and conclusions to support order, and reasonableness or arbitrariness of order. Abler v. Herman Bros., Inc. ---- 530

19. Railway commission has jurisdiction to reconsider

and vacate order on own motion within 30 days after mailing of copy of order and before appeal taken; upon expiration of 30 days from mailing copy of order, or upon appeal being perfected, power of commission to reconsider order on own motion terminates. Andrews Van Lines, Inc. v. Smith ---- 533

20. Transfer of operating rights may be approved after notice and hearing if railway commission finds transaction will be consistent with public interest, does not unduly restrict competition, and applicant fit, willing, and able to perform service. Andrews Van Lines, Inc. v. Smith ---------- 533

21. Order of railway commission which fails to make findings of ultimate facts irregular and will be set aside upon appeal. Andrews Van Lines, Inc. v. Smith 533

22. Determination of what consistent with public interest peculiarly for determination of railway commission. Andrews Van Lines, Inc. v. Smith ------ 533

23. Evidence which would require finding that certificate authorizing transportation of general commodities dormant in part may not require similar finding as to such certificate authorizing transportation of household goods because of differences between two operations. Andrews Van Lines, Inc. v. Smith ---------- 533

24. When appeal taken from railway commission's denial of certificate of public convenience and necessity, only questions to be decided by Supreme Court whether commission acted within scope of its authority and if order complained of reasonable and not arbitrarily made. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

25. Under Constitution of Nebraska, railway commission has plenary power to regulate common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

26. Constitutionally created powers and duties of railway commission include regulation of rates, service, and control of common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

27. Mobile telephone service in its different aspects is form of telephone service and subject to all statutes and regulations pertaining to telephone service. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

28. Certificate of public convenience and necessity which authorizes its holder to render "telephone service" does not limit holder to practice of art of telephony as was known and practiced on date certificate

issued, nor to use therein of devices, equipment, and methods then in use. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

29. In broad sense term telephone or telephony includes entire art of speech transmission with many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at distance by electrical means. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

30. Object and purpose of railway commission control of common carriers to secure adequate sustained service for public at lowest reasonable cost, and to protect and conserve investments made for that purpose. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

31. Invasion of mobile telephone service company of territory of another similar company, either in service or construction, intended to be prohibited unless invading company first applies for and receives certificate of public convenience and necessity. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ------ 637

32. Duplicate lines of transportation by competing common carriers ordinarily incompatible with public interest; such competing line will be authorized only for compelling reasons. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

33. Ordinarily, new carrier cannot be certificated until existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of railway commission. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

Public Utilities.

1. Mobile telephone service in its different aspects is form of telephone service and subject to all statutes and regulations pertaining to telephone service. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

2. Certificate of public convenience and necessity which authorizes its holder to render "telephone service" does not limit holder to practice of art of telephony as was known and practiced on date certificate issued, nor to use therein of devices, equipment, and methods then in use. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

3. Invasion of mobile telephone service company of territory of another similar company, either in service or construction, intended to be prohibited unless in-

vading company first applies for and receives certificate of public convenience and necessity. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ------ 637
4. Duplicate lines of transportation by competing common carriers ordinarily incompatible with public interest; such competing line will be authorized only for compelling reasons. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
5. Ordinarily, new carrier cannot be certificated until existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of railway commission. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

Quo Warranto.

1. District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners -------- 849
2. In action to establish plaintiff's alleged right to assume office of county assessor, he has burden of proving every essential element to establish his legal right to assume office. Shear v. County Board of Commissioners ---------- 849

Rape.

In prosecution for rape, corroboration as to material facts and circumstances which tend to support testimony of complaining witness sufficient. State v. Garza ---------- 407

Receiving Stolen Goods.

1. In prosecution for receiving stolen property where facts known to defendant such that man of age, intelligence, and experience of defendant would know property to have been stolen, jury may properly find defendant possessed guilty knowledge. State v. Alcorn ---------- 854
2. Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or apparent legal power to dispose. State v. Alcorn ---------- 854
3. In prosecution for receiving stolen property, conviction of defendant not dependent upon conviction of thief. State v. Alcorn ---------- 854

Records.

Conviction under section 28-472.03, R. S. Supp., 1969, will be affirmed where record sufficient to sustain conviction under section 28-470, R. S. Supp., 1969. State v. Smith ---------- 152

Reformation of Instruments.

Where evidence, in action for reformation of written instrument, sharply and irreconcilably conflicting, becomes necessary to apply well-known rule of equity that evidence must be clear, convincing, and satisfactory, and in consequence, deny reformation. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

Right to Counsel.

1. Accused not free to manipulate his right to counsel for purpose of obstructing orderly procedure or other phases of judicial administration. State v. Kirby ---------- 380
2. Counsel for accused not required to be present at time of out-of-court photographic identification, regardless of whether accused in custody or not. State v. Moss ---------- 391
3. Right of indigent to counsel does not give unbridled right to be represented by counsel of own choosing. State v. Bratton ---------- 460
4. Right of indigent to counsel cannot be manipulated so as to obstruct orderly procedure in courts or interfere with fair administration of justice. State v. Bratton ---------- 460
5. When defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to court for removal of counsel, his only alternative to proceed pro se if competent to do so. State v. Bratton ---------- 460
6. No right to counsel at pretrial photographic identification. State v. Tramble ---------- 488
7. Rule pronounced in Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, that it is necessary to supply indigent defendant with lawyer at his preliminary hearing not retroactive. State v. Whited ---------- 592

Robbery.

1. Essential element of crime of robbery that theft be accomplished by use of force, violence, or intimidation. State v. Blunt ---------- 631

2. In crime of robbery, force relied upon must be sufficient to effect transfer of property from victim to robber and if sufficient to overcome resistance, degree is immaterial. State v. Blunt ---------- 631

Rules of Court.

Ordinarily Supreme Court will take note only of those assigned errors which are discussed. Revised Rules of Supreme Court, 1967, Rule 8a2(3). State v. Lilja 550

Schools and School Districts.

1. Under provisions of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), term "per pupil cost" means district's current operating expense for preceding year, as shown in district's annual financial report, divided by average daily membership of resident and nonresident pupils for preceding year, unless context in which term "per pupil cost" used otherwise. School Dist. of Omaha v. State Board of Education ---------- 76
2. Purpose of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), to provide formula for distribution of state aid to public school districts. School Dist. of Omaha v. State Board of Education ----- 76
3. Formula for determining base amount of state aid to different school districts in state prescribed in cited statutes. School Dist. of Omaha v. State Board of Education ---------- 76
4. Purpose of limitations set out in section 79-1341, R. S. Supp., 1967 (section 12 of L.B. 448), to equalize allocation of funds as between different school districts in state. School Dist. of Omaha v. State Board of Education ---------- 76
5. Powers of county board of equalization, under provisions of nonresident high school tuition act, ministerial only and has no standing to question discretionary legislative powers of school district. Werth v. Buffalo County Board of Equalization --- 119
6. True test in setting nonresident high school tuition rates laid down in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729. Werth v. Buffalo County Board of Equalization ---- 119
7. County board of equalization must, in determining mill levy under provisions of nonresident high school tuition act, deduct from total requirements of fund any balance which remains after all claims for preceding fiscal year have been paid. Werth v. Buffalo

County Board of Equalization ---------- 119
8. Unless Legislature otherwise provides, funds properly expended by receiving high school district from state and federal aid includable in computation of per pupil costs under provisions of cited statute. Werth v. Buffalo County Board of Equalization -- 119
9. In action which challenges legality in whole or part of levy made under provisions of nonresident high school tuition act, receiving school districts to which tuition claims paid from fund necessary parties. Werth v. Buffalo County Board of Equalization -- 119
10. Where defeated party undertakes to perfect appeal from adverse ruling of county superintendent of schools and orders transcript in accordance with cited statute, and transcript incomplete or deficient in form, all other requirements having been met, failure to furnish proper transcript will not defeat appeal. Cherry v. Lofgren ---------- 133
11. Lemburg v. Neilsen, 182 Neb. 747, 157 N. W. 2d 381, overruled. Cherry v. Lofgren ---------- 133
12. Duly authenticated transcript of proceeding to be reviewed must be filed in district court, but if required transcript furnished and filed, deficient in form through no fault of appellant, should not defeat his right to appeal. Cherry v. Lofgren ----- 133
13. Transfer from nonaccredited school district to accredited one states sufficient reason for transfer. Bader v. Hodwalker ---------- 138
14. Statutory plans for voluntary dissolution of school district cease to be available when district becomes subject to statute requiring mandatory dissolution by county superintendent of schools and provisions of statute invoked. Nelson v. Robertson -------- 192
15. Provisions of cited statute for dissolution of school districts may not be invoked until termination of fifth school year. Nelson v. Robertson --------- 192
16. Establishment of school district boundaries purely legislative matter. Kaup v. Sweet ---------- 226
17. Courts on appeal cannot deny change of school district boundaries under statute enacted after board entered order granting change in school district boundaries under statute then in effect. Kaup v. Sweet ---------- 226
18. Petition to detach land from school district filed with board created by cited statute not pending action within meaning of general savings statute. Clark v. Sweet ---------- 232

19. Determination as to validity and sufficiency of petitions for school district reorganization filed under cited statutes made as of date petitions filed with county superintendent by county committee for school district reorganization. Virka v. Knox ---- 664
20. By its terms, cited statute provides that petitions, although presented to county committee prior to time of holding statutory public hearing, shall not be filed with county superintendent until 10 days following public hearing. Virka v. Knox -------- 664
21. County committee for school district reorganization not a governing body within ambit of cited statute. State ex rel. Medlin v. Choat ---------- 689
22. Although county superintendent of schools nonvoting member of county school district reorganization committee, must be included in maximum number permitted by cited statute. State ex rel. Medlin v. Choat ---------- 689

Searches and Seizures.

1. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. Rules stated for sufficiency of affidavit of tip from informant. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Holloway ---------- 1
2. Recital of some of underlying circumstances in affidavit for search warrant essential if magistrate performs his detached function; mere affirmance of belief or suspicion not sufficient. State v. Holloway 1
3. State has burden of establishing legal sufficiency of consent to search and seizure; existence and voluntariness of consent question of fact. State v. Holloway ---------- 1
4. Consent freely and intelligently given by proper person may operate to eliminate any question otherwise existing as to propriety of search and seizure. State v. Holloway ---------- 1
5. Under stated circumstances, defendant had no standing to challenge legality of search and seizure. State v. Holloway ---------- 1
6. In warrantless search, controlling factor whether officer had reasonable grounds before search to make arrest; essential test whether facts available at moment of search would warrant man of reasonable caution to believe action taken appropriate; existence of probable cause must be determined by prac-

tical, not by any technical, standard. State v. Oltjenbruns ---------- 694
7. When materials in plain sight within motor vehicle indicative of criminal offense, subsequent search justified and legal. State v. Oltjenbruns ---------- 694

Security Interest.

Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. - 446

Self-Incrimination.

Accused without counsel and in custody for interrogation may effectively waive privilege against self-incrimination without receiving Miranda warnings. State v. Russo ---------- 348

Sentences.

1. Where criminal statute amended by mitigating punishment after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Goham ---------- 34
2. Purpose of kidnapping in every instance to make possible to commit some other crime; very nature therefore embraces other crimes as well as that of kidnapping. Penalties of kidnapping intentionally more severe than other crimes which may be included because of consequences which often result from its perpetration. State v. Goham ---------- 34
3. Habitual criminal act does not create new and separate criminal offense for which person may be separately sentenced; merely provides that repetition of criminal conduct aggravates guilt and justifies greater punishment than ordinarily considered. State v. Tyndall ---------- 48
4. Sentence imposed within statutory limits not disturbed for excessiveness in absence of abuse of discretion. State v. Holoubek ---------- 163
State v. Saxon ---------- 338
State v. Black Bear ---------- 670
5. Supreme Court may reduce sentence when in its opinion sentence excessive. State v. Nuss ---------- 220
State v. Keck ---------- 794
6. Standard for validity of guilty plea is whether plea represents voluntary and intelligent choice among

alternative courses of action open to defendant. State v. Cruse ---------- 331
7. Court should not correct erroneous record of criminal sentence without affording parties hearing. State v. Cruse ---------- 331
8. Discretionary with district court to hold hearing sua sponte on mental competency of defendant to undergo sentence for commission of offense. State v. Saxon ---------- 338
9. Whether defendant sentenced or placed on probation matter within discretion of trial court. State v. Gutierrez ---------- 383
10. Where sentence imposed within statutory limits, will not be disturbed in absence of abuse of discretion. State v. Gutierrez ---------- 383
State v. Escamilla ---------- 457
State v. Morosin ---------- 521
State v. Jurgens ---------- 557
State v. Williams ---------- 708
State v. Melvin ---------- 797
State v. Middleton ---------- 821
11. Statute provides that Supreme Court may reduce sentence rendered by district court against accused when in its opinion sentence excessive, in which event it renders such sentence as may be warranted by evidence. State v. Leadinghorse ---------- 386
12. Where punishment of offense created by statute left to discretion of district court to be exercised within certain prescribed limits, sentence imposed withing such limits not ordinarily disturbed where no abuse of such discretion. State v. Leadinghorse 386
State v. Andersen ---------- 605
State v. Blunt ---------- 631
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10. Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Smith ---------- 152

11. Cited statute requires railway commission to hold hearing on application or petition unless not opposed and disposition made by use of affidavits. Allen v. Omaha Transit Co., Inc. ---------- 156

12. General rule as to opinon of lay witness that witness may testify only to facts perceived by his senses and may not give opinion or conclusion. Shamburg v. Folkers ---------- 169

13. Lay witness may testify to relevant opinion based upon facts perceived by him if opinion of kind normally formed by person constantly and correctly and witness cannot accurately, adequately, or with reasonable facility describe fundamental facts upon which opinon based; in substance such process under these circumstances description. Shamburg v. Folkers ---------- 169

14. Unnecessary to repeat same objection to further testimony of same nature by same witness in order to save error; however, failure to object to identical

or substantially same incompetent testimony by another witness waives erroneous ruling in admission of testimony of first witness. Shamburg v. Folkers ---------- 169

15. Where court of equity obtains jurisdiction of cause for any purpose, may retain it for all and proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Freeman v. Rose ---------- 176

16. Where evidence insufficient to sustain verdict in favor of plaintiff, duty of trial court to dismiss action on motion of defendant. Sinnett v. Dial Constr. Co. ---------- 190

17. Refusal of trial court in criminal case to direct prosecutor to accept offer by defendant to stipulate to essential element of alleged offense ordinarily constitutes no ground for new trial. State v. Narcisse 209

18. Testimony of alleged victim in criminal prosecution for sodomy with human being insufficient for conviction unless corroborated in accordance with rules pertaining to other sexual offenses. State v. Narcisse ---------- 209

19. Under provisions of cited statute, determination that accused mentally incompetent to stand trial effective as of date of determination and operates to suspend criminal proceedings until disability removed; does not invalidate prior proceedings nor constitute finding or determination that accused insane or incompetent to stand trial or assist in own defense at any prior time. State v. Klatt ---------- 274

20. Defendant in criminal action presumed sane until defendant produces evidence of insanity at time of alleged crime; if any evidence produced, State must then sustain burden of producing evidence that defendant sane at time of crime beyond reasonable doubt. State v. Klatt ---------- 274

21. Verdict of finder of fact on issue of insanity will not be disturbed unless insufficient evidence to support findings. State v. Klatt ---------- 274

22. Question of whether legal sanity of accused established beyond reasonable doubt at trial one of fact to be determined by trial court when jury waived; where substantial evidence to sustain finding of trial court on that issue, that determination not disturbed on appeal. State v. Klatt ---------- 274

23. Motion for change of venue in criminal case addressed to sound discretion of trial court and its

ruling not disturbed unless clear abuse of such discretion shown. State v. Klatt ---------- 274

24. Where classification or degree of crime depends upon determination of certain minimal value of property and there is market for that type of property, State must present proof by competent evidence that market value of property at time and place of crime charged equal to or exceeded designated minimal value. State v. Hayes ---------- 325

25. Post Conviction Act requires that unless motion, files, and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito ---------- 328

26. Standard for validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Cruse ---------- 331

27. Possibility that stolen truck might be abandoned later not defense to charge of auto theft. State v. Warner ---------- 335

28. In absence of request, trial court not required to instruct in regard to lesser included offenses. State v. Warner ---------- 335

29. Among intervals ordinarily to be excluded in computation of time for speedy trial are delay resulting from (1) other proceedings concerning defendant or (2) continuance granted at request or with consent of defendant. State v. Russo ---------- 348

30. If court has instructed jury generally on law and has not withdrawn any essential issue from consideration by jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Russo ---------- 348

31. Where default has been regularly entered, within discretion of trial court as to whether default judgment shall be set aside; in absence of showing of abuse of discretion, Supreme Court will not interfere. Michaelis v. Michaelis ---------- 350

32. Facts and circumstances in each case determine whether there has been abuse of discretion; among matters to be considered are promptness of motion to vacate, negligence or want of diligence of party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in administration of

justice. Michaelis v. Michaelis ---------- 350
33. Resolution of conflicts and inconsistencies in testimony of witness question of fact for jury; jury's function to determine which, if any, of inconsistent statements of witness is true. State v. Ford ----- 353
34. In sex crime, testimony on direct examination concerning victim's complaint should be confined to fact that complaint was made, and details of event, including identity of person accused, not proper subjects of inquiry unless complaint spontaneous, unpremeditated statement so closely connected with act as to be part of res gestae. State v. Juarez -- 354
35. Statement relating to startling event or condition made while declarant under stress of excitement caused by event or condition generally admissible as exception to hearsay rule, whether treated as part of res gestae or as spontaneous declaration or excited utterance. State v. Juarez ---------- 354
36. Where question asked of witness, and answer responsive to question and received without objection, and motion then made by counsel to strike out such evidence on ground of incompetency, discretionary with court whether to sustain motion or not. State v. Masek ---------- 358
37. Ordinarily, question of negligence, contributory negligence, and assumption of risk are for jury; where evidence of assumption of risk so clear that reasonable minds can reach no other conclusion, directed verdict for defendant proper. Jeffrey v. Retzlaff ---------- 372
38. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Small - 379
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39. Proof that exhibit remained in custody of law enforcement and court officers sufficient to prove chain of possession. State v. Gutierrez ---------- 383
40. If while criminal proceedings pending, facts brought to attention of court, either from own observation or from suggestion of counsel, which raise doubt as to sanity of defendant, question should be settled before further steps taken. State v. Boston ----- 388
41. Except as otherwise provided by statute, matter of granting hearing on issue of competency to stand trial rests in discretion of trial court. State v. Boston ---------- 388

42. Means employed in resolving question of sanity discretionary with court. State v. Boston ---------- 388
43. Question, summary in nature and including statement as to ultimate fact, although improper, not prejudicial where witness testified in detail as to facts constituting offense. State v. Garza ------- 407
44. One may not complain of alleged misconduct of adverse counsel if, with knowledge of alleged misconduct, does not ask for mistrial but consents to take chances of favorable verdict. Johnson v. Nebraska Public Power Dist. ---------- 421
45. To require new trial, must be shown that alleged improper argument such as to prejudice substantial rights of party. Johnson v. Nebraska Public Power Dist. ---------- 421
46. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all reasonable inferences that can be reasonably deduced from proof. Kohler v. Ford Motor Co. ---------- 428
47. Entertainment of belated motion to strike testimony, no proper objection having been previously made, discretionary with trial court. Kohler v. Ford Motor Co. ---------- 428
48. Asking of improper questions of witness to which objections sustained by court not prejudicial error in absence of showing that defendant thereby deprived of fair and impartial trial. State v. Escamilla ---------- 457
49. Test by which jury shall determine sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Escamilla - 457
50. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Belek v. Travelers Ind. Co. ---------- 470
51. In-court identification evidence admissible where such identification made on basis independent of tainted lineup. State v. Evans ---------- 474
52. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn there-

from. Hacker v. Perez ---------- 485
53. Question of whether pretrial photographic identification procedure impermissibly suggestive must be determined by evaluation of all surrounding circumstances. State v. Tramble ---------- 488
54. To justify conviction on circumstantial evidence, necessary that facts and circumstances essential to conclusion sought be proved by competent evidence beyond reasonable doubt, and when taken together must be of such character as to be consistent with each other and with hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Eickmeier - 491
55. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491
56. When fact in issue may be explained by production of article or object to which testimony relates, proper to produce such object or article and exhibit it to jury. State v. Eickmeier ---------- 491
57. Evidence of crime, like one charged against an accused, admissible if tends to prove particular criminal intent necessary to constitute crime charged. State v. Moore ---------- 498
58. Whether other crimes too remote determinable by exercise of judicial discretion; limits of discretion set by facts of each case. State v. Moore ---------- 498
59. Litigant who knowingly and deliberately assumes particular position in judicial proceeding, generally estopped to take position inconsistent therewith to prejudice of adverse party. Brander v. Eagle Raceways, Inc. ---------- 508
60. Policy of insurance given effect according to ordinary sense of terms used, and if clear, will be applied according to their plain and ordinary meaning. Brander v. Eagle Raceways, Inc. ---------- 508
61. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522
62. Where motion for new trial presents questions of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with ref-

erence thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

63. In stock transfer proceeding under Motor Carrier Act, personal appearance of applicant at hearing not necessarily condition precedent to approval of proposed transfer by railway commission. Abler v. Herman Bros., Inc. ---------- 530

64. Subject to Motor Carrier Act, determination of factors relevant to public interest in stock transfer proceeding left primarily to railway commission. Abler v. Herman Bros., Inc. ---------- 530

65. In stock transfer proceeding under Motor Carrier Act, railway commission in weighing public interest possesses discretion to decide whether evidence of allied employment and noncompetition agreement necessary. Abler v. Herman Bros., Inc. ---------- 530

66. Foundation for admission into evidence of body fluid test showing compliance with provisions of cited statute sufficient. State v. Lilja ---------- 550

67. Evidence of commission of other crimes than one for which defendant being tried incompetent, irrelevant, and immaterial, and ordinarily prejudicial to rights of defendant. State v. Murray ---------- 554

68. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged, even though such facts and circumstances may prove or tend to prove defendant committed other crimes. State v. Murray ---------- 554

69. Delivery of life insurance policy and acceptance of premiums raise presumption that all conditions precedent such as continued insurability met; this presumption sufficient to sustain plaintiff's burden of proof unless defendant introduces evidence to rebut it. Ortega v. North American Co. for L. & H. Ins. 569

70. Where evidence introduced by insurer wholly insufficient to rebut presumption that plaintiff in good health at date of issuance of policy, error for trial court to submit such issues to jury. Ortega v. North Amercian Co. for L. & H. Ins. ---------- 569

71. If plaintiff without reasonable explanation testifies to facts materially different from his deposition concerning vital issue, change clearly being made to meet exigencies of pending action, evidence discredited and should be disregarded. Beshaler v. Helberg 584

72. Rule announced in United States v. Wade, 388 U. S.

218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, that in-court identification inadmissible if tainted by improper prior lineup or confrontation not retroactive. State v. Whited ---------- 592

73. Intent to cheat and defraud may be proved by circumstances surrounding transaction. State v. Bohannon ---------- 594

74. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606

75. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606

76. Special findings by district court ordinarily unnecessary unless party requests them with view of excepting to decision of court upon question of law involved in trial. Bailey v. McCoy ---------- 618

77. District court may determine any controversy between parties before it, when can be done without prejudice to rights of others, or by saving their rights; but when determination of controversy cannot be had without presence of other parties, court must order them brought in. Bailey v. McCoy ---------- 618

78. What is public good as relates to zoning ordinances affecting use of property primarily matter lying within discretion and determination of municipal body to which power and function of zoning committed; unless abuse of discretion clearly shown, not province of courts to interfere. J. W. Auto Parts, Inc. v. City of Omaha ---------- 624

79. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648

80. Rule for consideration of motion for directed verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648

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83. Failure to instruct jury to return verdict for nominal damages in action for trespass, where defendant admitted trespass, error. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---------- 683

84. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686

85. Function of prosecutor's opening statement to generally state nature of case; within discretion of prosecutor how much or how little to comment specifically upon evidence to be offered. State v. Oltjenbruns ---------- 694

86. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701

87. Trial court in criminal case has large, though not unlimited, discretion in granting or refusing permission to ask witness leading question; discretion legal one and subject to proper limitations. State v. Hoffmeyer ---------- 701

88. As general rule, evidence of other crimes not admissible to prove guilt of defendant of particular crime charged; are exceptions, however, to rule; such evidence relevant and admissible if tends to prove particular criminal intent which is necessary to constitute crime charged. State v. Hoffmeyer -- 701

89. Rule stated as to duties of driver approaching unprotected intersection at speed as will afford reasonable opportunity for effective observations for cars approaching on intersecting road or when view completely obstructed. Where facts undisputed, negligence may be found as matter of law. Hodgson v. Gladem ---------- 736

90. In absence of request for cautionary instruction with relation to previous similar offenses, not error for trial court to fail to give such instruction. State

v. Randall ---------- 743
91. Trial court's finding that in-custody statement of accused voluntary must appear from record with unmistakable clarity. State v. McDonald ---------- 752
92. To be admissible, confession must be free and voluntary, that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence. State v. McDonald ---- 752
93. Duty of court not only to instruct as to what constitutes voluntary confession, but also to instruct jury to disregard alleged confession if found to be involuntary. State v. McDonald ---------- 752
94. Not proper to allow attorney's fee in criminal cases only for time spent in trial and refuse allowance for time or services reasonably and necessarily required and performed prior to trial. State v. McDonald ---------- 752
95. In prosecution for larceny in Nebraska, lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Simons ---------- 761
96. Standards Relating to Pleas of Guilty promulgated by American Bar Association outline what should be minimum procedure in taking of pleas of guilty. State v. LeGear ---------- 763
97. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. LeGear ---------- 763
98. Trial court may not rely upon generalized admissions or statements by defense counsel as method for determining is factual basis for plea of guilty. State v. LeGear ---------- 763
99. Extent to which witness on redirect examination may explain testimony elicited on cross-examination lies primarily in discretion of trial court. State v. Fellman ---------- 767
100. In criminal prosecution where State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination limited. State v. Fellman ---------- 767
101. No denigration of right to trial to hold when defendant waives his state court remedies and admits guilt, he does so under law then existing; further, he assumes risk of ordinary error in either his or his attorney's assessment of law and facts. State v. Bevins ---------- 785

102. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were principal offender. State v. Cook ---------- 788
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2. Power of Congress over Indian affairs plenary and cannot be limited by treaty. Robinson v. Sigler -- 144
3. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
4. No acceptance of Public Law 280 required of State of Nebraska; by its terms applied to Nebraska, and only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144

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1. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261
2. Public corporation authorized by Legislature and

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1. Motion for change of venue in criminal case addressed to sound discretion of trial court; its ruling thereon not disturbed unless abuse of such discretion disclosed. State v. Goham ---------- 34
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3. Request for change of venue in criminal case addressed to sound discretion of trial court, and its ruling thereon will not be disturbed unless abuse of discretion shown. State v. Hoffmeyer -------- 701

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1. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Hacker v. Perez ---------- 485
2. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491
3. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522
4. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg ---- 584
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2. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur ------ 313
3. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
4. Codicil may alter, enlarge, or restrain provisions of will; distinguishing feature is addition to or qualification of will. Flint v. Panter ---------- 615
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1. In order to deny claim to privilege against self-incrimination by witness, must be perfectly clear to trial judge, from careful consideration of all circumstances in case, that witness mistaken and answer or answers cannot possibly tend to incriminate. State v. Holloway ---------- 1
2. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
3. Before witness permitted to testify as to testimony of witness at former trial, must be shown that witness able to recall and relate substance of entire testimony upon subject or topic involved. State v. Christiansen ---------- 73
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5. Testimony by expert witness as to weight of exhibit weighed on laboratory scale admissible with-

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6. In prosecution for burglary, witness who only receiver of stolen property or accessory after the fact not accomplice of defendant. State v. Holoubek -- 163
7. General rule as to opinion of lay witness that witness may testify only to facts perceived by his senses and may not give opinion or conclusion. Shamburg v. Folkers ---------- 169
8. Lay witness may testify to relevant opinion based upon facts perceived by him if opinion of kind normally formed by person constantly and correctly and witness cannot accurately, adequately, or with reasonable facility describe fundamental facts upon which opinion based; in substance such process under these circumstances description. Shamburg v. Folkers ---------- 169
9. Unnecessary to repeat same objection to further testimony of same nature by same witness in order to save error; however, failure to object to identical or substantially same incompetent testimony by another witness waives erroneous ruling in admission of testimony of first witness. Shamburg v. Folkers ---------- 169
10. Resolution of conflicts and inconsistencies in testimony of witness question of fact for jury; jury's function to determine which, if any, of inconsistent statements of witness is true. State v. Ford ------ 353
11. Where question asked of witness, and answer responsive to question and received without objection, and motion then made by counsel to strike out such evidence on ground of incompetency, discretionary with court whether to sustain motion or not. State v. Masek ---------- 358
12. Conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification; each case must be considered on own facts. State v. Moss ---------- 391
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14. Weight and credibility of testimony of both lay and

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15. Asking of improper questions of witness to which objections sustained by court not prejudicial error in absence of showing that defendant thereby deprived of fair and impartial trial. State v. Escamilla ---------- 457

16. Primary factor in determining whether independent basis for in-court identification exists is opportunity afforded witness to observe defendant under circumstances free from taint. State v. Evans ---------- 474

17. Not province of Supreme Court to pass on credibility of witnesses or weigh evidence in criminal case. State v. Walker ---------- 482
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18. Either lay or expert witnesses may testify as to value of property if shown they have acquaintance with property and are informed as to state of market. Chudomelka v. Board of Equalization ------ 542

19. Competency of witness to testify as to value is matter within discretion of trial court. Chudomelka v. Board of Equalization ---------- 542

20. No formal offer to prove required to obtain review of ruling of trial court excluding answer of witness to question, where question itself clearly indicates what party expected to prove by witness. George Rose Sodding & Grading Co., Inc. v. City of Omaha 683

21. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686

22. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701

23. Trial court in criminal case has large, though not unlimited, discretion in granting or refusing permission to ask witness leading question; discretion legal one and subject to proper limitations. State

v. Hoffmeyer ---------- 701
24. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Simons ---------- 761
25. Extent to which witness on redirect examination may explain testimony elicited on cross-examination lies primarily in discretion of trial court. State v. Fellman ---------- 767
26. In criminal prosecution where State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination limited. State v. Fellman ---------- 767
27. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821

Words and Phrases.

1. Relation of master and servant cannot be defined in general terms with substantial accuracy. Todd v. Boals ---------- 51
2. Under provisions of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), term "per pupil cost" means district's current operating expense for preceding year, as shown in district's annual financial report, divided by average daily membership of resident and nonresident pupils for preceding year, unless context in which term "per pupil cost" used otherwise. School Dist. of Omaha v. State Board of Education ---------- 76
3. Word "airport" in clause "any city * * * owning or operating an airport" in Cities Airport Authorities Act, means airport qualified and licensed for public use. Elliott v. City of Plattsmouth ---------- 165
4. "Municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions. Evans v. Metropolitan Utilities Dist. ---------- 261
5. Trailer which is used as office may be subject of burglary under cited statute. State v. Warner --- 335
6. In automobile liability insurance policy, word household in omnibus clause extending liability available to insured to other members of household means

those who dwell under same roof and compose a family. State Farm Mut. Auto. Ins. Co. v. Selders - 342
7. When one knows that dangerous condition exists, appreciates its dangerous nature and deliberately exposes himself to such danger, he assumes risk of injury from it. Jeffrey v. Retzlaff ---------- 372
8. Term "unlawfully" word of common usage and as such need not be specifically defined in instruction or statute. State v. Neal ---------- 413
9. Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
10. Lesser included offense one which includes some of elements of crime charged without addition of any element irrelevant to crime charged. State v. Escamilla ---------- 457
11. For purposes of taxation, terms actual value, market value, and fair market value mean exactly same thing; actual value to be determined by using applicable elements including those specified in cited statute. Chudomelka v. Board of Equalization --- 542
12. In construing writing, words used should be given their ordinary and popularly accepted meaning in absence of explanation or qualification. Rogers v. Neiman ---------- 582
13. Provision in lease granting lessee option to purchase in event "the lessors shall place the premises up for sale" does not apply to sale of undivided interest in premises by one lessor to another lessor. Rogers v. Neiman ---------- 582
14. In service partnership agreement with provision that partners base payment for good will on annual income, word "income" ordinarily imports net profits. Bailey v. McCoy ---------- 618
15. In broad sense term telephone and telephony includes entire art of speech transmission with many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at distance by electrical means. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
16. Concealment, within meaning of cited statute, simply means any possession of goods in such manner as to keep them from rightful owner and intent to deprive owner of his property. State v. Oltjenbruns 694

17. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701
18. Habeas corpus is writ of right but not writ of course, and probable cause for its allowance must be shown. Middlebrook v. Sigler ---------- 705
19. Applicable part of "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff construed to limit liability to that proportion of any loss which last reported value bears to actual value at time of report, provided liability does not exceed amount stated in schedule endorsement of policy. Nile Valley Coop. G. & M. Co. v. Farmers Elevator Mut. Ins. Co. ---------- 720
20. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781
21. If publication day falls upon holiday, publication preceding day in weekly newspaper complies with statutory requirement that publication be had upon same day of week as first publication. Hollstein v. Adams ---------- 781
22. Chapter 57, article 9, R. R. S. 1943, contemplates that determination of correlative rights of adjoining owners in pool of oil or gas shall be determined on fair, reasonable, and equitable basis. Farmers Irr. Dist. v. Schumacher ---------- 825
23. Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or apparent legal power to dispose. State v. Alcorn ---------- 854

Workmen's Compensation.

1. Requirement that objective symptoms of injury be produced "at the time" of accident satisfied if symptoms manifest themselves according to natural course of such matters without any independent intervening cause shown. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
2. Workmen's Compensation Act does not require objective symptoms of injury produced at time of accident be observed by others or their existence be proved by independent testimony. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
3. On appeal of workmen's compensation case to Su-

preme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57

4. Upon appellate review of workmen's compensation case in Supreme Court, cause considered de novo only where findings of fact not supported by evidence as disclosed by record. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57

5. Applicability of workmen's compensation statute providing attorney's fees and penalty for waiting time for delinquent payments turns largely on facts of each case. Marshall v. Columbus Steel Supply _ 102

6. Workmen's compensation claimant, unaided by presumption, bears burden of proof that his employment in fact caused compensable injury. Conn v. ITL, Inc. ---------- 112

7. Workmen's compensation claimant with atherosclerosis which was personal risk and cause of otherwise compensable injury may recover under these circumstances: Employment risk greater than that of ordinary nonemployment life was cause of injury. Conn v. ITL, Inc. ---------- 112

8. Losses in bodily function are important only insofar as they relate to earning capacity and loss thereof. Shotwell v. Industrial Builders, Inc. ---------- 320

9. Disability defined in terms of employability and earning capacity rather than in terms of loss of bodily function. Shotwell v. Industrial Builders, Inc. ---------- 320

10. When employee's injuries caused by willful negligence, may not recover compensation. Bole v. S. M. S. Trucking Co. ---------- 341

11. On appellate review of workmen's compensation case in Supreme Court, it will not be considered de novo if findings of fact are supported by evidence. Bole v. S. M. S. Trucking Co. ---------- 341

12. General test in determining whether employee servant of original master, or of party to whom has been furnished, whether in particular service which he is engaged to perform he continues to be liable to direction and control of master, or becomes subject to that of party to whom he is lent or hired. Mid-America Pipeline Co. v. Warren ---------- 710

13. Rule stated as to relationship of employee between original master and new master to whom loaned.

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15. In workmen's compensation proceeding, district court finding against party will be set aside if evidence compels finding for that party. Adler v. Jerryco Motors, Inc. ---------- 757
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Zoning.

1. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. City of Imperial v. Raile ---------- 404
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