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DOROTHY SCHULTZ, APPELLANT, V. SCHOOL DISTRICT OF DORCHESTER, IN THE COUNTY OF SALINE, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.
222 N. W. 2d 578

Filed October 24, 1974. No. 39449.

Schools and School Districts: Contracts: Tenure. Section 79-1254, R. R. S. 1943, in its present form does not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring a determination that reasonable and just cause exists for termination of such employment.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

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

Jack L. Craven, for appellees.

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

BRODKEY, J.

This case involves an interpretation of section 79-1254, R. R. S. 1943, as amended by L.B. 266 in 1971. The appellant originally brought the action in the District Court for Saline County, seeking a declaratory judgment to the effect that the foregoing section, as amended, creates in a teacher employed thereunder a substantive right of continued employment by the school district requiring a determination that "just cause" exists for the termination of employment. The District Court held it did not, and found generally against the appellant. We affirm.

Section 79-1254, R. R. S. 1943, in its present form, reads as follows: "The original contract of employment with an administrator or a teacher and a board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of

the board. Any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract at the close of the contract period; Provided, that the secretary of the board shall, not later than April 15, notify each administrator or teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. No member of the board of education may cast a vote in favor of the election of any teacher when such member of the board is related by blood or marriage to such teacher."

In order to determine the intent and meaning of the foregoing statute, and to reach a proper conclusion as to whether the statute creates a "property right" of continued employment in the teacher, it is necessary that we not only consider the language of the statute, but also carefully review the legislative history of the 1971 amendment thereof by L.B. 266.

As originally introduced by Senator Simpson, L.B. 266 provided among other things that a contract of a teacher employed by a Class I, II, III, or VI district could be terminated at any time during the term of the contract for a "reasonable and just cause." The districts were also instructed to establish "reasonable criteria and procedures" for evaluating its teachers at least once each school year, the teacher to be given notice in writing of the alleged areas of deficiency within 30 days after such evaluation. It was further provided that no less than 60 days following notice of deficiency the teacher should be reevaluated to determine whether the deficiency had been eliminated. If after reevaluation the board determined that the deficiency continued and may constitute a reasonable and just cause for termination of the contract of employment, the board is required to give notice in writing to the teacher of a hearing to be held not less than 10 days subsequent to such notice for the purpose of hearing evidence relevant to the deficiency in performance of the teacher and a continuation of his contract of employment. L.B. 266, as originally introduced, further provided that in making its decision as to whether there was reasonable and just cause to terminate the contract of employment, the board's decision must be based solely upon the deficiency reported in the evaluation and the evidence presented at the hearing. Senator Harold Simpson, the introducer of the bill, in testifying before the Committee on Education indicated that one of the purposes of the bill was to aid the teachers involved by removing the uncertainty regarding whether or not they were to be rehired. He also stated that the bill would enable the teachers to teach with an understanding of how their performance was to be evaluated.

The Committee on Education offered amendments to L.B. 266 providing among other things that at any time

during the term of the contract of employment a board of education may discharge a teacher or administrator and terminate a contract of employment for any of the following reasons: (1) Incompetency; (2) physical disability or sickness of any type which interferes with the performance of duties; (3) insubordination, which shall be deemed to mean a willful refusal to obey the school laws of this State, the rulings of the State Board of Education, or reasonable rules and regulations prescribed for the government of the schools of the district by the school board; (4) neglect of duty; or (5) immorality. The original form of L.B. 266, as introduced, remained intact under the proposed amendments in all other significant respects, including the provision for the establishment of reasonable and objective criteria for evaluating teaching performances and the provision requiring that the ultimate decision to terminate the contract be based solely upon the deficiency reported in the evaluation which may constitute reasonable and just cause for the termination.

L.B. 266 met with substantial opposition both in committee and on the floor of the Legislature. The basic concern of the opposition was that L.B. 266 would have the effect of creating a species of tenure system, similar to that which exists for teachers in Class IV and Class V school districts under sections 79-1255 to 79-1262, R. R. S. 1943. There was considerable apprehension expressed that a school district would only be able to terminate teaching contracts under certain prescribed circumstances, and also that L.B. 266 would be a further limitation upon the authority of the school districts to terminate such contracts at will.

As an apparent result of the opposition to L.B. 266 in its original form, and probably as a compromise between the opposing factions, substantial changes were made in the bill before its final adoption. As will be apparent from a reading of the bill as finally adopted,

all references to reasonable and just cause, and to decisions to terminate based solely upon deficiencies in performance, constituting reasonable and just cause, were deleted, as was also the provision requiring reasonable and objective criteria for the evaluation of teaching performances. In its final form, section 79-1254, R. R. S. 1943, reflects only two significant changes in language as a result of the amendments to L.B. 266 following its introduction. The first change is that section 79-1254, R. R. S. 1943, in its present form requires that by April 15 of each year the secretary of the board of education must "notify each . . . teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be cause to either terminate or amend the contract for the ensuing school year." The second important change in section 79-1254, R. R. S. 1943, was the addition of a provision requiring that: "At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto." Other minor changes were made but we deem them to be immaterial to our present interpretation of the statute.

A fundamental principal of statutory construction is to ascertain the legislative intent and give effect to it, if it is a lawful one. School Dist. of Bellevue v. Strawn, 185 Neb. 392, 176 N. W. 2d 42 (1970). We have also held that in construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon. Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N. W. 2d 400 (1960).

Let us now examine the present language of section 79-1254, R. R. S. 1943, against the backdrop of the fore-

going well-established rules of statutory construction. It must be emphasized that section 79-1254, R. R. S. 1943, in its present form, has no express requirement that the cause of termination be "just cause" nor any language similar thereto. Where there is such a requirement it conceivably could be argued that termination could only be grounded upon causes that all reasonable men would regard as just or legitimate reasons for the termination of a teacher's employment. The legislative history of L.B. 266, as recited above, clearly indicates that the Legislature had the opportunity to impose such a requirement; but that having had that opportunity, it elected not to adopt such a provision. Such action or inaction, as the case may be, on the part of the Legislature is persuasive and indicates a legislative intention to affirmatively reject a standard of "just cause." We reach this conclusion notwithstanding the fact that section 79-1254, R. R. S. 1943, does require written notice of "any conditions of unsatisfactory performance . . . *which the board considers may be cause* to . . . terminate . . . the contract for the ensuing school year." (Emphasis supplied.) We do not believe that such language can be considered as creating a substantive right to employment which may be terminated only upon the basis of some objective standard of performance. The statute does not specify what the "conditions of unsatisfactory performance" may or may not be, and the determination of what constitutes such conditions is left entirely up to the board of education. Nor does that section, as it now appears, require the board to establish objective criteria for evaluation so that a teacher would be enabled to have knowledge in advance of what would be considered a satisfactory performance on his or her part. We note again that the Legislature had the opportunity, by virtue of the original wording of L.B. 266, to add such provisions to section 79-1254, R. R. S. 1943. Their ab-

sence in the present statute can only be regarded as indicative of a willful and intentional rejection of them by the Legislature.

We now turn attention to the language in section 79-1254, R. R. S. 1943, which provides for a hearing at which "evidence shall be presented in support of the reasons given for considering termination . . . of the contract, and the teacher . . . shall be permitted to produce evidence relating thereto." Does this language mean that the Legislature intended the statute to create a substantive right to employment which could be terminated only upon the basis of some objective standard of performance? We do not believe this result necessarily follows. Even in the absence of objective standards for the evaluation of the teacher's performance, it will undoubtedly be true that in many or most cases the actual cause of the proposed termination will be a legitimate cause which the board will be able to explain to the teacher at the time of the hearing in order that the teacher may be able to benefit from the board's evaluation of his or her performance. Whatever the cause of the proposed termination, whether it be considered "just" or not, the teacher will, at the hearing, be able to introduce evidence in an attempt to convince the board ultimately to decide against termination. The hearing will provide an opportunity for the teacher to persuade the board. Certainly, the hearing and the gathering of evidence called for can serve a useful function within the framework of the statute, and the provision for a hearing in taking of evidence need not necessarily relate to or be for the purpose of determining whether or not lawful reason exists to terminate the employment of the teacher.

Finally, we are greatly persuaded by the fact that in their consideration of and debates upon L.B. 266, the Legislature had before it as an example, and considered the adoption of, a "tenure" plan, similar to

that presently provided for tenured teachers in Class IV and V districts under sections 79-1255 to 79-1262, R. R. S. 1943. Section 79-1260, R. R. S. 1943, provides that even the indefinite contract of permanent teachers in Class IV and V school districts may be canceled for seven specific grounds set out therein, or other good and just cause, "but may not be made for political or personal reasons." Under section 79-1254, R. R. S. 1943, there is no limitation in the statute requiring that the ultimate decision of the board of education to terminate be based upon any particular objective standard of any kind. Under section 79-1260, R. R. S. 1943, applying to tenured teachers in Class IV and V districts, there is at least a negative limitation upon the boards of education that they may not decide to cancel the contracts of such teachers upon the basis of political or personal reasons. No such limitation appears in section 79-1254, R. R. S. 1943. Teachers employed in Class I, II, III, and VI districts do not possess the substantive right not to have their employment terminated for political or personal reasons. As originally introduced, L.B. 266 required that the ultimate decision by the board to terminate a contract must be based solely upon a deficiency constituting reasonable and just cause for such termination. That provision, however, was excised by the Legislature from L.B. 266 as finally passed, and no longer appears therein. We regard that fact as indicative of a legislative intent not to place any limitation upon the boards of education in respect to the reasons for which they decide to terminate teaching contracts.

We wish to make it clear that the conclusion we have reached is referable only to the interpretation of the statute discussed above. We do not pass upon the possible effect of contractual provisions contained in contracts between teachers and school districts which may have the effect of modifying that result. How-

ever, under the present statute the board may terminate a contract of a teacher in a Class I, II, III, or VI school for any cause whatsoever, or for no cause at all. This may or may not be a desirable situation, and may, in fact, be just the opposite of that desired or intended by the drafters and introducers of L.B. 266; nevertheless we feel it is the necessary result of the changes in, and amending of, that bill during its course through the Legislature.

We must therefore hold that section 79-1254, R. R. S. 1943, in its present form does .not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring determination that reasonable and just cause exists for termination of such employment. The District Court was correct in its interpretation of section 79-1254, R. R. S. 1943, as presently existing, and its judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT O. MCDONNELL, APPELLANT.
222 N. W. 2d 583

Filed October 24, 1974. No. 39460.

1. **Post Conviction: Criminal Law: Joinder.** Joinder of offenses of the same or similar character is permissible in the absence of prejudice to the defendant.
2. **Post Conviction: Criminal Law.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Affirmed.

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

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

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

NEWTON, J.

This is a post conviction proceeding. Defendant was previously tried on two counts of burglary, one in Merriman, Nebraska, and the other in Valentine, Nebraska. He was convicted on the first and acquitted on the second. He assigns error for lack of a speedy trial, inadequate counsel, abuse of discretion in sentencing, admission of improper evidence, and failure to supply a complete record. We affirm the judgment of the District Court.

The identical assignments of error were presented on direct appeal. See State v. McDonnell, 186 Neb. 316, 182 N. W. 2d 903. Defendant now seeks to embroider and expand two of the assignments. He charges trial counsel was inadequate because he failed to object to the joinder of the two causes. He also objects to the admission in evidence of a bank bag stolen in the Valentine burglary. Defendant asserts that the joinder of the charge pertaining to the Valentine burglary and the admission of evidence in regard to it was an attack upon his character. Joinder of offenses of the same or similar character is permissible in the absence of prejudice to the defendant. See State v. Rodgers, 186 Neb. 633, 185 N. W. 2d 448. In the present instance the evidence warranted submission of the Valentine burglary charge to the jury. The fact that he was acquitted on this charge indicates defendant was not prejudiced.

In any event, defendant's assignments of error were fully considered on his direct appeal to this court. "A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already

litigated." State v. Weiland, 190 Neb. 111, 206 N. W. 2d 336.

The appeal is entirely without merit and the judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM H. FAUTH, APPELLANT.
222 N. W. 2d 561

Filed October 24, 1974. No. 39463.

1. **Criminal Law: New Trial.** In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal.
2. **New Trial.** Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Donald R. Hays, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

SPENCER, J.

Defendant-appellant was convicted in the county court of Lancaster County of willful failure to support his minor children between June 1 and June 28, 1973. Defendant prosecutes this appeal from the affirmance of that judgment by the District Court for Lancaster County. We affirm.

Defendant's assignments of error are as follows: "1. The court erred in failing to sustain defendant's motion to vacate and set aside the verdict and judgment of the Lancaster County Court because of errors of law and errors in finding of fact occurring at the time of trial.

"2. The court erred in failing to sustain defendant's motion to modify the judgment of the Lancaster County Court when defendant's motion to vacate was denied."

Without comment on the assignments of error being in general terms, we suggest that no motion for new trial relating to any assignments of error under section 29-2101, R. R. S. 1943, was ever filed. This was fatal to the consideration of defendant's assignments in this court.

As we said in State v. Seger (1974), 191 Neb. 760, 217 N. W. 2d 828: "In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal.

"Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon."

The judgment is affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

CITY OF BEATRICE, NEBRASKA, APPELLEE, V. JAMES E. BLAKE, APPELLANT.
222 N. W. 2d 584

Filed October 24, 1974. No. 39464.

1. **Trial.** The findings of the court in an action where a jury is waived have the same weight as a verdict of a jury.
2. **Criminal Law: Evidence.** 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 it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

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

C. E. Danley, for appellant.

Stephen L. Von Reisen, for appellee.

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

NEWTON, J.

Defendant was convicted of violating ordinances of the city of Beatrice in that he left the scene of a vehicle accident without furnishing to persons whose property was damaged his name, address, and vehicle registration number, and was guilty of reckless driving. As his sole assignment of error, defendant challenges the sufficiency of the evidence.

The record reflects that during the early morning hours on October 26, 1973, two mailboxes were struck and damaged at the intersection of Shugart and Union Streets in Beatrice, Nebraska. The intersection is a T intersection. Shugart Street runs east and west and Union Street runs south from Shugart Street. The mailboxes were on the north side of Shugart Street at approximately the center of the T. Vehicle tracks were found the morning of the accident running east in the north ditch on Shugart Street 178 feet to the mailboxes, thence south across the street into the ditch at the southeast corner of the intersection, across Union Street into the west ditch, and south on Union Street. The same morning a police officer found and took a sample of blue paint from the mailboxes and a sample of blue paint from the left front fender of defendant's pickup. The fender and headlight on the left had been damaged. The paint samples appear to be identical. Defendant resided on Union Street about a block south from the intersection and when asked why he failed to report the accident he had the night before said "he had just run off in the ditch."

One of the mailbox owners had heard a loud running motor and a crash. He had seen a pickup going out of the east ditch, crossing the street into the west ditch, circling in his yard, reentering the street, and proceeding south. His mailbox had been previously undamaged.

The evidence, although circumstantial, is sufficient to sustain the trial judge's finding of guilt. "The findings of the court in an action where a jury is waived have

the same weight as a verdict of a jury." State v. Crowley, 174 Neb. 291, 117 N. W. 2d 488.

"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 it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt." State v. Bayless, 186 Neb. 530, 184 N. W. 2d 634.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN GEORGE BROWN, APPELLANT.
222 N. W. 2d 808

Filed October 24, 1974. No. 39505.

1. **Post Conviction.** Matters which have been fully litigated in a direct appeal are not a basis for post conviction relief.
2. **Criminal Law: Trial: Time.** Delay resulting from the fact the defendant was serving a sentence imposed by a Canadian court can not be considered in determining whether the defendant was denied the right to a speedy trial.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Alan Saltzman and Fred Schrekinger, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of robbery and sentenced to imprisonment for 10 to 20 years in 1972. The judgment was affirmed in State v. Brown, 190 Neb. 96, 206 N. W. 2d 331.

The defendant now seeks post conviction relief. His

motion alleges the conviction was based on prejudicial and inflammatory testimony which was not relevant and he was denied a speedy trial.

The first ground alleged in the motion was considered and determined adversely to the defendant in the previous appeal. State v. Brown, *supra.* Matters which have been fully litigated in a direct appeal are not a basis for post conviction relief. See State v. Franklin, 187 Neb. 363, 190 N. W. 2d 780. These allegations were properly stricken by the trial court.

The robbery in Lincoln, Nebraska, was committed on May 17, 1963. The defendant was apprehended in Canada on May 27, 1963, in connection with a robbery that took place there. The defendant remained in the custody of Canadian authorities until 1969 when he was returned to Nebraska.

A complaint charging robbery was filed in the county court of Lancaster County, Nebraska, on September 28, 1963. While the defendant was being held in Canada, he wrote to the authorities in Nebraska in an effort to expedite a trial on the charge pending against him in Nebraska. Because the defendant was in custody in Canada he was not brought before the county judge until July 17, 1969.

Until the defendant was released by the Canadian authorities, the proceedings in Nebraska were necessarily suspended. Under the Canadian Extradition Act, a fugitive who is serving a Canadian sentence "shall not be surrendered until after he has been discharged." Extradition Act, R. S., c. 322, § 24.

The record shows any delay in the Nebraska proceedings that occurred after the defendant had been released by the Canadian authorities was with the approval or at the instance of the defendant. The record shows no denial of the defendant's constitutional right to a speedy trial.

The judgment of the District Court is affirmed.

AFFIRMED.

LEONARD LAWRENCE, APPELLANT, V. ALLEN BEERMANN, AS SECRETARY OF STATE OF NEBRASKA, ET AL., APPELLEES.

222 N. W. 2d 809

Filed October 28, 1974. No. 39797.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellees.

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

PER CURIAM.

This matter comes on for hearing before this court on an appeal from the District Court's judgment and order dismissing the plaintiff's petition for an injunction to prevent the Secretary of State from placing on the November 1974 general election ballot a referendum for a vote by the people of Laws 1974, Legislative Bill 772. Briefs of counsel have been filed and oral argument by counsel was heard by the court on October 28, 1974, and the cause stands submitted to the court. On consideration thereof the court finds and determines as follows:

I

That Article III, section 3, of the Constitution of Nebraska, provides: "The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act."

II

That by its terms, Legislative Bill 772 does not be-

come operative until September 1, 1976. Section 3, Legislative Bill 772, provides that: "There is hereby established in the state treasury a fund to be known as the Public School Support Trust Fund into which shall be placed such funds as are required to be deposited therein under the provisions of this act."

The court finds and determines that Legislative Bill 772 is not an appropriation bill within the meaning of Article III, section 3, of the Constitution of Nebraska. Legislative Bill 772 does not appropriate or set apart from the public revenue a certain sum of money and is not a specific appropriation, as required by our Constitution, but on the other hand sets up a new scheme for local public school district taxation and financing. Our decisions in these matters are clear that such an act does not constitute an appropriation measure, within the meaning of the Constitution. Stahmer v. State, *ante* p. 63, 218 N. W. 2d 893; Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373. It appears on the face of Legislative Bill 772 that no appropriation in the constitutional sense was intended because the act, by its terms, sets up a funding provision, providing for contributions, and provides that the act shall not become operative until September 1, 1976.

III

Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. State ex rel. Morris v. Marsh, 183 Neb. 502, 162 N. W. 2d 262; State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N. W. 179; Klosterman v. Marsh, 180 Neb. 506, 143 N. W. 2d 744. It is fundamental that such an exception with respect to appropriations should be given a strict construction in light of the fundamental purpose of the referendum provision to give the people the right to vote on specific legislation. Generally, the excep-

tion should be and must be construed to mean the ordinary running expenses of the state government and existing state institutions, and not to include money or appropriations or funds created or acts which have as their design a new or different scheme for the revenue raising and financing of state delegated and created local units of self-government. See Bartling v. Wait, 96 Neb. 532, 148 N. W. 507.

The referral of Legislative Bill 772 to a vote of the people will in no way jeopardize the state's continuous compliance with the constitutional requirement of providing free instruction in the common schools. It is clear that if the measure is defeated by a vote of the people free instruction will continue as provided by the preexisting legislation and the taxation and revenue producing scheme under the previously existing law. Again, this is not a case of the defeat of an appropriation for a specific sum of money that would destroy the operation of the fundamental functions of state government or existing state institutions.

IV

The court notes other arguments and contentions of counsel but deems it unnecessary, in the light of the necessity for a prompt decision in this case, to discuss these issues in this opinion.

V

The judgment and order of the District Court denying plaintiff's request for a permanent injunction enjoining defendant Beermann from placing and certifying the referendum measure on Legislative Bill 772 on the official ballot in the general election of November 5, 1974, and in dismissing the plaintiff's petition, is affirmed.

AFFIRMED.

NEWTON, J., concurring.

I agree with and concur in the Per Curiam opinion adopted by the court; however, I wish to point out

that under the legislative implementation of the constitutional command to provide for the common schools, local school districts are not part of state government nor are they state institutions within the meaning of the language of Article III, section 3, of the Constitution of Nebraska.

Local school districts in Nebraska are units of local self-government. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N. W. 2d 817; Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179. Our decisions in this area are clear to the effect that the mere fact that a state has some supervisory control over institutions that the Legislature has created does not mean that such institutions are part of "state government" or are "state institutions" under Article III, section 3, of the Constitution of Nebraska.

SPENCER, J., joins in this concurrence.

KATHRYN G. BRAEMAN, APPELLANT AND CROSS-APPELLEE, V. JOHN A. BRAEMAN, APPELLEE AND CROSS-APPELLANT.
222 N. W. 2d 811

Filed October 31, 1974. No. 39168.

1. **Divorce: Parent and Child: Custody.** Considerations of public policy do not, in all cases, prevent the splitting of custody of the children between the parents upon dissolution.
2. ———: ———: ———. The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests.
3. **Divorce: Equity: Appeal and Error: Custody.** Even though the issue of child custody is triable de novo in this court, the judgment of the trial court is entitled to great weight in determining the best interests of the children.

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

H. Jeanne Thorough and Kelly & Thorough, for appellant.

Paul E. Galter and Bauer, Galter & Geier, for appellee.

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

CLINTON, J.

This is an action brought by the wife, petitioner, against the husband, respondent, praying for dissolution of the marriage, child custody and support, division of property, alimony, and attorneys' fees. The respondent acknowledged that the marriage was irretrievably broken and by cross-petition asked for custody of the children of the parties. After trial the court found the marriage to be irretrievably broken, entered a decree of dissolution, and found that both parties were fit and proper persons to have the custody of the children of the parties. Custody of the daughter was given to the petitioner and custody of the son to the respondent, detailed provision for visitation rights and periodic temporary exchanges of custody being provided. The decree divided the property of the parties, and awarded alimony and child support. The petitioner appealed. On the appeal she assigns as error: (1) The order splitting custody of the children; (2) insufficiency of the award of alimony and child support, and inadequacy of the amount of property awarded to her; and (3) inadequacy of allowance of attorneys' fees. We affirm.

The parties were married on March 29, 1969. At the time of trial in 1973 the petitioner was 32 years of age and the respondent 40. The petitioner had previously been married. The son, David, was born August 11, 1970. The daughter, Beth, adopted by the respondent as soon after the marriage as was legally permitted, had been born to the petitioner on October 3, 1966. Respondent holds a Ph.D. Degree and is a professor of history with tenure at the University of Nebraska. His annual salary is $16,000, supplemented

by summertime teaching or research grants as well as royalty income from publications. The petitioner has a Master's Degree in English and at the time of the marriage was employed and earning $8,000 per year. At respondent's request she terminated this employment before the marriage.

The trial record explores in great detail the conduct and attitudes of the parties with reference to the children. We have examined that record carefully. Our references to it, however, will be only by way of conclusion or by occasional illustrative example.

It is evident that each parent loves both children and that each parent genuinely desires custody because each believes the best interests of the children demand it. This does not appear to be one of those cases in which the custody struggle is motivated primarily by desire for retribution against the opposite spouse. It is evident, however, that the views of the parties as to what the best interests of the children require and their views on child rearing differ radically.

The evidence demonstrating why the marriage foundered bears directly upon the child custody issue. Except for minor teaching assignments the petitioner was not gainfully employed during the marriage. She did, however, involve herself in a multitude of outside activities which left little time for household duties or care of the children. As a consequence a great deal of paid babysitting was required as well as some outside hired help for cleaning the house. Ultimately the petitioner became a candidate for Congress. The respondent threatened to bring an action for dissolution of the marriage if she did so, but he did not carry out the threat. Following her defeat in the congressional primary in the spring of 1972, the petitioner became, in the fall of 1972, a full-time law student at the University of Nebraska. Respondent had requested

that she postpone this endeavor until David reached school age.

The evidence supports the clear conclusion that the respondent assumed a large part of the household chores and the care of the children, including meal preparation and shopping. The daughter, Beth, developed psychological and medical problems related to the tension existing in the home between the parents. They consulted medical and psychiatric help for her. The following testimony of the psychiatrist is illustrative: "A. At that time, it appeared to me by what both parents said, by what Beth said and by the actions in the office, that Dr. Braeman was much more involved with her and with the baby. He was in the baby's presence several times [more] than Mrs. Braeman was.

"[As to] discipline in the office, he would say something, they would usually behave. And when she would say something, they'd go right on.

"She was very involved in bus committee and other things, and felt that she should be going to these meetings almost every day. And this was a real bone of contention that we discussed."

The family pediatrician stated: "Q. Now, did the interest that was shown by John Braeman include the daughter Beth, or Elizabeth, as well as the son David?

"A. Absolutely. And any requests that I made which involved him, any problems that she had, were always complied with.

"Q. Did Dr. Braeman seem to be intelligent and knowledgable in connection with the problems of the children?

"A. Yes. As a matter of fact, [he] often seemed to be more cognizant of things like details of the diet and sleep hours and so on, certainly than an average father would know. . . .

"Q. Did Dr. Braeman occasionally have conversations

with you about preparation of meals, things of that nature?

"A. Yes, he did. I would say that it was my opinion that he was more involved in the meal planning and the meal preparation and so on than Kathy. Now, this may have had something to do with her other activities, I don't know.

"But I know he very often would talk with me about some concern he would have about the make-up of the diet or, in other words, the nutritional discussion often was pretty heavy on his shoulders."

The respondent's attitude toward the children was described by disinterested witnesses as that of "a patient and loving father." "Very affectionate and very playful. He obviously enjoyed the children and the children obviously enjoyed him." The same witness gave favorable testimony for the petitioner as follows: "Q. At the time you were in the home, did you also observe Mrs. Braeman with the children? A. Yes. Q. What did you observe about that? A. That she also liked the children very much and they got along well."

Petitioner was cross-examined about a newspaper article written about her as follows: "Q. And she interviewed you, and there were a number of quotes, direct quotations of the statements that you made in that article; is that correct? A. Yes." One of the quotations is as follows: "'John takes care of the children and is more involved with them than the average man. The children have become very important to him and that is good for both of them.'" In this article petitioner stated her view that it was not good for a mother to seek fulfillment in her children.

Respondent favored what is described as a structured environment for the children. Petitioner favored what is referred to as an unstructured environment.

The petitioner's principal argument in support of her position that she should have permanent custody of

both children is that the separation of the children is psychologically bad for them and that therefore their best interests require they be kept together in the mother's custody. She cites statements of this and other courts which point out the general desirability of keeping children of the family together. However, we have said that considerations of public policy do not, in all cases, prevent the splitting of custody of the children between the parents upon dissolution. Humann v. Humann, 180 Neb. 719, 144 N. W. 2d 723. The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests. § 42-364, R. R. S. 1943. Even though the issue of child custody is triable de novo in this court, the judgment of the trial court is entitled to great weight in determining the best interests of the children. Scripter v. Scripter, 188 Neb. 576, 198 N. W. 2d 201.

The order of the trial court on custody was as follows: ". . . that petitioner is hereby awarded the care, custody and control of Elizabeth Kristin Braeman, subject to all reasonable rights of visitation by respondent; that respondent is hereby awarded the care, custody and control of David Saul Braeman, subject to all reasonable rights of visitation by petitioner; that said reasonable visitation rights shall include as a minimum: 1) the placement of the care, custody and control of both minor children variously in petitioner and respondent, on alternate weekends, from 5:00 p.m. Friday until 5:00 p.m. Sunday of each week, with petitioner receiving custody on Friday, March 16, 1973; 2) that during a five hour period between the approximate hours of 4:00 p.m. to 9:00 p.m. on Wednesday of each week, commencing Wednesday, March 14, 1973, the care, custody and control of both minor children shall alternate between petitioner and respondent, save number 3 below, said alternation shall commence with respondent on

March 14, 1973; 3) The care, custody and control of both minor children shall be with petitioner exclusively for one calendar month of each summer and with respondent exclusively for one calendar month of each summer; and 4) The care, custody and control of both minor children shall be in petitioner for Easter and Christmas Days of each year and with respondent for Thanksgiving Day and Two Days of the Jewish High Holidays of each year; . . ."

That order was made after the trial court personally heard the testimony of the parties and many witnesses with reference to the child custody issue. There is nothing in the record in the way of expert testimony or otherwise which leads us to conclude that the arrangements provided for in the order are likely to be any more harmful than would a more complete separation from one parent or the other. In the final analysis there is no magic in the pronouncement by this or any other court in matters of child custody. It can only be hoped that both parties will extend themselves in the best interests of the children in order to make the arrangement work. With them rests the ultimate responsibility for their children.

Under the circumstances here, even if both children were to be awarded to one party or the other, they would necessarily spend a considerable amount of time in the care of hired persons. The petitioner is a full-time law student and must necessarily sometime become employed full time. The respondent also works full time. However, a substantial part of his work consists of writing, research, and class preparation, which he is free to do at home. The record supports the conclusion that he is actually more available to the children than can be the petitioner in her present or foreseeable future situation.

We do not feel that the order of the trial court with

reference to the custody of the children should be disturbed.

The respondent was required to pay to the petitioner for the support of Beth $150 per month. The petitioner was awarded alimony in gross of $3,600, payable $100 per month until February 12, 1976. She was also awarded attorneys' fees of $1,500 for services in the trial court. There was no accumulation of property during the marriage save the household goods and a small equity in the residence. Petitioner was awarded the home of the parties subject to the existing lien, and received most of the household furniture. Respondent was awarded the 1969 Chrysler automobile owned by the parties, certain mutual funds which he owned before the marriage, and certain savings and bank accounts which in amount are substantially less than the savings brought to the marriage. He was also awarded his pension fund, his books, and office furniture. Each party was awarded his own personal effects. He was required to maintain in force medical insurance for the benefit of the children.

The respondent's take-home pay is less than $900 a month. From summertime teaching and a modest amount of royalties from publications, he has perhaps $2,500 additional gross annual income. The petitioner has demonstrated earning capacity of $8,000 per year and probably considerably more when she completes her legal education. We find that the child support, alimony, property division, and attorneys' fees provisions of the decree are reasonable and should not be modified. We affirm the judgment of the lower court. Each party shall pay his own costs in this court and his own attorneys' fees in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTINE LEWIS, APPELLANT.
222 N. W. 2d 815

Filed October 31, 1974. No. 39318.

1. **Criminal Law: Guilty Plea.** In a criminal prosecution the trial court should, before accepting a plea of guilty or nolo contendere, inform the defendant personally of the possible penalties that may be imposed.
2. **Criminal Law: Guilty Plea: Sentences.** Subsequent to sentence, in the absence of manifest injustice as defined in section 2.1(a) (ii) (1) (2) (3) (4), American Bar Association Standards Relating to Pleas of Guilty, the defendant should not be permitted to withdraw his plea of guilty or nolo contendere.
3. **Criminal Law: Guilty Plea: Constitutional Law.** The constitutional test for determining the validity of a plea of guilty is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
4. **Criminal Law: Guilty Plea: Records.** The record should affirmatively disclose that the defendant entered his plea of guilty or nolo contendere intelligently and voluntarily.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Remanded with directions.

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

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

This is an appeal from a sentence on a charge of uttering a forged instrument. Defendant was arraigned and entered a plea of not guilty. Later counsel was appointed for her and she thereafter asked leave to withdraw the plea of not guilty. Leave was granted and she then, after rearraignment, entered a plea of

nolo contendere, which plea was accepted by the court and a finding of guilty made. After a presentence investigation, sentence was imposed.

Defendant makes the following assignment of error: "The District Court committed reversible error in failing to make the constitutionally-required arraignment record sufficient to show that the defendant pled no contest voluntarily, understandingly, intelligently, and with full knowledge of the rights she was waiving by so pleading." She also raises the question of excessiveness of sentence.

An examination of the arraignment proceedings discloses that only one aspect of the defendant's contentions requires discussion. Although the judge addressed the defendant personally in the presence of her counsel, made a rather comprehensive explanation of her rights and the effect of the entry of a plea of nolo contendere, and received from her the necessary waivers, he did not, previous to the acceptance of the plea, specifically advise her of the possible penalties which might be imposed.

At the arraignment proceedings her counsel, in response to a question by the court, advised the court that he had "explained to her that No Contest plea is exactly the same thing as a guilty plea except for the civil liabilities," and that the plea was being entered upon his recommendation. The court then continued: "THE COURT: That's what I want to explain to you, Mrs. Lewis. If the Court accepts a plea of No Contest, or Nolo Contendere as we call it in the law, is the same as a plea of guilty for all the purposes of this action. In other words, the Court may impose the same sanctions upon you as the Court could upon a finding of guilty, a verdict of guilty, or upon your plea of guilty; do you understand that? THE DEFENDANT: Yes."

The record shows that the court for the first time

advised the defendant of the penalties immediately before sentence was imposed, some 6 weeks after acceptance of the plea. No suggestion was made to her at that time that she might withdraw her plea.

We note that the quoted portion of the arraignment proceedings is ambiguous insofar as her affirmative answer to the question by the court might indicate prior knowledge of the penalties. It could possibly mean only that she knew that she could be punished the same as upon a plea of guilty. Or it could be interpreted to mean that she was also aware of the specific sanctions which attached.

In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, we said that the standard for determining the validity of a plea of guilty is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. We there indicated that one of the items required for a substantial compliance with the American Bar Association standards on pleas of guilty as approved by us in that case was that the defendant be informed of the penalties for the offense. We there said: "There was substantial compliance with the American Bar Association standards herein. The trial court specifically asked the defendant if he understood he was waiving his right to a jury trial; if he was aware of the penalty of the offense; whether any promises had been made to him; and whether he had discussed all his rights with his counsel." Section 1.4 of the standards recommends that among other items concerning which the court should advise the defendant are the following: "(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences; (ii) of the mandatory minimum sentence, if any, on the charge; . . ." American Bar Association Standards Relating to Pleas of Guilty, § 1.4(c). The commentary to the standards says: "In the absence of a statute or rule, most

appellate courts have taken the position that the judge's obligation extends even to those cases in which the defendant has counsel. Annot., 97 A. L. R. 2d 549, 556 (1964). The recent revision of Federal Rule 11 makes it clear that the court is to determine in all cases that the defendant understands the consequences. This view is taken in the above standard, as the judicial warning effectively serves to overcome subsequent objections by the defendant that his counsel gave him erroneous information." American Bar Association Standards Relating to Pleas of Guilty, Standards with Commentary, Section 1.4(c) generally. Substantial compliance with the standards was not met in this case because of the failure of the court to advise the defendant of the penalties before accepting her plea.

The practice of advising a defendant who is about to enter a plea to a felony of the possible penalties on conviction, although not made mandatory by any statute in this state, is one of long standing in this jurisdiction and antedates the adoption of the standards in State v. Turner, *supra*. No doubt the failure in this case is the result of oversight and failure to use a check list. In Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, upon which the defendant relies, the Supreme Court of the United States vacated the judgment of conviction and ordered that the defendant be permitted to plead again. We do not interpret that case as holding that under a record such as we have in this case any such procedure is constitutionally required. The constitutional requirement is that the plea be voluntary and intelligent and the determination of that fact be reliably determined. As we read Boykin it does not lay down any constitutional mandate as to the procedure that must be followed in making a determination of whether a plea was in fact voluntary and intelligent.

In the case of North Carolina v. Alford, 400 U. S. 25,

91 S. Ct. 160, 27 L. Ed. 2d 162, footnote 3 at page 29 is as follows: "At the state court hearing on post-conviction relief, the testimony confirmed that Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issues of substance (are raised) under Boykin v. Alabama (citation ommitted)." See, also, Halliday v. United States, 394 U. S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16.

The record here supports at least by implication a conclusion that the defendant in fact knew the consequences of her plea. This implication arises from the fact that she was represented by counsel throughout and had adequate consultation with him, that when she was advised of the penalties just before sentencing she expressed no surprise, and when asked if she had any reason to give why sentence should not be imposed, she gave no relevant response. Further, at that time her counsel did, in her presence, say that no legal reason existed why sentence should not be imposed.

The standards recommend that a defendant be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. American Bar Association Standards Relating to Pleas of Guilty, § 2.1. The standards provide that one of the items which may constitute manifest injustice is a failure to be advised of penal consequences of a plea. In the absence of proof by the defendant of such manifest injustice, the defendant should not be permitted to withdraw her plea.

Although the defendant did not at any time make application to the trial court for leave to withdraw her plea, in order that the fact of whether or not the de-

fendant was aware of the possible penalties at the time she entered her plea may be reliably determined, we decide that, without vacating the judgment of conviction or the sentence, the cause shall be remanded with leave to the defendant to apply to the trial court to withdraw her plea. If she does so apply, the trial court shall hold an evidentiary hearing to determine the fact of the defendant's knowledge or the absence of such knowledge. If the court finds that she was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and she shall be permitted to plead again. If it determines that she did know, then the judgment and sentence shall stand. If she makes no application to withdraw her plea within 10 days of the filing of this opinion, then the sentence shall be carried into execution.

The sentence imposed was 2 to 6 years and a fine of $1. The statutory penalty is 1 to 20 years. In the light of the previous record of the defendant and the circumstances shown by the record which led to the crime of which she was convicted, we cannot say that the court abused its discretion in imposing the sentence it did.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LAVOY ORNER, APPELLANT.
222 N. W. 2d 819

Filed October 31, 1974. No. 39361.

Criminal Law: Sentences. A sentence imposed within the statutory limits will not be disturbed on appeal without a showing of an abuse of discretion by the sentencing court.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Muffly & Watkins and Richard E. Scott, for appellant.

Richard R. Wood and Norman Langemach, Jr., for appellee.

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

WHITE, C. J.

The sole issue presented in this case is the excessiveness of a sentence, imposed by both the municipal court and the District Court, of 30 days in jail and a license suspension of 1 year, imposed on conviction of driving an automobile during the period of a previous license suspension. We affirm the judgment and sentence of the District Court.

This court has repeatedly and recently held that a sentence imposed within the statutory limits will not be disturbed on appeal without a showing of an abuse of discretion by the sentencing court. The defendant nevertheless argues, under section 29-2308, R. R. S. 1943, that this court is authorized to reduce a sentence when in its opinion the sentence is excessive. The thrust of the defendant's argument is to the effect that this court should sit as an original sentencing court and to determine de novo what the sentence should be. This court has consistently held, as we have noted, that the standard of review in this court is whether there has been an abuse of discretion by the lower court. This court construed the meaning of section 29-2308, R. R. S. 1943, in the case of Bell v. State, 159 Neb. 474, 67 N. W. 2d 762, when it said as follows: "Section 29-2308, R. R. S. 1943, which authorizes the Supreme Court to reduce a sentence when in its opinion the sentence is excessive, was not intended by the Legislature as a directive to the court to reduce the sentence in every instance where it is asked, but only in those cases where it is apparent that the *trial court has abused its judicial discretion and fixed a penalty which is clearly excessive.*" (Emphasis supplied.)

The record shows that the defendant's license was

suspended on points on August 18, 1972. The defendant had received a previous notice of revocation of his license on points on or about July 19, 1972. The record shows, so far as pertinent here, that subsequent to the July 19, 1972, suspension, that the county court of Otoe County set aside a sentence on one of the convictions supporting that suspension, and in order to prevent the defendant from losing his license on points, placed him on probation and transferred the probation to the Lancaster County, Nebraska, probation officer. The August 18, 1972, revocation resulted from a subsequent conviction while the defendant was on probation. The defendant failed to report to the probation officer as directed and revocation of that probation was recommended by the Lancaster County probation officer. The defendant concedes that he drove an automobile "about three times" after his license was suspended.

The District Court, before sentencing on the appeal from the municipal court conviction, ordered a presentence investigation. The record shows that the defendant has been convicted over a period of 10 years of other offenses unrelated to driving an automobile. Further recitals of the evidence from the record are unnecessary. It is clear the sentence was not excessive and there was no abuse of discretion on the part of either the municipal court or the District Court in imposing the sentence that they did.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN LANGER, APPELLANT.
222 N. W. 2d 820

Filed October 31, 1974. No. 39403.

Trial: Evidence: Criminal Law. Generally, proof that an exhibit

remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence, and the ruling will not be overturned on appeal except for a clear abuse of discretion.

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

Walter J. Matejka, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

WHITE, C. J.

This is an appeal from a conviction and sentence of the defendant for a violation of section 28-4,125, R. S. Supp., 1972, prohibiting the manufacture, distribution, delivery, or dispensing of a controlled substance. The sole assignment of error on appeal is that the verdict was not sustained by sufficient evidence and was contrary to law. We affirm the judgment and sentence of the District Court.

More precisely, the defendant contends that there was insufficient evidence to show a chain of possession by law enforcement officials of the hashish exhibit, which was the foundation of the factual proof necessary to convict the defendant of the charge. In a brief argument, the defendant contends that after the undercover agent purchased the hashish from the defendant and completed the test at the police station, he put the substance back in his wallet, left the station, went home, and did not lock the evidence up in the property room of the police station. He argues that the undercover

officer did not return to the station for 2 or 3 days and the police property officer did not receive the exhibit until about 3 days after the alleged purchase. He argues that the police officer did not have his wallet on his person at night when he slept and during the entire 3-day period he continued to carry the substance in his wallet. The argument is that he did not follow the customary police procedures and under all the facts and circumstances there was an insufficient foundation for the introduction of the hashish exhibit in evidence and that, therefore, the District Court abused its discretion in receiving the hashish exhibit in evidence.

In similar cases involving controlled substances we have held that proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164; State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321; State v. Bullard, 186 Neb. 709, 185 N. W. 2d 864. Important in such situations are the nature of the exhibit and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence. The ruling will not be overturned on appeal except for a clear abuse of discretion. State v. Huffman, *supra*.

We examine the evidence supporting the trial court's ruling admitting the hashish exhibit in evidence. Officer Robert Runkles was an undercover narcotics officer for the Omaha police department, for approximately 1 ½ years. On September 25, 1972, he went to a North Omaha address with a companion where the defendant opened the door and admitted them. Runkles negotiated and made the purchase of a small amount of hashish from the defendant. He watched the defendant trim this substance from a larger amount and place it in a small piece of tinfoil. He placed the foil packet contain-

ing the suspected hashish in his wallet and then took his companion home. Runkles then went to the Omaha police headquarters at approximately 9:30 p.m., and tested the suspected hashish. The test was positive and then Runkles placed the hashish back in his wallet, left the station, and returned home. Three days later, on the evening of September 28, 1972, Runkles returned to the station, removed the foil packet from his wallet and sealed it in an envelope marked "R. B. 45579F", and placed it in the police property room. Between the evening of September 25, 1972, and September 28, 1972, Runkles testified that the foil packet was always in his presence, in his billfold, except when he slept. Runkles further testified that he had no other substances in his wallet during that time period and made no other purchases. On October 2, 1972, a police officer testified that he transferred an envelope bearing "R. B. 45579F" from the Omaha police department's property vault to a medical laboratory in Omaha for testing. This officer never opened the envelope but hand delivered it to a chemist at the medical laboratory. The exhibit was tested by the chemist who was an expert in drug analysis, at the medical laboratory. The chemist opened the sealed envelope and analyzed the contents on the same day. He testified that the substance tested was hashish. When finished with the test, the chemist placed the remainder of the substance back in the envelope, stapled it shut, and filed it in the vault at the medical laboratory. The defendant does not contend that the chain of possession was insufficient from this point on and consequently it will be unnecessary to discuss the further evidence in this area.

We come to the conclusion that the record reflects a continuous chain of custody from the time of purchase until the analysis of the substance and that the total circumstances surrounding the purchase and the operations of the agent are reasonable and support the foundation for the testimony given at the trial. In reality,

the defendant's contention is an attack upon the irregular nature of the manner in which the undercover agent Runkles handled the exhibit. We simply point out, again, that the chain of custody and its complete and continuous possession by one person is conclusively established by the evidence. It may be true that it is inherent in the nature of an undercover agent's work that he maintain a schedule of hours and general mode of operation different from those of uniformed police officers. The very success of the operation depends upon an almost absolute disassociation with uniformed officers. Considering all the circumstances and the nature of the operation, it does not appear unreasonable, much less being adequate to establish insufficient foundation, that an officer under these circumstances would retain personal custody of the evidence for 3 days prior to turning it into the police property room. We further point out that in State v. Huffman, *supra,* the evidence in question was kept in an unlocked room in the police station where it was possibly accessible to employees, to janitors, and at times even to prisoners and visitors. Nevertheless, this court held that it was important in such circumstances to determine the nature of the exhibit, the circumstances surrounding its preservation and custody, and the *likelihood of intermeddlers* tampering with the object. The court held that the exhibit was properly introduced in evidence and that it was a question for the jury to determine if there had been sufficient intermeddling or tampering with the object under all the circumstances to destroy its credibility. We come to the conclusion that there was ample evidence to sustain the admissibility of the hashish exhibit in evidence and that the defendant's contention is without merit.

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

AFFIRMED.

CRALE L. HANSEN, APPELLEE AND CROSS-APPELLANT, V. EILEEN A. HASENKAMP, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH JERRY BRUMMER, APPELLEE AND CROSS-APPELLEE.

223 N. W. 2d 44

Filed October 31, 1974. No. 39425.

1. **Trial: Motions, Rules, and Orders.** A motion for directed verdict must be treated as an admission of the truth of all competent 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.
2. **Trial: Evidence.** Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence and where there is a conflict in the evidence, such issues must be submitted to the jury.
3. ———: ———. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry. The use of motion pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge.
4. **Trial: Instructions.** After the cause has been submitted to the jury, a further communication by the trial judge to the jury in the absence of the parties and their counsel, which communication merely repeats or affirms an instruction already given to the jury, is not reversible error.
5. **Parties: Appeal and Error.** In this court a cross-appeal by an appellee can be taken only against an appellant unless otherwise provided by statute.

Appeal from the District Court for Cass County: WALTER H. SMITH, Judge. Affirmed.

Casey & Elworth, for appellant.

E. Dean Hascall, for appellee Hansen.

Harry L. Welch, Harold W. Kauffman, and Richard P. Jeffries of Gross, Welch, Vinardi, Kauffman & Day, for appellee Brummer.

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

MCCOWN, J.

This is an action for personal injuries arising out of an automobile accident. Plaintiff Hansen, a guest passenger in an automobile driven by defendant Hasenkamp, brought this action against the host driver and against the defendant Brummer, the driver of the other vehicle involved in the two-car accident. The jury returned a verdict of $50,000 in favor of the plaintiff and against the defendant Hasenkamp, and also found that plaintiff had no cause of action against the defendant Brummer. Judgment was entered on the verdict of the jury and the defendant Hasenkamp appealed.

The defendant, Eileen Hasenkamp, was an employee of First Federal Savings and Loan Association in Omaha, Nebraska. On July 10, 1971, First Federal held an outing and picnic for its employees at Lake Wa-Con-Da, a recreation area near the Missouri River, some distance south of Omaha, Nebraska. Hasenkamp invited the plaintiff, Crale Hansen, as her guest for the outing. The plaintiff met the defendant Hasenkamp at mid-morning on Saturday, July 10, 1971. The two left in the defendant's car at approximately 10:30 a.m. and picked up Ann Gebhardt, another First Federal employee. On the way to Lake Wa-Con-Da the three individuals stopped for hamburgers and plaintiff bought a six-pack of beer. On the way to the picnic, defendant Hasenkamp drank a beer and a half. The parties arrived at the picnic area at about 12:30 p.m. During the afternoon the defendant Hasenkamp fished and water skied, and at approximately 4 p.m., the group had a steak dinner. At approximately 7 p.m., or a little later, plaintiff Hansen, defendant Hasenkamp, and Miss Gebhardt left the picnic to return to Omaha.

The evidence is in some conflict as to the amount

of liquor consumed by defendant Hasenkamp during the course of the picnic. She testified that she had four drinks, including one drink after the meal. There was other testimony that she had at least five drinks. There is testimony that the defendant Hasenkamp did not appear to be under the influence of liquor during the course of the picnic. There is other evidence that liquor may have had some effect on her alertness, speech, and walking. When she left the picnic there is testimony that she had a drink in her hand as she got into the car to drive back to Omaha. Miss Gebhardt testified that the defendant Hasenkamp finished that drink while driving back toward Omaha and tossed the glass out the window some 5 minutes after they had reached U.S. Highway No. 73-75. Miss Gebhardt also testified that as they left the picnic area on a hilly dirt road proceeding toward Highway No. 73-75, the defendant Hasenkamp was not staying on her side of the road; the speed was somewhat above normal; and Miss Gebhardt suggested defendant Hasenkamp should slow down or be a little more careful. She also testified that defendant Hasenkamp's speech was loud and silly, although not slurred. Defendant Hasenkamp denied Miss Gebhardt's testimony on these issues.

After driving some 3 to 5 miles on the dirt road, they reached Highway No. 73-75, a two-lane paved highway. They proceeded north on Highway No. 73-75 at a speed of approximately 60 miles per hour. As they were driving along, at approximately 7:30 p.m., the defendant Hasenkamp decided to stop to get some cigarettes at a service station just past an intersection known as Murray Corner. The service station was on the west side of the highway and in order to reach it, it was necessary to make a left-hand turn across the southbound traffic lane of Highway No. 73-75. The defendant Hasenkamp testified that she looked to the north and saw no vehicles approaching. She made a left-hand

turn in front of a southbound pickup truck being driven by the defendant Brummer. She never saw the Brummer truck. The point of impact was in the southbound traffic lane.

The plaintiff Hansen received injuries to the head, neck, and chest. The injuries included multiple fractures of bones and also the loss of sight of one eye. The jury returned a verdict in favor of the plaintiff and against the defendant Hasenkamp in the sum of $50,000, and there is no complaint that the judgment is excessive. The jury also found that plaintiff had no cause of action against the defendant Brummer.

This appeal turns on the determination of whether or not there was sufficient evidence to go to the jury as to whether the defendant Hasenkamp was under the influence of intoxicating liquor. This becomes critical because the cause of action against the defendant Hasenkamp arises under the guest statute. Under that statute, if the host driver is not under the influence of intoxicating liquor, a guest can recover only where there is gross negligence; while if the host driver is under the influence of intoxicating liquor, only ordinary negligence need be proved. See Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201. Here the evidence is clear, and the jury of necessity found, that the defendant Hasenkamp was guilty of at least ordinary negligence.

In the posture of this case we must view the evidence in the light of the fact that the jury returned a verdict in favor of the plaintiff. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Speedway Transp., Inc. v. DeTurk, 183 Neb. 629, 163 N. W. 2d 283.

Here the jury was correctly instructed as to the meaning of the term "under the influence of intoxi-

cating liquor" under the rule laid down in O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322. "A person is under the influence of alcoholic liquor if such person is under (the) influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently." That case also confirms the rule that where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, and where there is a conflict in the evidence, such issues must be submitted to the jury. See, also, Speedway Transp., Inc. v. DeTurk, *supra.*

The defendant asserts that the verdict of the jury is contrary to the law and to the evidence, and that the court erred in failing to sustain her motions for directed verdict.

A motion for directed verdict must be treated as an admission of the truth of all competent 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. Hoffman v. Jorgensen Awnings, Inc., 178 Neb. 261, 132 N. W. 2d 867.

Under the evidence in this case we cannot say as a matter of law that reasonable minds could not differ on the issue of whether or not the defendant Hasenkamp was under the influence of intoxicating liquor. The action of the court in submitting the matter to the jury was proper.

There is a single assignment of error complaining generally as to errors of law occurring during the trial. Only two complaints are mentioned in her brief. The first relates to the contention that the court erred in permitting the plaintiff to express an opinion that the defendant Hasenkamp was under the influence of al-

coholic liquor over an objection that there was no proper and sufficient foundation. It is well established in Nebraska that a lay witness may give his opinion as to intoxication, at least where it has been established that the witness had an opportunity to observe the person. McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321. In this case there is no dispute that the plaintiff had ample opportunity to observe the defendant over a period of several hours before the accident occurred, and that he had testified in full detail as to the facts and circumstances which he had observed. What the defendant actually complains about is the fact that plaintiff had testified in an earlier deposition that he did not believe the defendant Hasenkamp was under the influence of liquor during the course of the trip back to Omaha, but had changed his mind later, based upon the fact that the defendant had made a left turn on a busy highway in front of oncoming traffic. These differences in the testimony of the plaintiff were fully brought out to the jury and plaintiff's opinion was not excludable upon the ground that there was no proper or sufficient foundation. The plaintiff had already testified as to the facts and circumstances which entered into his opinion. Unless we can say as a matter of law that there was no evidence upon which any lay witness could have testified that the defendant Hasenkamp was under the influence of intoxicating liquor, certainly we cannot say that there was no foundation for the plaintiff to express an opinion.

The defendant also argues that there was error in refusing to admit in evidence a motion picture which showed the defendant Hasenkamp water skiing at approximately 3 p.m. on the afternoon of the picnic. The trial court sustained plaintiff's objection to the admission of the film in evidence and expressed the view that the picture showing her water skiing at 3 p.m. was not relevant to show her condition at 7:30 p.m.

There was evidence in the record as to the defendant's water skiing by eye-witnesses, without any dispute. The motion picture would simply have been cumulative evidence of activities already testified to by several witnesses. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry. Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221. The use of motion pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge. Denison v. Omaha & C.B. St. Ry. Co., 135 Neb. 307, 280 N. W. 905. Even if it be assumed that the defendant's water skiing some 4½ hours before the accident was at a time sufficiently close to the accident to be pertinent, and that the exclusion of motion pictures showing that activity was therefor improper, nevertheless under the evidence here, the exclusion cannot be deemed prejudicial.

Complaint is also made that when the jurors transmitted a question to the judge as to whether they must all agree on the same cause of guilt, the court, in the absence of the parties and their counsel, sent the following "instruction" to the jury: "You are instructed that the Court cannot give you any further clarification beyond that which is set forth in Instruction No. 5. As stated in Instruction No. 1, any one instruction should be considered in the light of all the others."

While communications between the trial judge and jury should be controlled by a high degree of circumspection, we have consistently held that the repetition or affirmation of an instruction already given to the jury is not reversible error. See, Anderson v. Evans, 168 Neb. 373, 96 N. W. 2d 44; Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627. There

was clearly no error here in the trial court directing the jury to consider the instructions previously given.

The remaining assignments of error are without merit and the judgment of the trial court should be affirmed.

One further matter remains to be disposed of. Plaintiff's cause of action here was filed against the defendants Eileen Hasenkamp and Jerry Brummer. The verdict of the jury was in favor of the plaintiff and against the defendant Eileen Hasenkamp for $50,000; and that the plaintiff had no cause of action against the defendant Jerry Brummer, and judgment was entered on the verdict.

The defendant Eileen Hasenkamp filed a motion for new trial or, in the alternative, judgment notwithstanding the verdict as to the judgment against her. The plaintiff filed a motion for new trial or, in the alternative, judgment notwithstanding the verdict against the jury's verdict and judgment in favor of the defendant Brummer. Both motions were overruled, and the defendant, Eileen Hasenkamp, perfected her appeal to this court, and is the only appellant.

The plaintiff-appellee attempted to assert a right to cross-appeal from the judgment in favor of the defendant Brummer, by asserting the purported cross-appeal in the manner provided by Rules 1d and 8b3 of the Revised Rules of this court. Under these rules, no notice is required and the cross-appeal must be set out separately in the appellee's brief. The defendant Brummer has filed a motion to dismiss the purported cross-appeal of the plaintiff-appellee against Brummer.

The general rule is that a cross-appeal is allowable and can be taken by an appellee only against an appellant, unless otherwise provided by statute. See, 4 C. J. S., Appeal & Error, § 35, p. 141; 4 Am. Jur. 2d, Appeal and Error, § 177, p. 688. While that general rule is not expressly stated in our rules, it is clearly implied. Rule 8c dealing with reply briefs provides:

"* * * The answer of *appellant* to any cross-appeal shall be set forth in a separate division of the reply brief, * * *." (Emphasis ours.) We therefore hold that in this court a cross-appeal can be taken only against an appellant, unless otherwise provided by statute. The only appellant here was the defendant Eileen Hasenkamp. The defendant Brummer was not an appellant. The motion to dismiss the purported cross-appeal against the defendant Brummer is granted.

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

AFFIRMED.

CONSTANCE S. BREWER, APPELLANT, V. LYLE CASE, ET AL., APPELLEES.

LONNY L. BREWER, APPELLANT, V. LYLE CASE ET AL., APPELLEES.

222 N. W. 2d 823

Filed October 31, 1974. Nos. 39428, 39429.

1. **Motor Vehicles: Negligence.** As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. **Trial.** Generally, a party cannot claim error when an issue submitted to the jury is found in his favor. And this is especially true when no issue of contributory negligence or comparative negligence exists.
3. **Trial: Verdicts: Damages.** A verdict and judgment will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury.

Appeals from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Richard J. Bruckner of Schrempp, Bruckner & Dinsmore, Harry E. Stevens, and Leo J. Eskey, for appellants.

Brogan & Stafford and Frederick S. Jack, for appellees.

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

WHITE, C. J.

In this consolidated action for personal injuries, medical expenses, and loss of consortium, the plaintiffs recovered a jury verdict and judgment in the amount of $100 on the wife's claim for personal injuries and $500 on the husband's claim for medical expenses and loss of consortium. The plaintiffs appeal from the verdicts and judgments of the District Court. We affirm the judgments of the District Court.

The plaintiffs contend that the District Court erred in failing to direct a verdict on the issue of negligence; that there was error in the giving of the instruction concerning a preexisting condition; and lastly that the inadequacy of the verdict requires reversal.

On August 28, 1971, Mrs. Brewer was driving north on Main Street in Decatur, Nebraska, on a clear, dry day. She had stopped at a stop sign at the intersection of Main and Huff Streets and observed the defendant, Jean Case, through her rearview mirror, approaching from the rear approximately one-half block away. While approaching the Brewer car at a speed of 10 to 15 miles per hour, Mrs. Case' 1-year-old daughter started to "tilt". Seeing this, she turned to the child and removed her foot from the accelerator. Instead of then pressing the brake, she hit the accelerator again. Mrs. Case struck the rear of the Brewer car as it was leaving the intersection. Neither car sustained great damage. Immediately after the accident, neither party saw a doctor. There was evidence to suggest that Mrs. Brewer may have hit the steering wheel of her car in the chest area. Mrs. Brewer, 5 months pregnant at the time of the accident, saw a doctor 1 week later. She had a spontaneous abortion on September 14, 1971. Due to heavy flowing following the abortion she had a D & C in December. The flowing continued and in February 1972, she had a

hysterectomy. Mrs. Brewer has alleged breathing and weight problems, chest pains, and a decreased capacity to work in addition to other medical problems.

We examine the question of the failure of the District Court to withdraw the issue of negligence from the jury and give an instruction on liability. The evidence shows that the defendant Case admitted stepping on the accelerator and did not allege or attempt to prove any negligence on the part of Mrs. Brewer nor any excuse or sudden emergency that would justify the failure to stop. The defendant testified in substance that she failed to take the proper precautions in preparing to stop. The record indicates that the sole focus of the trial was on the issues of the nature and extent of Mrs. Brewer's injuries and whether they were proximately caused by the negligence of the defendant. We agree it is true in this jurisdiction it is the general rule that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870. It is not alleged or contended, nor is there any evidence of, a lack of visibility or other circumstances reasonably excusing the defendant's actions or bringing her conduct within the range of the recognized exceptions to this rule. We agree that the District Court erred in submitting the question of the defendant's negligence to the jury. We are also of the opinion that this error was nonprejudicial to the plaintiff. Generally a party cannot claim error when an issue submitted to the jury is found in his favor. Prell v. Murphy, 178 Neb. 278, 133 N. W. 2d 5. This is especially true when no issue of contributory negligence or comparative negligence exists. Prell v. Murphy, *supra*. No comparative negligence instruction was requested or given in this particular case. No contention can be made that the plaintiffs' verdicts were probably reduced by the confusion of the issue of contributory negligence. More-

over, the record in this case reveals an entire lack of suggestion that the jury was misled in any respect in connection with the issue of liability. We come to the conclusion that this error by the District Court in the failure to give a peremptory instruction on the issue of negligence was nonprejudicial.

The plaintiffs also contend that the court erred in submitting the issue of the proximate cause of Mrs. Brewer's alleged damages and injuries to the jury and that the court was in error when it instructed the jury and submitted the issue of a preexisting condition. It is contended that no such condition was established in the defendant's evidence or in her pleadings. The two contentions are interwoven and we will discuss them together. It is fundamental that when evidence conflicts on the question of the proximate cause of alleged injuries or damages the issue is ordinarily for the jury under proper instructions. We review the evidence to determine whether such an issue existed in light of the basic rule that where reasonable minds may reach a different conclusion from the evidence adduced as to whether the negligence of the defendant proximately caused the abortion and subsequent hysterectomy. Cross-examination of Mrs. Brewer's doctor revealed that she had similar problems prior to the accident, the same problems plaintiffs now allege were caused by the accident.

In December 1964, Mrs. Brewer was troubled by cramps and a late period. She experienced water discharge and was passing clots. In February 1965, she saw her doctor about abdominal pains and was given birth control pills for cramping, pain, and flowing. In October 1968, she had a vaginal infection. In June 1970, an IUD was inserted. Her doctor admitted that some doctor's feel IUD's are a source of infection. The death of her baby was caused by a premature birth and infection of the uterus. In November 1970, she complained

of heavy flowing, cramps, and the IUD was lost. In May 1971, she was given an antibiotic for infection. Evidence of a prior weight problem existed in 1967 and 1970.

It is also clear from the evidence that she did not complain of a uterus injury upon visits to the doctor most closely following the accident. The doctor testified that the only impact to her body was in the chest area and she was treated for a fractured rib on September 4, 1971. The doctor also testified that the baby's heartbeat was strong and normal in September 1971, and there was no evidence of injury to the fetus. It appears that her problems after the accident were similar to those she had in 1964 and 1965. Evidence of her total disability after the accident is not compatible with her work record in October and November of 1971. Use of birth control pills and the IUD could have been the source of some of her problems.

It is evident from the above recital of the evidence that the factual question was raised as to whether the accident was the proximate cause of the abortion and the subsequent medical treatment. What we have said also disposes of the contention that the District Court erred in instructing the jury on the issue of a preexisting condition. The contention that the issue was not raised is without merit. The defendant specifically denied that the accident caused Mrs. Brewer's injuries, thus raising the issue that such conditions were proximately caused by the accident. The assertion that the instruction is not sufficiently supported by the evidence is without merit. Of course, it is error to submit such an instruction to the jury when there is no support in the evidence for it. Swanson v. Murray, 172 Neb. 839, 112 N. W. 2d 11. However, the evidence, particularly that obtained on cross-examination of Mrs. Brewer's doctor, and recited in detail earlier in this opinion, is amply sufficient to create the fact issue that her physical and medical condition was created and caused by a preexisting condition

and not as the proximate cause flowing from the accident. There is no merit to this contention.

The plaintiffs finally urge that the amount of the jury award was grossly inadequate. This court has held that a verdict and judgment will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Parkhurst v. Barth, 189 Neb. 154, 201 N. W. 2d 708. The plaintiffs' real contention here is that the jury verdicts of $100 and $500 are obviously inadequate *on the assumption* that Mrs. Brewer's injuries, condition, and claimed disabilities arising from the abortion and the subsequent medical treatment were proximately caused by the accident. As we have pointed out, the jury resolved this issue under the evidence and proper instructions against the plaintiffs. That being true, it is quite apparent there is nothing in the jury verdict that would indicate passion, prejudice, or mistake, or that its verdicts were clearly wrong. It is apparent that the jury did not accept the plaintiffs' claim and evidence regarding the extent of Mrs. Brewer's injuries and awarded an amount less than claimed. In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts. The credibility of the witnesses and the weight to be given to their testimony are for the triers of fact. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115.

The judgments of the District Court are correct and are affirmed.

AFFIRMED.

LINDA DALLMANN, APPELLANT, V. PAT MEHRER ET AL., APPELLEES.
222 N. W. 2d 827

Filed October 31, 1974. No. 39450.

1. **Infants: Domicile: Parent and Child: Custody.** The jurisdic-

tion of a state to determine the status and custody of a child extends to every child within its borders.

2. **Infants: Divorce: Comity: Custody.** A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children.

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

Zane M. Pic, for appellant.

Van Steenberg, Brower & Chaloupka, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding involving the custody of two minor children. The trial court found the custody of the children should be awarded to the defendant, Marlyn Dallmann. The plaintiff, Linda Dallmann, has appealed.

The plaintiff and the defendant were divorced in 1970 in San Mateo County, California. In that proceeding the custody of their children, Cameron, now 11 years of age, and Debra, now 10 years of age, was awarded to the plaintiff. In 1973 the defendant commenced a proceeding in the California court to obtain custody of the children. On the day before a hearing was to be held in that proceeding, the plaintiff appeared at the defendant's home in California and took the children from the home where they were visiting and returned them to Nebraska.

This action was commenced to enjoin the defendant and the plaintiff's parents, Pat Mehrer and Doug Martindale, from interfering with the plaintiff's custody of the children. The defendants filed an answer and cross-petition in which they asked that the custody of the children be transferred to the defendant father. The case was tried upon the cross-petition and resulted in a judgment transferring the custody to the defendant.

There can be no question concerning the jurisdiction of the trial court to determine the custody of the children. The plaintiff and the children were residents of Nebraska when this action was commenced. All the other parties were before the court. The jurisdiction of a state to determine the status and custody of a child extends to every child within its borders. In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161. A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846.

The significant evidence in this case relates to the conduct of the plaintiff after she returned to Nebraska following the divorce in California. The record shows without dispute the plaintiff has been sexually promiscuous and that conduct has taken place in the home on occasions when the children were there. Recently, the plaintiff has been dating a Wyoming man who is identified as a professional gambler. He has stayed at her home on a number of occasions.

The defendant has remarried and maintains a very suitable home in Pacifica, California. He and his wife are active in church affairs and he is able to provide a very satisfactory environment for the children. The record fully supports the finding of the trial court that the best interests of the children require the custody be transferred to the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL HEDGLIN, APPELLANT.
222 N. W. 2d 829

Filed October 31, 1974. No. 39465.

Sentences: Criminal Law: Statutes. Under section 83-1,105(2),

R. S. Supp., 1972, where the trial court imposes a sentence for a definite term of years on a defendant, the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.

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

Richard E. Gee, for appellant.

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

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

SPENCER, J.

This is a criminal case wherein defendant pled guilty to a charge of burglary. He was given an indeterminate sentence of 5 to 7 years. He filed a motion to the effect that the 5 year minimum exceeded the statutory minimum established by section 83-1,105, R. S. Supp., 1972. The trial court sustained defendant's motion, and imposed a new sentence of 6 years. Defendant perfected this appeal, setting out four assignments of error which may be summarized by his contention that the second sentence is more severe than the first one and therefore violates his constitutional rights. We affirm.

The sentence originally pronounced herein was in excess of the minimum authorized by statute. Section 28-532, R. R. S. 1943, provides a sentence of not more than 10 years nor less than 1 year for burglary, the crime to which defendant pled guilty. The sentence imposed was for 5 to 7 years. However, section 83-1,105, R. S. Supp., 1972, provides in part: "Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may:

"(1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more

than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law; * * *."

The minimum portion of the sentence was void as being in excess of the statutory authority. Defendant was resentenced to 6 years in the Nebraska Penal and Correctional Complex. His contention is that because 6 years is more than the 5 years specified as the minimum in the previous sentence, he has been given a more severe sentence.

We believe defendant misunderstands the legal effect of his sentence. In arguing that the flat sentence of 6 years involved an increase in his sentence, defendant completely overlooks subsection (2) of section 83-1,105, R. S. Supp., 1972, which provides: "(2) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law; * * *."

Under this section all sentences except life imprisonment are indeterminate sentences. The new sentence imposed in this case is exactly the same in legal effect as though it had read: "For a period of not more than 6 years nor less than 1 year." Consequently, the resentencing reduced his maximum sentence from 7 to 6 years, and his minimum sentence from 5 years to 1 year.

The judgment is affirmed.

AFFIRMED.

NEWTON, J., concurring.

I concur in the opinion of Spencer, J. The question of the constitutionality of section 83-1,105, R. S. Supp., 1972, as adopted at the Eighty-second Session of the Nebraska Legislature, has not been raised in this case.

Since this statute reduces every felony penalty fixed by other statutes, makes it impossible for a court to fix a flat, as distinguished from an indeterminate sentence, and also effectively prevents the imposition of maxi-

mum sentences as prescribed by other statutes, it would appear to be amendatory of every statute fixing a penalty for the commission of a felony and violative of Article III, section 14, Constitution of Nebraska.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD JONES, SR., ALSO KNOWN AS GLASSES, APPELLANT.
222 N. W. 2d 831

Filed October 31, 1974. No. 39482.

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

Clayton H. Shrout of Shrout, Caporale, Krieger, Christian & Nestle, for appellant.

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

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

CLINTON, J.

Defendant Jones was charged with the crime of intentionally being in possession, on March 28, 1973, of a controlled substance, heroin, with intent to distribute, deliver, or dispense. Previous to trial a motion to suppress certain physical evidence, namely, the heroin and various paraphernalia used in connection with the preparation of the same for sale, was made and a hearing held thereon. The motion was denied. Defendant entered a plea of not guilty and, in the presence of his own counsel, waived trial by jury and consented to a trial by the District Judge upon the basis of police reports which were offered and received in evidence pursuant to an oral stipulation by the State, the defendant, and his counsel. The defendant submitted his own case without evidence.

The stipulation for trial on the evidence contained in the police reports is lacking in desirable specificity. However, it is clear from the interrogation of the defendant by the court that he, with the advice and consent of his experienced defense counsel, intended not only to waive a jury trial, but also intended to and did waive confrontation and cross-examination of witnesses, his own presence and the presence of his counsel during the consideration of the evidence by the court, the taking of oaths by witnesses, and all objections which might be made in the course of trial such as objections to evidence on the grounds of hearsay, lack of foundation, qualification of witnesses, and the actual offer and receipt of physical evidence. We so interpret the record. We further find that the defendant, who was personally addressed by the court during the course of the proceedings on the stipulation, voluntarily, knowingly, and intelligently waived all the foregoing constitutional and statutory rights.

After consideration of the evidence the trial judge announced a finding of guilty and pronounced a judgment of conviction. After continuance for a presentence investigation the defendant was sentenced to a term of 15 years, to be served concurrently with a federal sentence. The defendant appeals.

Three assignments of error are made here: (1) The trial court erred in denying the motion to suppress. (2) The evidence is insufficient to sustain the verdict. (3) The sentence imposed is excessive and illegal because section 28-4,125, R. S. Supp., 1972, was amended before the judgment became final and such amendment provided for a lesser maximum sentence than that imposed by the court.

The charge and conviction in this case arise from the same transaction and the same search and seizure with which we dealt in State v. Patterson, *ante* p. 308, 220 N. W. 2d 235. The suppression hearing in that case and the one in this case were jointly held and counsel for the

defendant participated fully therein. The record of the suppression hearing is identical in both cases. It is clear that the defendant and his skilled counsel were familiar with and recognized the overwhelming nature of the proof of guilt. For these reasons defendant and his counsel reasonably determined to put all their eggs in the suppression basket. Patterson was tried and convicted before the defendant Jones was brought to trial. When our opinion in State v. Patterson, *supra,* was filed the basket fell and the eggs were broken. Our opinion in State v. Patterson, *supra,* insofar as assignment No. (1) is concerned, governs this case.

With reference to the sufficiency of the evidence to sustain the conviction, we have examined the police reports which were offered and received in evidence. These reports establish, with less detail, essentially the same picture which supported the conviction in State v. Patterson, *supra.* The defendant here was one of the persons arrested in the raid described in that case. The defendant's implication in the plan to distribute the heroin seized at that time was established by the eyewitness testimony of an accomplice whose signed interrogation appears in the reports. The presence of heroin, the quantities seized, and the evidence of packaging for distribution are uncontradicted. The evidence is just as convincing as that in State v. Patterson, *supra,* and is clearly sufficient to support the conviction.

The State concedes that assignment No. (3) is well taken on the basis of our holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225; and State v. Patterson, *supra.*

The judgment of conviction is affirmed. The sentence is vacated and the cause remanded for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MORRIS D. COMBS, APPELLANT.
222 N. W. 2d 533

Filed October 31, 1974. No. 39484.

1. **Criminal Law: Trial: Evidence: Verdicts.** After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt.
2. ———: ———: ———: ———. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt.
3. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, C. J.

The defendant appeals from a burglary conviction, asserting the insufficiency of the evidence to support the verdict of the jury; that there was error in the admission of certain statements of the defendant in evidence; and that the indeterminate sentence of not less than 3 and ⅓ years nor more than 5 years in the Nebraska Penal and Correctional Complex was excessive. We affirm the judgment and sentence of the District Court.

We examine the assignment of error that the evidence was insufficient to support the verdict of guilty. In

the early morning hours of November 13, 1973, somebody broke and entered into the Ress Insurance Agency, located in the lower level of the building known as the Century House, 600 South Twelfth Street, in Lincoln, Nebraska. It is not disputed that a burglary occurred. The owner testified that approximately $7 to $10 was taken from the office; certain files in the office had been damaged; drawers rifled; and the front door had been smashed in. A safe had been removed from the office, taken to the first floor on the elevator, and then removed to the south parking lot. Further evidence showing the nature and extent of the burglary need not be recited in this opinion.

The evidence shows that the owner had employed the defendant's wife for a little over 3 years in general office work and that the defendant had been in the office many times. There is direct evidence of identification of the defendant at the scene of the burglary, an unusual circumstance in a burglary case. Michael Buttz lived in the Century House. He left about 2 o'clock in the morning of the break-in to get cigarettes. He went to a vending machine in the basement, stopped off enroute to check the mail on the first floor, and found a pack of Kool cigarettes jammed in the latch of the security door. He noticed the other elevator was downstairs. He proceeded downstairs and upon arriving there saw that the other elevator was "locked to be off". While getting his cigarettes from the vending machine in the storage room he saw a safe coming out of the Ress office. The safe had a blanket over it. Later he saw a man pushing the safe and loading it onto the elevator. In the trial Buttz identified the defendant as the same man he had seen in the basement and outside in the south parking lot standing near a Buick Electra. And, while the defendant was still sitting in his car which had been stopped by the police on Twelfth Street a short time after the burglary,

this witness then identified him as the same man he had seen earlier that night. There is other evidence supporting this identification that need not be recited here. One of the cars in the parking lot observed by Buttz was a Buick Electra 225. The defendant's car was a Buick Electra 225 with a noisy muffler. The man pushing the safe out of the Ress Insurance Agency was wearing a black leather jacket. A black leather jacket was found in the defendant's apartment when it was searched with the consent of the defendant's wife. It is apparent that there was both direct and circumstantial evidence linking the defendant almost conclusively as the person who had been in the building, removed the safe, and had performed the other acts described. The intent to steal is readily inferable from the fact that an attempt had been made to enter the locked file drawer containing petty cash. Drawers had been rifled, and the safe was actually moved from the basement to the first floor and rolled out onto the parking lot south of the building after an attempt had been made to open it. The defendant's car had a loud muffler on it as did the one that was heard near the scene of the crime shortly after it had occurred.

It is self-evident from this recital of only a portion of the evidence that it is amply sufficient to sustain the verdict. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Harig, *ante* p. 49, 218 N. W. 2d 884. The thrust of the defendant's argument is to point out some inconsistencies and discrepancies in the testimony of the State's witnesses and asks the court, in effect, to determine that the credibility of the State's witnesses was so destroyed that it was insufficient to support the guilty verdict. The credibility of the witnesses and the weight of the evidence in a

criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480.

The next contention of the defendant is that certain statements that he made were not voluntary and were therefore inadmissible in evidence. The testimony to which the defendant objects in his argument was given on the defendant's own initiative. It was not given in response to interrogation nor after the giving of the Miranda warnings. We observe that Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, cited by the defendant in his argument, explicitly held that volunteered statements of any kind are admissible without prior explanation of the defendant's rights. The statements to which he objects were the result of a conversation following a request to talk to Detective Thomas and to Detective Barker of the Lincoln police department. The evidence shows that when he started talking about the burglary, they stopped him, telling him they did not want to talk about the burglary any more. They did not give him the Miranda warnings on this second contact with him after they had previously given them to him, because "we were not interrogating him anymore regarding the burglary; that he was there at his own request to see us." The trial court ruled that the statements complained of were voluntarily made by the defendant himself, and the evidence supporting this finding is conclusive in the record. There is no merit to this contention.

Lastly, the defendant contends as excessive his 3 ⅓ to 5 year indeterminate sentence. The statute, section 28-532, R. R. S. 1943, provides for a possible sentence of 1 to 10 years in the Nebraska Penal and Correctional Complex. The District Court had before it a presentence investigation report, a part of which contained a record of prior criminal conduct on the part of the defend-

ant. At the hearing on sentencing the defendant only presented as mitigating circumstances the fact that he might have a medical problem; that he had a family; and that he probably has some time to do for parole violation. The record is devoid of any evidence or inference that there was any abuse of discretion by the sentencing judge. A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harig, *supra*.

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

AFFIRMED.

IN RE INTEREST OF BELDING.
STATE OF NEBRASKA, APPELLEE, V. COLIN L. BELDING, A MINOR, BY AND THROUGH GWENDOLYN L. BELDING, HIS MOTHER, APPELLEE, C. E. DANLEY, APPELLANT.
222 N. W. 2d 835

Filed October 31, 1974. No. 39485.

Criminal Law: Attorneys at Law: Fees. Court-appointed counsel for an indigent is entitled to all expenses reasonably necessary to permit him to effectively and competently represent his client, and reasonable fees for services performed pursuant to his appointment.

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

C. E. Danley, pro se.

Steven R. Brott, for appellee State of Nebraska.

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

SPENCER, J.

This is an appeal by C. E. Danley, court-appointed attorney for Colin L. Belding, a minor. The trial court

allowed applicant $1,400 for services rendered, and $19.20 for expenses. Applicant, who requested $3,956.25, perfected this appeal on the insufficiency of the award. We affirm as modified.

Applicant's request for fees reflects 158.25 hours at the rate of $25 per hour, for a total of $3,956.25. The attorney who represented Gage County testified that he spent approximately 45 to 55 hours on behalf of Gage County, and that a reasonable charge for his services would have been approximately $800. He further testified that he had no reason to believe the time and work stated by the applicant were false. The trial court allowed applicant $1,400, premised we assume on substantially discounting the time allegedly spent by applicant in this matter.

It will serve no useful purpose to describe in detail the work done by the applicant, or to analyze in detail the time spent by him in doing so. Court-appointed counsel for an indigent is entitled to all expenses reasonably necessary to permit him to effectively and competently represent his client, and reasonable fees for services performed pursuant to his appointment.

Applicant is entitled therefore to reasonable expenses and fees for services rendered. We are convinced that the $1,400 allowance is inadequate. Considering the services rendered, and the result obtained, we find that the sum of $3,000 would be more adequate and is not unreasonable herein.

We modify the judgment of the District Court by raising the allowance of attorney's fee from $1,400 to $3,000, and tax all costs to Gage County. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. PAUL E. RHODES, APPELLANT.
222 N. W. 2d 837

Filed October 31, 1974. No. 39490.

1. **Contempt.** A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence.
2. **Contempt: Constitutional Law.** The constitutional right of confrontation does not apply to criminal contempt proceedings.
3. ———: ———. A proceeding to punish for contempt of court does not require the presence of the defendant in order to satisfy the requirement of due process, if there have been suitable notice and adequate opportunity to appear and be heard.

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

Paul E. Rhodes, pro se.

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

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

NEWTON, J.

Defendant was convicted of contempt of court on November 21, 1960, and sentenced to serve 9 months at hard labor in the Nebraska State Penitentiary and to pay a fine of $2,500. On November 18, 1968, he filed a motion to vacate and expunge the judgment from the record. The motion was finally heard and overruled January 30, 1974, and defendant appeals.

This court will take judicial notice of the fact that defendant's conviction of contempt was appealed to this court and dismissed for failure of defendant to file a brief. The order of dismissal was entered on *September 26, 1961.*

As grounds for his motion he states that the sentence was void as he was not present when it was pronounced; it included "hard labor"; he was required to be a witness against himself; and he was denied the right of confrontation. It may be noted that defendant was aware of all these matters at the time of his direct appeal but failed to urge them.

It is noted that the record fails to disclose the filing of a motion for new trial and no action appears to have been taken to vacate the judgment until 8 years had elapsed. If the motion is to be considered as a motion for a new trial, it was filed out of time. See §§ 25-1143 and 25-1145, R. R. S. 1943. Section 25-2008, R. R. S. 1943, prescribes the time within which an application to vacate a judgment must be commenced. It was not complied with.

Should we view defendant's motion as an application for a writ of error coram nobis, it would not avail him. In Newcomb v. State, 129 Neb. 69, 261 N. W. 348, this court ruled that the proceeding must be commenced within the time allotted by section 25-2008, R. R. S. 1943.

"Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied. * * *

"The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented." Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561.

"The writ of error coram nobis is not a substitute for a writ of error brought to correct errors of law apparent on the record." Parker v. State, 178 Neb. 1, 131 N. W. 2d 678.

A writ of error coram nobis lies only to correct errors of fact in ignorance or disregard of which the

judgment was pronounced. See Hawk v. State, *supra*. Defendant does not here present an issue of fact but restricts his motion solely to questions of law.

Notwithstanding defendant's procedural deficiencies we will consider the merits of his motion. It was held in Rhodes v. Houston, 258 F. Supp. 546 (1966), a case based on the same facts now before us, that: "An action to obtain punishment for contempt of court is not itself a criminal proceeding, even though it may result in a sentence to the payment of a fine or to imprisonment or both."

In State ex rel. Beck v. Lush, 168 Neb. 367, 95 N. W. 2d 695, this court held that a proceeding for contempt was not a criminal action and not subject to constitutional provisions governing such actions. The court said: "A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence." In this connection see, also, §§ 25-2121, 25-2122, and 25-2123, R. R. S. 1943.

We have heretofore determined that the constitutional right of confrontation does not apply to criminal contempt proceedings. See, State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282; State ex rel. Beck v. Lush, *supra*.

In the present instance the defendant purposely absented himself, and instructed his attorney not to appear, during the final moments of the hearing in the District Court and the entry of judgment by the court. He had notice of the hearing and an opportunity to be heard. The court had jurisdiction and the presence of defendant, or his counsel, was not required to satisfy due process. See 17 Am. Jur. 2d, Contempt, § 93, p. 85. If it were required, defendant himself an attorney at law must be deemed to have waived the right.

In regard to the assertion that he was required to be a witness against himself, it is well answered by the following excerpt from a related case, Rhodes v. Houston, 418 F. 2d 1309 (1969): "And so far as he would assert violation of a fifth amendment privilege against self-incrimination at his state trial, the answer is (a) that the testimony evoked from him, as the record reads, is hardly to be deemed as incriminatory and (b) Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), was decided after Rhodes' Nebraska state trial in 1960, and we do not apply Malloy v. Hogan retroactively. See Tehan v. United States ex rel. Shott, 382 U. S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966)."

Defendant also insists that his sentence to "hard labor" was void. At this late date the question is moot. Defendant has served his sentence. The record in Rhodes v. Meyer, 334 F. 2d 709 (1964), disclosed that no part of the time served was at "hard labor." Regardless of that, his sentence to 9 months imprisonment was not void. At best, only that portion of his sentence specifying "hard labor" was open to question and if found to be incorrect could have been set aside on completion of a direct appeal.

It may be well to note that the identical propositions here presented have been previously litigated and determined adversely to defendant. See, Rhodes v. Houston, 202 F. Supp. 624, affirmed 309 F. 2d 959, cert. den. 372 U. S. 909, 83 S. Ct. 724, 9 L. Ed. 2d 719, cert. den. 383 U. S. 971, 86 S. Ct. 1282, 16 L. Ed. 2d 311, motion denied 258 F. Supp. 546, affirmed 418 F. 2d 1309, cert. den. 397 U. S. 1049, 90 S. Ct. 1382, 25 L. Ed. 2d 662; Rhodes v. Meyer, 225 F. Supp. 80, 334 F. 2d 709, cert. den. 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186.

The judgment of the District Court is affirmed.

AFFIRMED.

ZEV ZOIMEN, APPELLANT, V. MENDEL LANDSMAN, APPELLEE.
223 N. W. 2d 49

Filed November 7, 1974. No. 39397.

1. **Motor Vehicles: Negligence.** A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation.
2. **Motor Vehicles: Negligence: Words and Phrases.** The definition of gross negligence as defined by the guest statute is great and excessive and it indicates the lack of slight care in the performance of duty.
3. **Trial: Negligence.** If the evidence as to gross negligence is conflicting and reasonable minds could draw different conclusions, it is for the jury. But, when the evidence is resolved most favorably to the existence of gross negligence, and thus the facts are determined, the inquiry of whether or not they support a finding of gross negligence is one of law for the court.
4. **Motor Vehicles: Negligence.** The presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration in the determination of gross negligence.
5. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality.
6. **Statutes: Constitutional Law: Waiver.** It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived.

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

Alfred A. Fiedler of Fiedler & Fiedler, for appellant.

John R. Douglas and Michael Kinney of Cassem, Tierney, Adams & Henatsch, for appellee.

John C. Gourlay, James A. Lane, John P. Miller, Milton C. Murphy, Richard Van Steenberg, and J. Patrick Green, for amicus curiae.

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

WHITE, C. J.

This is a personal injury automobile accident case brought by the passenger, plaintiff Zoimen, against the driver, defendant Landsman, as the result of a single car accident in which the driver collided with a telephone pole on a public street in the City of Omaha, Nebraska. The court directed a verdict of dismissal at the end of plaintiff's case, and the plaintiff appeals. We affirm the judgment of the District Court.

The issues presented by this case are: (1) Did the District Court err in not permitting the question as to whether the plaintiff was or was not a guest to go to the jury; (2) in holding as a matter of law that the defendant driver of the automobile was not guilty of gross negligence; and (3) whether the plaintiff properly presented the question of the constitutionality of the Nebraska guest statute, section 39-740, R. R. S. 1943, now section 39-6,191, Reissue of 1974.

The pertinent facts are: The plaintiff and the defendant had known each other for some years because of a prior working relationship. In early 1971, plaintiff got a job in Omaha working as a ritual slaughterer. He rented a room near defendant's home, and during that period he rode to work with a third person. Plaintiff would return to Chicago on the weekends and would take a cab to and from the airport during that period. In August of 1971, he again returned to Omaha and rented the same room as before. He had been riding to work with the defendant each day for 3 weeks prior to the accident. The plaintiff continued his practice of flying to Chicago on the weekends. However, upon his return rather than using a cab to get to his Omaha room, defendant would pick him up at the airport. On three different occasions the plaintiff had given the defendant $2 for picking him up at the airport to defray

his expenses for running his car. The accident happened, however, while the plaintiff and the defendant were returning home from work during the week. The accident causing the plaintiff's injuries occurrred when the defendant suddenly passed out while driving his car and it struck a telephone pole. Prior to the accident, both parties had been carrying on a normal conversation. The expert witness of the plaintiff testified that the defendant's passing out or "sleepiness" *could* be attributed to a hay fever drug. The defendant's doctor had never warned the defendant not to drive while he was taking the drug. After the accident, the defendant was hospitalized for 5 days. During that period the defendant was given numerous tests to determine why he lost consciousness. The evidence shows there was no definite determination that the drug caused the loss of consciousness, and the final diagnosis stated: "* * * possible seizure disorder, cause unknown, possibly related to trauma."

The plaintiff asserts that the question of whether the plaintiff was a mere passenger and not a guest in the defendant's car should have been submitted to the jury. The evidence shows that on three occassions the plaintiff gave the defendant $2 in connection with picking him up at the airport after his weekend trips to Chicago. During the week the defendant had been taking the plaintiff to work regularly and it was on one of these occasions that the accident happened. There is no evidence at all that there were any arrangements or any payments made for these daily trips. The test as to whether a passenger is a guest within the purview of the statute is: "A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a *tangible and substantial* one to the owner and a *motivating influence* for his furnishing the transportation. A remote, vague, incidental, or speculative benefit is not sufficient to have that effect. *This is the basis of the rule that the sharing*

of the cost of operating the car or other expenses of the trip, when the acceptance of the occupant for conveyance is not motivated by or conditioned on such contribution, is incidental, an exchange of social amenities, and does not transform the occupant into a passenger for compensation." (Emphasis supplied.) Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593. Not only is there no evidence of any payments for this particular trip or the trips taking the plaintiff back and forth from work, but the plaintiff himself testified affirmatively as follows:

"Q. Now, you worked here about three weeks in August before this accident, right?

"A. Yes.

"Q. And it was your practice to walk over to Rabbi Landsman's house every morning and wait for him and ride to work with him?

"A. Yes, sir.

"Q. And you used to wait out by the driveway?

"A. Yes, sir.

"Q. And as I understand it Rabbi Landsman never came over to your house and picked you up?

"A. He picked me up a couple of times.

"Q. Most of the time you would walk over to him?

"A. Yes, sir.

"Q. You never had any talks with Rabbi Landsman about him giving you a ride to work, I think you said it was just that you lived so close together it worked out that way?

"A. *Yes, we didn't make any arrangements.*

"Q. You made no arrangements?

"A. No.

"Q. It was just that you were living close to each other and you were both working at the same place?

"A. Yes, sir.

"Q. And that's why you went over there?

"A. Yes, sir.

"Q. Rabbi Landsman never asked you for any money in the morning?
"A. No, sir.
"Q. And you never gave him any in the mornings?
"A. No, sir." (Emphasis supplied.)

Even giving maximum import to the three $2 payments for the airport travel, the only possible conclusion that can be made is that the money given to defendant was incidental in character and was not the defendant's motivating influence in providing transportation for the plaintiff under the above rule. Under the plaintiff's own testimony, no money was given the defendant at all for the regular daily trips and the only possible construction to be placed upon the three airport "payments" was that it was a pure gratuity, resulting from hospitality and friendship between the parties and that therefore the payment was incidental in character and was not the defendant's motivating influence in providing transportation for the plaintiff. The trial court's determination on this issue was correct.

The plaintiff next contends that even if the plaintiff were a guest for the purposes of the statute, the evidence was sufficient to submit the issue of gross negligence to the jury because the defendant was grossly negligent in "passing out" or in falling asleep while operating his motor vehicle. The definition of gross negligence, under our statute, is defined as "* * * great and excessive negligence * * *. It indicates the absence of slight care in the performance of duty." Hess v. Holdsworth, 176 Neb. 774, 127 N. W. 2d 487. The principles governing our appellate judicial review of this question in a guest case are well settled. If the evidence is conflicting and reasonable minds could draw a different conclusion, it is for the jury. But, when the evidence is resolved most favorably to the existence of gross negligence, and thus the facts are determined, the inquiry of whether or not they support a finding of gross negligence is one of law for the court. Thorpe v. Zwonechek,

177 Neb. 504, 129 N. W. 2d 483; Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571; Morris v. Erskine, 124 Neb. 754, 248 N. W. 96; Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716; Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297. It is conclusive under the evidence, much of which we have recited herein, that the sole proximate cause of the accident was the seizure, falling asleep, or the passing out of the defendant as he drove along the street. There is no evidence of excessive speed, intoxication, failure to keep a proper lookout, or the violation of any state statute or city ordinance. Broadly stated the sole question for our determination is whether losing consciousness, or falling asleep momentarily, is per se evidence sufficient to submit to the jury the issue of gross negligence. The hospital diagnosis of the defendant's loss of consciousness was cause unknown. The plaintiff's own expert witness testified that he *could not say with medical certainty* that the defendant fell asleep as a result of the hay fever drug or whether he had some sort of a seizure disorder. The defendant's doctor had never warned or told the defendant not to drive an automobile or warned him that there was any danger from taking the hay fever drug.

This court has laid down the general principles governing the examination of factual situations to determine whether there is sufficient evidence of gross negligence. The presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration in the determination of this question. Thorpe v. Zwonechek, *supra;* Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184; Born v. Estate of Matzner, *supra.*

The plaintiff cites no authorities or cases that sustain the proposition that falling asleep or a momentary loss of consciousness, per se, is evidence of gross negligence. The defendant's evidence is that he became suddenly ill

and did not "fall asleep". What we do know is that the defendant's loss of consciousness was sudden and momentary. There is no medical or lay testimony to the effect that the defendant went through the normal process of "falling asleep" immediately prior to the accident. This court has stated that the single act of falling asleep is evidence of negligence sufficient to be submitted to the jury. Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63. On the other hand, we have not stated that falling asleep without more is evidence of gross negligence. In our previous decisions, a number of which are cited in this opinion, we have pointed out that it is difficult to colormatch the facts and circumstances of each particular case. The plaintiff has the burden of proof and it is clear there is no evidence before this court except that the defendant suffered a momentary loss of consciousness, the cause of which is unknown. It was not coupled with any other acts of negligence or violations of statutes or ordinances. We agree with the trial court that under these circumstances, with a momentary loss of consciousness and no more, there is no showing of gross or excessive negligence or a lack of even slight care under the circumstances. There is an utter lack of evidence that the defendant had knowledge of or was warned of any imminent danger or that there were any acts or conduct on his part which indicated a persistence in the continuation of any previous negligent acts sufficient to sustain a finding of gross negligence. In LaVigne v. LaVigne, 176 Ore. 634, 158 P. 2d 557, the plaintiff sustained injuries when the automobile in which he was riding as a guest collided with a trackless trolley bus coming from the opposite direction. The evidence showed that the driver lost control of his car and failed to keep a proper lookout because of having fainted at the wheel. In reversing a judgment on a verdict for the plaintiff, the Supreme Court of Oregon said as follows: "We think the only reasonable deduction that can be made from the evidence is that the collision was caused

by the fainting of the defendant driver. If such conclusion is sound, it is clear that a charge of gross negligence cannot be based thereon."

We have examined the plaintiff's authorities carefully. He cites several cases to the effect that the evidence of falling asleep at the wheel is evidence of negligence. We have no quarrel with these authorities. Primarily the plaintiff relies upon the case of Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201. This case is clearly distinguishable and by inference supports the conclusion that we have reached herein. In that case the court summarized the facts as follows: "We think the evidence of Tripple's drinking throughout the day, the testimony of the patrolman that Tripple was intoxicated at the time of the accident, his admission that he fell asleep at the wheel, and his failure to comply with warning and stop signs is sufficient to warrant the submission of Tripple's gross negligence to the jury." In that case, therefore, there was evidence of the defendant's admission he was intoxicated at the time of the accident and during this period of time he fell asleep at the wheel; and there were other acts of negligence coupled with this situation consisting of violation of warning and stop signs, all of which together warranted the submission of the case to the jury. We therefore hold that under the facts and circumstances of this case the momentary loss of consciousness by the defendant, with nothing more appearing, was insufficient to support a finding of gross negligence and that the District Court was correct in so holding.

Lastly, the plaintiff seeks to contend that the Nebraska guest statute, section 39-740, R. R. S. 1943, is unconstitutional and therefore he was entitled to go to the jury on the issue of simple negligence. The record shows that the plaintiff failed to challenge the constitutionality of the law until after the District Court had sustained the defendant's motion to dismiss the plaintiff's petition. Moreover, the record shows that the entire case was

tried upon the theory that the Nebraska guest statute applied. The defendant in his answer alleged that the plaintiff's suit was barred by the guest statute, and the plaintiff filed a reply in which he did not raise any issue of constitutionality but affirmatively alleged that he relied upon the provision of section 39-740, R. R. S. 1943, that the statute did not apply if the guest was driven for hire. The evidence also shows that one of the central, if not the major, fact issues tried in the case by the parties was the question of whether the plaintiff was a guest or a passenger for hire. There are two answers to the plaintiff's contention in this situation. First, having tried this case by reliance on an exception contained in the guest statute, he cannot, after having failed to qualify for the exception in the statute, attack the constitutionality of the entire statute. "A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality." Read v. City of Scottsbluff, 179 Neb. 410, 138 N. W. 2d 471. See, also, Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174.

Secondly, a more decisive answer is found in our recent holding in Hale v. Taylor, *ante* p. 298, 220 N. W. 2d 378, an opinion filed by this court on July 18, 1974, 4 days before the final briefs of the parties in this case were filed. There, we stated as follows: "Plaintiff attempted to raise the *constitutionality of the guest statute* by an amendment to her motion for new trial. No allegation of unconstitutionality appears in the amended petition. *Defendant definitely relied on the guest statute in his answer.* Plaintiff's reply simply denies that plaintiff was a guest passenger and *does not allege unconstitutionality of the statute.* No issue of unconstitutionality was before the District Court when the motion for summary judgment was presented and determined. Section 25-1142, R. R. S. 1943, provides for motions for new trial and its first sentence reads: 'A new

trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or decision by the court.' Plaintiff's motion for new trial asked the District Court to determine a new issue rather than to reexamine an issue previously decided. *A new issue is not a ground for the granting of a motion for new trial.* § 25-1142, R. R. S. 1943. In Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626, the court said: 'It is a general rule that the constitutionality of a legislative act *must be raised at the earliest opportunity consistent with good pleading and orderly procedure,* or it will be considered as waived.' In Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119, the court quoted with approval from Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834, as follows: 'No procedural principal is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' In Consumers Public Power Dist. v. City of Sidney, 144 Neb. 6, 12 N. W. 2d 104, the court said: 'The question of constitutionality not being an issue under the pleadings filed, this court may not properly pass upon it.' * * * The question of the unconstitutionality of the guest statute is not properly before us on the record in this case. In addition there has been no compliance with Rule 18 of the 1971 Revised Rules of this court requiring that a party presenting a case involving the constitutionality of a statute must file a written notice thereof with the Clerk of this court at the time of filing his brief and serve a copy of the brief on the Attorney General within 5 days of the filing of the brief with this court." (Emphasis supplied.)

As in the above case there was no compliance with Rule 18 of the rules of this court requiring that a party presenting a case involving the constitutionality of a statute must file a written notice thereof with the Clerk

of this court and serve a copy of the brief on the Attorney General. We therefore come to the conclusion that the issue of constitutionality of section 39-740, R. R. S. 1943, the guest statute, is not properly before us on the record in this case.

We therefore hold that the District Court was correct in determining that the plaintiff was a guest passenger as a matter of law and in sustaining a motion for a directed verdict and dismissing the case because of the insufficiency of the evidence to sustain a finding of gross negligence.

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

AFFIRMED.

ROBERT G. ADAIR, APPELLANT, V. RALPH L. ADAIR ET AL., APPELLEES.

222 N. W. 2d 908

Filed November 7, 1974. No. 39431.

1. **Signatures: Contracts: Security Agreements.** When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
2. **Contracts: Consideration.** A consideration for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other but the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Francis D. Lee, for appellant.

Edward E. Hannon and Edward J. Welch, for appellees.

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

NEWTON, J.

This is an action to foreclose a real estate mortgage.

The trial court found that there was no consideration for the mortgage and the note of $3,000 it purports to secure. The sole issue presented is the sufficiency of the evidence to sustain the judgment of the District Court for the defendants. We reverse the judgment.

The mortgage was dated and acknowledged on December 30, 1958. The promissory note was dated October 1, 1958, and the mortgage recorded on April 20, 1972. On September 8, 1958, the mother of plaintiff and the defendant Ralph L. Adair deeded a 320-acre farm to Ralph and Elsie Adair. A Federal Land Bank Association mortgage was obtained in the sum of $6,200. Of this amount the mother gave $3,515.44 to plaintiff and applied the balance on indebtedness to the Federal Land Bank. Plaintiff and defendant Ralph were the only boys in the family but had several sisters who were not involved in this transaction. Defendants Ralph and his wife Elsie plead that there was no consideration for the note and mortgage of $3,000. Plaintiff admits that he personally gave them nothing in return but insists that his mother required Ralph to pay enough more than the $3,515.44 to make $7,000. Ralph did pay an additional $900 directly to plaintiff prior to the execution of the note and mortgage in question, making $4,415.44 received by plaintiff. This sum, together with the $3,000 note, exceeds the $7,000 he insists he was to receive.

The evidence is contradictory and plaintiff contradicts his own testimony. He states that his mother and brother asked him if it was all right for Ralph to buy the farm and that he consented. When asked: "Did his mother make him promise to give you this money?", plaintiff said, "I don't think so. No." He was also asked: "What I want to know, what did you give to him to get this mortgage?" He replied: "I did not give him a damn thing." Other excerpts from the plaintiff's testimony are as follows: "Now, then, what was the occasion or why did they give you this promis-

sory note? Why did they sign it?" Answer: "Well, I don't know. The kid bought the place. * * * And what about this? * * * So they asked me if I would take a mortgage so what he could not pay out what I had coming. * * * What you had coming — where did you have something coming from? * * * Mother sold the place to him and give him so much and me so much and she kept so much. * * * And what did you say to Ralph Adair with regard to the note and mortgages, or how did you elicit them from him? * * * Well, I said it didn't make any difference to me. I said, yes, I will pack him. * * * What do you mean pack him? * * * Well, I would finance him. I did not need the money, see. * * * Your mother did not require him to pay you $7,000, did she? * * * No, but it was all in the deal. * * * Whose deal? * * * His and mother's."

The deed recites a consideration of $12,000 although it is conceded that the appraised value of the land was $75 per acre, or $24,000. When asked why he was supposed to get $7,000, plaintiff stated: "Well, she wanted to give her two boys something, I suppose. * * * I think they came over and asked me if it would be all right if he bought the place and if they gave me $7,000 and she get so much and then he could have the rest of it. * * * And how did you arrive at the $7,000 you were to receive? * * * Don't ask me. That is just what they came up with. They told me I would get $7,000, * * *."

In 1972 Ralph signed a renewal note and mortgage but his wife refused to sign them. Ralph died prior to trial and the mother, although competent and available, did not testify. Ralph's wife Elsie stated the mother told plaintiff that she had turned the place over to Ralph and that she was going to give plaintiff the money; and that plaintiff received the Federal Land Bank check for $3,515.44 and did not ask for more.

Execution of the note and mortgage was established

by the evidence of the notary who drew them. Under section 3-307 (2), U. C. C., when signatures on commercial paper are established, the burden of establishing a defense is on the defendant makers. As an action in equity, the case must be considered de novo on appeal with due regard for the fact that the trial court heard and saw the witnesses. Although the evidence of the plaintiff regarding consideration is of a wandering nature, the defendant Elsie Adair indirectly verifies the fact that plaintiff was consulted about the sale, was informed that he would receive some money from it, and consented to it. The evidence, taken as a whole, indicates that Ralph was to give the note and mortgage to plaintiff as part of the consideration for the sale of the farm to him by his mother. The fact that defendants Ralph and Elsie Adair executed and delivered these instruments is a strong indication, in the absence of any other explanation, that it was required by Ralph's mother to equalize treatment of her two sons. The farm was sold for half of its appraised value and according to the evidence the only money actually paid to the mother was $5,890 of which $3,515.44 was given to plaintiff. We do not believe defendant Elsie Adair has met her burden of proof in regard to her defense of no consideration.

A "consideration" for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other but the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request. Plastray Corp. v. Cole, 324 Mich. 433, 37 N. W. 2d 162. See, also, 17 Am. Jur. 2d, Contracts, § 94, p. 437.

The judgment of the District Court is reversed and the cause remanded with directions to enter a decree of foreclosure for plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

BANK OF GERING, A CORPORATION, APPELLANT, V. MAUDIE GLOVER, APPELLEE.
223 N. W. 2d 56

Filed November 7, 1974. No. 39467.

1. **Security Agreements: Consideration.** An accommodation maker is a debtor within the meaning of section 9-504(3), U. C. C.
2. **Statutes: Words and Phrases.** Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows: When the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed.
3. **Security Agreements: Notice: Sales.** Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.

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

Holtorf, Hansen, Kovarik & Nuttleman, Robert M. Brenner, and Byron J. Brogan, for appellant.

Robert M. Harris, for appellee.

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

SPENCER, J.

This appeal involves an interpretation of the notice provision in section 9-504, U. C. C. Defendant-appellee was an accommodation maker on a note covered by a security interest in certain collateral. The plaintiff-appellant payee took possession of the collateral, solicited bids, and sold it at private sale. This action is for a deficiency judgment against defendant. The trial court sustained her motion for summary judgment because no notice of sale was given to defendant, and dismissed plaintiff's petition. We affirm.

In considering the issue presented, we construe section 9-504 (2) and (3), U. C. C., which provides: "(2)

If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

"(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor,* and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale." (Emphasis added.)

The note was executed by Rex Bryan, Gladys Bryan, and defendant, Maudie Glover. The plaintiff took a financing statement and security agreement executed by Rex and Gladys Bryan. The financing statement and security agreement covered the inventory, furni-

ture, fixtures, and accounts receivable owned by Rex and Gladys Bryan, doing business as B & G Booterie. The Bryans filed a petition in bankruptcy. The trustee in bankruptcy disclaimed any interest in the property covered by the security agreement.

Rex Bryan voluntarily turned over the possession of the collateral to the plaintiff. The plaintiff had the property appraised. It then solicited bids by letter from four different business establishments located in Gering and Scottsbluff, Nebraska, and Laramie, Wyoming. The property was sold to one of those solicited. The proceeds were first applied on another note which had not been signed by the defendant. The balance remaining was applied on the note in suit. Plaintiff commenced this action against defendant for the balance due. Plaintiff admits that no notice of the private sale was given to the defendant prior to the completing of the sale. It seems clear that if there was time to solicit bids through the mails, as was done, there was time to give the required notice to the defendant if notice is essential.

The appeal presents an issue of first impression in this jurisdiction. Other jurisdictions which have been faced with the problem have reached differing results. Many of the courts have held that a security holder who sells without notice may not recover any deficiency resulting from the sale. See Camden Nat. Bank v. St. Clair (Me., 1973), 309 A. 2d 329, which, like the instant case, involved an accommodation maker. Some others, following the lead of Arkansas in Baber v. Williams Ford Co. (1965), 239 Ark. 1054, 396 S. W. 2d 302, indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, and shift to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law. The third line of cases, such as Abbott Motors, Inc. v. Ralston

(1964), 5 U. C. C. Rptng. Serv. 788, 28 Mass. App. Dec. 35, hold that the violation of the notice provision does not excuse the debtor from paying a deficiency, but that he is entitled to a setoff for any loss which he can prove he suffered as a result of it.

The first question presented is whether the defendant who signed the obligation as an accommodation maker to enable the Bryans to secure the loan from the plaintiff is a debtor within the meaning of section 9-504(3), U. C. C. Section 9-105(1), (d), U. C. C., gives the following definition: " 'Debtor' means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper." It would seem from this statute that an accommodation maker would fit within the definition of "debtor." We so hold.

Our first consideration in construing section 9-504, U. C. C., is to consider the reason for the notice provision. Obviously it is intended for the benefit and protection of the debtor. If he is given notice, he will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise.

The language of subsection (3) of section 9-504, U. C. C.: "* * * reasonable notification of the time after which any private sale or other intended disposition is to be made *shall* be sent by the secured party to the debtor," (italics added) would presume a mandatory obligation. We have heretofore held that unless the context indicates otherwise, the use of the word "shall" purports a mandatory obligation. See Anderson v. Carlson (1961), 171 Neb. 741, 107 N. W. 2d 535, in which we pointed out section 49-802, R. R. S. 1943, provides: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter

shall be as follows: (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."

The following observation from Leasco Data Processing Equipment Corp. v. Atlas Shirt Co. (1971), 323 N. Y. S. 2d 13, 66 Misc. 2d 1089, is of interest herein: "It surely has meaning that the very section that affirms the right to a deficiency judgment after sale of a repossessed article also describes in simple and practical terms the rules governing dispositions as well as the pertinent notice requirements. If a secured creditor's right to a deficiency judgment were intended to be independent of compliance with those rules, one would surely expect that unusual concept to be delineated with clarity. The natural inference that the right depends upon compliance is forcefully underlined by the joining of the two provisions in one section." This reasoning is particularly pertinent when considered in the light of Nebraska's construction of the word "shall" when used in the statutes.

We see no need to go into a discussion of the divergent views presented by the cases from other jurisdictions. Balancing the various considerations presented therein, we are persuaded that to require compliance with the notice provision as a condition precedent to a deficiency judgment reaches the better result. We accordingly hold compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.

The creditor is given several options in disposing of collateral and very minimal formal requirements. The burden on the secured creditor is to comply with the law. The act is framed in his interest. It is not onerous to require him to give notice of the time and place of sale. In some instances it will be to the creditor's

advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor. It prevents the debtor from taking steps to protect his interests at the sale. In many instances it could also make it extremely difficult for him to prove the sale was not a commercially reasonable one.

In the present case it would have been a simple matter for the plaintiff to have notified the defendant at the time of soliciting bids on the collateral. We are persuaded that the construction we put on the statute is the natural construction dictated by the statutory language and our law. The legal background, the realities of the relationships between secured creditors and debtors who have defaulted, and the respective resources for protecting their interests all require the conclusion that the right to a deficiency judgment depends on compliance with the statutory requirements. If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment.

The judgment is affirmed.

AFFIRMED.

RICHARD H. HAYS ET AL., APPELLANTS, V. COUNTY OF DOUGLAS, NEBRASKA, APPELLEE.
223 N. W. 2d 143

Filed November 14, 1974. No. 39414.

1. **Remittitur: Verdicts.** Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty.
2. **Damages: Interest.** If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

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

Abrahams, Kaslow & Cassman, for appellants.

Donald L. Knowles and William T. Ginsburg, for appellee.

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

BRODKEY, J.

This is an appeal from an order of the District Court requiring the plaintiffs to file a remittitur from the amount of a judgment recovered by them against the defendant county pursuant to a jury trial, or in the event of their failure to do so, sustaining a motion for a new trial. We affirm, but modify the amount of the remittitur required.

At the trial of this action, which was one to recover damages for breach of contract, the court directed a verdict against the defendant county on the issue of liability, leaving only the amount of damages for the determination of the jury. The jury returned a verdict of $42,800, which the court found was excessive. The court thereafter ordered a remittitur in the sum of $11,594, or a new trial.

In 1967 defendant county was engaged in sponsoring and constructing a certain channel improvement project on the Little Papillion Creek, involving the widening, deepening, and straightening of part of the channel, and, in other places, the dredging out of a new channel, together with the filling in of the old channel. For the purposes of that project, it was necessary for defendant to obtain a portion of certain real estate owned by the plaintiffs and located along the Little Papillion Creek, which they were in the process of developing into a shopping area. Plaintiffs were particularly interested at that time in obtaining fill dirt for the purpose of elevating their property to a certain desired grade level. In No-

vember of 1967, a meeting was held between the plaintiffs and the county surveyor, William Green, and the project engineer, John Smith, in order to discuss the purchase of part of plaintiffs' land by the county. It was determined at that meeting that approximately 60,000 cubic yards of dirt would be required in order to raise the remainder of plaintiffs' land to the desired elevation. It also appeared that the county had considerable excess dirt as a result of prior construction on the creek project which it wished to dispose of, and therefore it appeared that it would be to the mutual advantage of the plaintiffs and the county to reach an agreement for the exchange of part of the plaintiffs' land for the dirt needed by the plaintiffs for the grading and elevation of their property. As a result of such meeting, an agreement was entered into between the parties on December 30, 1967, under the terms of which agreement plaintiffs agreed to convey to the county the land required for the channel improvement project; and as consideration for that conveyance, the county agreed to pay the plaintiffs one dollar and to "deposit approximately 60,000 cubic yards of earth from said Channel Improvement" upon the remainder of the parcel of the land owned by plaintiffs. The agreement further provided that "final grades . . . shall conform to the requirements shown on the drawings or as directed." The plaintiffs, Richard H. Hays, J. Frederic Schlott, and Willis G. Farrington, were landscape architects, practicing as a firm, and they thereafter prepared and submitted a grade plan to the county indicating the amounts of dirt fill required for different locations on their property.

It appears that plaintiffs fully performed the agreement on their part, and did convey to the county that portion of the property needed for the channel improvement project, but that the county supplied only part of the 60,000 cubic yards of dirt called for in the agreement. This point is not in dispute, and was, in

fact, stipulated to be the fact during the trial. In their petition brought in this action, in which they sought to recover damages against the county for failure to deliver the entire 60,000 cubic yards of dirt, plaintiffs alleged, among other things, that approximately 45,000 of the 60,000 cubic yards of dirt promised had not been delivered, and further alleged that the fair and reasonable price of the earth fill was 95.2 cents per cubic yard. Based upon those allegations, plaintiffs prayed judgment against the county for $42,840.

The principal issue in the case involved the determination of the amount of the dirt actually delivered and compacted upon plaintiffs' land pursuant to the contract in question. The key testimony on this issue at the trial was that of James Siebken, a civil engineer employed by Kirkham-Michael & Associates, consulting engineers. Siebken had been requested by the county to determine how much dirt had actually been deposited on the land of the plaintiffs pursuant to the contract in question. By a letter dated December 14, 1970, introduced in evidence at the trial, he indicated that he had determined a total in-place fill of only 14,763 cubic yards of dirt had been deposited thereon. However, in a subsequent letter, dated October 19, 1971, also in evidence at the trial, he indicated that the 14,763 cubic yards, previously referred to, represented only a portion of the dirt actually deposited on the property in question; and that, in fact, 30,280 cubic yards of dirt had actually been deposited. He explained the discrepancy in the figures contained in his two letters by the fact that the original figure had not included 8,531 cubic yards of dirt that had been used to fill the old creek channel located on plaintiffs' land, and abandoned as a result of the channel improvement project. The addition of that amount to the 14,763 cubic yard figure meant that, in Siebken's estimation, a total in-place quantity of 23,294 cubic yards of dirt had been added to the land. He also testified that it was then necessary to apply a "compaction factor of

1.3" in order to determine how much loose material had actually been placed on the land prior to its compaction by heavy equipment. We note in passing also that this same "compaction factor," was referred to in Knight Bros., Inc. v. State, 189 Neb. 64, 199 N. W. 2d 720 (1972). As a result of applying that factor, Siebken concluded "that it would require 30,280 cubic yards to give 23,294 cubic yards in place."

As previously stated, the District Court directed a verdict in favor of the plaintiffs on the issue of liability of the county, leaving to the jury only the issue of the amount of the damages. The verdict of the jury in the amount of $42,800 was obviously in close conformity with the calculations appearing in the petition filed by plaintiffs. It seems clear, however, that the trial court in ordering a remittitur of $11,594, was accepting the 30,280 cubic yard figure testified to by Siebken, which meant that only 29,720 cubic yards of the 60,000 cubic yards of dirt had not been delivered by the county. This is made clear by the statement of the trial judge: "In connection with the order of a remittitur, there can be no question that the jury in this case failed to take into consideration the 8,531 cubic yards of dirt put into the old channel bed which was upon the property of the Plaintiffs herein, and that they failed to give them credit for that dirt placed on their property to fill up the old creekbed." He then used a market value of $1.05 per cubic yard for dirt, and determined that the plaintiffs were only actually entitled to damages in the amount of $31,206, thereby requiring a remission by the plaintiffs of $11,594 of their original verdict in the sum of $42,800.

The law is well established that where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. Daly v. Publix Cars, 128 Neb. 403, 259 N. W. 163 (1935). Although we believe that a review of the record will sustain the action of the trial court in

ordering a remittitur, nevertheless we are of the opinion that the remittitur should not be as large as that ordered. We are in agreement with the plaintiffs that the 8,531 cubic yards of dirt used to fill the abandoned creek channel on plaintiffs' property should not have been considered as part of the 60,000 cubic yards of dirt called for under the agreement of the parties, and we hold this view for several reasons. In the first place the evidence of the preliminary negotiations between the parties would seem to require such a conclusion. It is uncontroverted that when the plaintiffs met with Messrs. Green and Smith in November 1967, at which time it was computed that 60,000 cubic yards of dirt would be needed for plaintiffs' purposes, the computation did not include a consideration of how much dirt would be needed to fill the abandoned creek channel. Secondly, it is significant that the grade plan submitted by the plaintiffs to the county in order to indicate the final grades needed on the land does not include any reference to the dirt needed to fill the abandoned creek channel. Finally, it is necessary to point out that the record is replete with evidence to the effect that, as part of the channel improvement project *all* abandoned creek channels along the entire extent of the project were filled. Robert Miller, one of the general contractors for the project, testified that the abandoned creek channels were filled for all the property owners along the length of the project. Kirkham-Michael & Associates had been retained as consulting engineers for the work done on the channel improvement project. James Siebken, their employee, served in the capacity of project engineer for the project; and in his testimony, he confirmed the fact that the contractor filled the abandoned creek channel along the entire project. James R. Scott, who served as representative contracting officer for the area of channel improvement project for the Corps of Engineers, testified that every time a new channel was made, they were required to fill the aban-

doned channel. On the strength of this and other evidence, we must conclude that it was not within the contemplation of the parties that the dirt necessary to fill the abandoned creek channel on plaintiffs' property would be included in the 60,000 cubic yards of dirt called for in the agreement. It was therefore error to include that amount in the calculation of the damages due to plaintiffs.

We must therefore return to the base figure originally reached by Siebken of 14,763 cubic yards of dirt. We feel that it is also necessary to apply to that amount the 1.3 compaction factor testified to by Siebken, since, as pointed out by the District Court, the testimony representing the need to apply that factor is uncontroverted. Therefore, applying the compaction factor of 1.3 to the base figure of 14,763 cubic yards, we find that 19,191.9 cubic yards of dirt were actually delivered by the county to the plaintiffs, leaving a deficiency of 40,808.1 cubic yards of dirt due under the agreement. The damages due to the plaintiffs must be calculated on the basis of this amount. We accept the price per cubic yard of 95.2 cents, as alleged in plaintiffs' petition, to be the fairest representative of the reasonable market price of fill dirt. Using that price, we conclude that the actual amount of damages due plaintiffs is the sum of $38,849.31. Such being the case, a remittitur of $3,950.69 from the verdict of $42,800 is required.

Plaintiffs also assert that the District Court erred in failing to award interest on their claim, from December 14, 1970, the date of the first Siebken letter. We have held that if the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount. Smith v. Platte Valley P. P. & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478 (1949). While it is true in this case that

the right to damages was not a matter of reasonable litigation, the county having stipulated that the full amount of dirt promised under the agreement had not been delivered, nevertheless the amount of such damages was not capable of being definitely ascertained by mere computation as of December 14, 1970. On that date the parties were under the impression that only 14,763 cubic yards of dirt had been delivered. It was not until Siebken's letter of October 19, 1971, that the parties were informed a compaction factor of 1.3 would have to be applied to the figure of 14,763 cubic yards in order to determine the exact amount of the dirt deposited upon the land. Thus as of December 14, 1970, it would not have been possible to make a definite determination of the amount of damages due to the plaintiffs, even by reference to market values.

We note the claim of the county in its brief to the effect that a special statute of limitations was applicable to the claim of the plaintiffs in this action and that their failure to file their claim within 90 days from and after a time when any materials or labor which formed the basis of the claim shall have been furnished or performed bars them under section 23-135, R. R. S. 1943. We need not and do not decide this collateral matter for the reason that it is not properly before this court. This is a matter which should have been raised by cross-appeal. Rule 1 d, Revised Rules of the Supreme Court, 1974, provides: "The filing of an appeal shall vest in an appellee the right to a cross-appeal. The cross-appeal need only be asserted in appellee's brief in the manner provided by Rule 8 b 3." Also Rule 8 b 3 provides: "Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed 'Brief on Cross-Appeal' and shall be prepared in the same manner and under the same rules as the brief of appellant." This was not done. We must note in passing that we have strong doubts as to whether the

requirements of section 23-135, R. R. S. 1943, apply to the facts of this case, but express no opinion with regard to it.

We believe that the remittitur ordered by the District Court was excessive in amount, and accordingly the order of remittitur is modified to require instead a remittitur of $3,950.69, and plaintiffs are to be given 10 days from and after receipt by the District Court of the mandate in this case to elect whether to file such remittitur or undergo a new trial, as provided in the order of the District Court.

AFFIRMED AS MODIFIED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. NEBRASKA LAND CORPORATION, A CORPORATION, APPELLANT, IMPLEADED WITH WHEATBELT PUBLIC POWER DISTRICT, A CORPORATION, ET AL., APPELLEES.
223 N. W. 2d 425

Filed November 14, 1974. Nos. 39443, 39444, 39445, 39446.

1. **Foreclosure: Liens.** Generally a lien creditor has no right to apply the surplus proceeds of a foreclosure sale to other debts or claims which he holds against the debtor and has no priority over other general creditors of the debtor in the absence of an agreement relating thereto.
2. ————: ————. The holder of two liens against distinct parcels of land and for different debts but against the same debtor, cannot apply the surplus arising on the foreclosure of one of the liens to make up a deficiency on the other as against a trustee of the debtor for the benefit of creditors.
3. **Foreclosure: Liens: Judgments.** A general lien on all the debtor's property is not created by a judgment or decree for the foreclosure of a lien on specific property described in the foreclosure action.
4. **Foreclosure: Equity.** In a suit for foreclosure of a mortgage after sale and satisfaction of the mortgage if a surplus remains, the District Court has full power to determine the interest of all parties in the surplus, and to do complete and final justice between the parties.

Appeals from the District Court for Morrill County:

TED R. FEIDLER, Judge. Affirmed as modified, and remanded with directions.

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

Marti, Dalton, Bruckner, O'Gara & Keating, for appellee Northwestern Mut. Life Ins. Co.

Peetz & Dorwart, for appellee Wheatbelt P. P. Dist.

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

McCOWN, J.

In this case four separate real estate mortgage foreclosure actions have been consolidated for appeal. The mortgage debtor, Nebraska Land Corporation, by and through its trustee in bankruptcy, has appealed from an order of the District Court directing the distribution of a portion of surplus sale proceeds to Wheatbelt Public Power District, the holder of a contractual lien in each of the four cases.

On September 16, 1970, Northwestern Mutual Life Insurance Company filed four separate real estate mortgage foreclosure actions against Nebraska Land Corporation, the titleholder of the land in each case. For purposes of clarity, the separate actions will be designated by the case numbers given them in this court.

In cases Nos. 39444, 39445, and 39446, the mortgages were each a first lien on the land involved in each respective case. In case No. 39443, the mortgage was a first lien on the property being foreclosed in that case, and a second lien on all the property in cases Nos. 39444, 39445, and 39446. In the foreclosure actions the mortgage creditor joined a number of other creditors, including Wheatbelt Public Power District. In each case Wheatbelt held a contractual lien for power furnished to the property involved in that case. After the foreclosure actions were initiated, a petition in bankruptcy was filed

by Nebraska Land Corporation under Chapter X of the Bankruptcy Act.

The District Court entered a decree of foreclosure in each case which fixed and determined the amounts of the mortgage and lien indebtedness as follows: No. 39443, Northwestern $397,593, and Wheatbelt $10,100.98; No. 39444, Northwestern $187,027, and Wheatbelt $3,868.32; No. 39445, Northwestern $184,011, and Wheatbelt $4,580.34; and No. 39446, Northwestern $156,676, and Wheatbelt $4,405.37.

In each case the property was ordered sold, and the net proceeds of the sales in each case were: No. 39443, $302,614.57; No. 39444, $249,732.13; No. 39445, $244,844.05; and No. 39446, $220,340.73. Each sale was confirmed.

After application of sale proceeds to Northwestern's first mortgage in each case, there was a deficiency of $109,688.43 in case No. 39443; and surpluses of $55,885.13 in No. 39444; $54,025.05 in No. 39445; and $58,783.73 in No. 39446. Northwestern then moved in case No. 39443 that it be paid the total net sale proceeds in that case to apply on its first mortgage; and that $109,688.43 of the total surplus in cases Nos. 39444, 39445, and 39446 be paid to Northwestern on its second mortgage, with the balance of the surplus to be retained by the court for distribution among the junior lienors. Northwestern also moved in cases Nos. 39444, 39445, and 39446 to have the remaining surplus in each case paid into case No. 39443 to be applied, first to Northwestern's second mortgage in that case, and the balance to be distributed among the junior lienors. These motions were neither granted nor denied.

On January 26, 1973, Northwestern moved in each case for an order requiring the sheriff to disburse to it from the proceeds of the sales in cases Nos. 39443, 39444, 39445, and 39446, the total sum of the indebtedness and interest due it in all four cases. These motions were granted by an order entered in each case, which also

directed that the balance be retained until further order of the court.

On July 20, 1973, Wheatbelt moved in each case for an order to distribute to it $24,800.53, the total sum of its liens, with interest, in all four cases, from the proceeds of the sales in all four cases. The appellant moved for an order denying any distribution to Wheatbelt and establishing and decreeing the priorities of the liens of each party in each separate case. On August 23, 1973, the District Court entered an order in each case requiring that out of the $59,005.48 total surplus remaining after satisfaction of Northwestern's mortgages, the sum of $24,800.53 be paid to Wheatbelt, and finding that the trustee appellant's rights and claims were inferior to the Wheatbelt liens. The appellant moved for a new trial, and upon overruling of that motion, this appeal followed.

The appellant contends that the proceeds of a mortgage foreclosure sale must be applied in accordance with the provisions of the mortgage or in accordance with the terms of the foreclosure decree. The thrust of the argument is that the sale in case No. 39443 resulted in a deficiency and therefore eliminated Wheatbelt's contractual lien in that case.

Wheatbelt, however, in effect contends that its liens were a pervasive single lien, which attached to all the premises involved in the four cases. The nature of Wheatbelt's liens therefore becomes critical. At the time of the foreclosures in each of the four cases here involved, Wheatbelt held four separate liens, one in each case, which arose out of four independently executed contracts between Wheatbelt and the titleholder of the real estate, for the furnishing of power by Wheatbelt to irrigation wells and pumps located on each of the four parcels of real estate. Wheatbelt's lien in each foreclosure case covered only the premises that were the subject of that foreclosure petition.

As a general rule, a lien creditor has no right to apply

the surplus proceeds of a foreclosure sale to other debts or claims which he holds against the debtor, and in this respect has no priority over other general creditors of the debtor, at least in the absence of an agreement relating thereto. A lien established for one debt or liability does not cover other and different debts or liabilities of the same debtor, especially where the rights of third persons intervene. The holder of two liens against the same debtor but on distinct parcels of land and for different debts cannot apply the surplus arising on the foreclosure of one of the liens to make up a deficiency on the other as against a trustee of the debtor for the benefit of creditors. 59 C. J. S., Mortgages, § 799(d), p. 1529; 53 C. J. S., Liens, § 9, p. 854; Bruckman v. Healy, 126 Ore. 129, 268 P. 1001; Swann v. Maxcy, Inc., 120 Fla. 283, 162 So. 696; Midland Nat. Life Ins. Co. v. Johnson, 69 S. D. 150, 7 N. W. 2d 620.

In this case Wheatbelt's lien of $10,100.98 against the land foreclosed in case No. 39443 was wiped out when that land was sold on foreclosure sale for less than the amount of Northwestern's first mortgage. Unless that deficiency of $10,100.98 can be carried over and asserted as a lien against the surpluses in the other cases, Wheatbelt is relegated to the position of a general creditor with respect to the indebtedness formerly secured by its lien in case No. 39443.

Wheatbelt contends that the judgment or decree of foreclosure in case No. 39443 created a general judgment lien in Wheatbelt's favor that extends over to the property in cases Nos. 39444, 39445, and 39446. A foreclosure proceeding, however, is not brought to create a lien but to enforce one already in existence. It affects no property except the property being foreclosed for the particular lien and affects it only by limiting the time for redemption and authorizing its sale if not redeemed. A general lien on all the debtor's property is not created by a judgment or decree for the foreclosure of a lien on specific property described in the foreclosure action.

See, Central Union Trust Co. v. Appalachian Corp., 300 F. 397 (D. C. Ga.), affirmed 2 F. 2d 585 (5th Cir.); 59 C. J. S., Mortgages, § 701, p. 1276.

The appellant also contends that it was error to permit Northwestern to satisfy the deficiency in case No. 39443 by applying a portion of the amount of the surplus in each of the other three cases. Instead, the appellant asserts that Northwestern should have been required to apply the surplus in each of the other three cases to the deficiency in the order in which the foreclosure cases were filed. It is also contended that the pro rata or equal allocation of the surpluses in the three cases to the payment of Northwestern's deficiency constituted a marshaling of assets which was unauthorized and improper. We disagree.

The indebtedness to Northwestern which gave rise to the deficiency in case No. 39443 was also secured by a second mortgage which covered all the property in cases Nos. 39444, 39445, and 39446. Northwestern's second mortgage lien was established at one time and under one agreement, and applied with equal force in all three cases. There was no reason why the surplus in each case should not be allocated in such fashion that the liens of both creditors in each of the three cases would be fully satisfied. In the posture of these cases, the appellant stands in no better position to object to the allocation of surpluses between secured creditors than does the debtor, Nebraska Land Corporation.

It is a long-established rule that a court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. In a suit for foreclosure of a mortgage, after sale and satisfaction of the mortgage, if a surplus remains, the District Court has full power to determine the interest of all parties in the surplus and to do complete and final justice between the parties. See Mauzy v. Elliott, 146 Neb. 865, 22 N. W. 2d 142.

We have now held that Wheatbelt's lien of $10,100.98 against the property foreclosed in case No. 39443 was wiped out when that land was sold on foreclosure sale for less than the amount due on Northwestern's first mortgage. For that reason the order of August 23, 1973, entered in all four cases must be altered and modified in each case and individual and different orders entered in each case.

In case No. 39443, an order should be entered finding that the entire sale proceeds have been distributed to Northwestern to apply on its first mortgage, leaving a deficiency of $109,688.43, and that no funds remain for distribution to any junior lienors.

In each of cases Nos. 39444, 39445, and 39446, the court should order that the combined surplus remaining in those cases after the satisfaction of the deficiency, and the payment of Northwestern's second mortgage, the total of which surplus was $59,005.48, shall be allocated one-third to each of those three cases. The court should then direct that Wheatbelt Public Power District has a lien of $3,868.32, plus interest, in case No. 39444; a lien of $4,580.34, plus interest, in case No. 39445; and a lien of $4,405.37, plus interest, in case No. 39446; payment of which should be made out of the surplus in that particular case.

The judgments are modified and the causes remanded to the District Court for further proceedings in accordance with this opinion.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

JOHN A. DOWNER, APPELLANT, V. ALAN H. IHMS, SUBSTITUTED FOR LAWRENCE L. GRAHAM, ET AL., APPELLEES.
223 N. W. 2d 148

Filed November 14, 1974. No. 39451.

1. **Administrative Law: Appeal and Error.** Orders of the Department of Public Welfare made pursuant to the provisions

of section 68-1016, R. R. S. 1943, may be reviewed by petition in error under section 25-1901 et seq., R. R. S. 1943, as well as by appeal under section 84-917, R. R. S. 1943.

2. **Administrative Law: Venue.** Venue in either case lies in the county of residence of the applicant or recipient affected by the final order under section 68-1016, R. R. S. 1943.
3. **Appeal and Error: Records: Pleadings.** The provision of the statutes requiring the plaintiff in error to file with his petition an authenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory.

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

Donald E. Sanders, for appellant.

Clarence A. H. Meyer, Attorney General, and E. D. Warnsholz, for appellees.

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

CLINTON, J.

This action arises from a hearing before the Department of Public Welfare under the provisions of section 68-1016, R. R. S. 1943. The Department of Public Welfare, after the hearing, terminated the plaintiff's eligibility for disability aid. The plaintiff filed a petition in error in the District Court for Scotts Bluff County, Nebraska, asking a review of the order. The petition set forth in general terms the nature of the proceedings had before the Department of Public Welfare; and alleged that the department after the hearing had found that the plaintiff was no longer disabled within the meaning of section 68-1005, R. R. S. 1943, such finding being affirmed upon appeal to the department under the provisions of section 68-1016, R. R. S. 1943. It further alleged that the plaintiff was disabled as an "alcoholic neurotic"; that he was undergoing treatment at a center for alcoholism; that he and his family were unable to sustain themselves on the plaintiff's earnings; that their needs as de-

fined by department standards were not met; and that he was entitled to public assistance. The plaintiff further alleged that the Department of Public Welfare had entered into a contract which undertook to subsidize the cost of his rehabilitation; that by reason of the terms of said contract the department was not entitled to discontinue the public assistance; that his treatment had only been partly completed; and that he will be unable to complete it because of the discontinuance of the public assistance. The petition then prayed for reversal of the order of the department.

At the same time he filed the petition, plaintiff filed what amounted to an affidavit of poverty and obtained leave of court to proceed without payment of costs. With the petition in error the plaintiff filed a motion in which he specifically asked that the matter be heard as a petition in error and made reference to the applicable statutes. This motion further set forth plaintiff's view that appeal proceedings under section 84-917, R. R. S. 1943, were not available to him because they had been interpreted to place venue in the District Court for Lancaster County and that because of his poverty this recourse was not available to him. Summons, as required by statutes pertaining to error proceedings, was served upon the defendant Director of the Department of Public Welfare.

The defendant entered a special appearance "for the reason that the administrative decision being appealed was completely made in Lincoln, Nebraska, thus vesting jurisdiction in the District Court of Lancaster County, Nebraska under provisions of the Administrative Procedures Act, Section 84-917 R. R. S. 1943."

The trial court sustained the special appearance for the reason that, under the provisions of section 84-917, R. R. S. 1943, providing for appeals under the Administrative Procedures Act, jurisdiction was vested in the District Court for Lancaster County. Accordingly, it dismissed the action.

On appeal errors assigned are: (1) As section 84-917 (1), R. R. S. 1943, provides in part: "Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law," plaintiff argues that review by error proceedings under section 25-1901 et seq., R. R. S. 1943, are and were available and the court therefore erred in dismissing the petition. (2) If, under the provisions of section 84-917, R. R. S. 1943, exclusive venue lies in the District Court for Lancaster County, then that provision of the statute is unconstitutional because it denies to indigents due process and equal protection under the federal Constitution and is also unconstitutional under the provisions of Article I, sections 1, 13, and 24, Constitution of Nebraska.

The Department of Public Welfare here contends that even though review by petition in error may be available to the plaintiff, nonetheless the order of the District Court for Scotts Bluff County dismissing the petition in error was correct because the plaintiff did not comply with the jurisdictional requirements of sections 25-1905 and 25-1906, R. R. S. 1943, by filing with the petition an authenticated transcript of the proceedings, including the order appealed from.

The department cites Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N. W. 2d 387, for the proposition that: "The provision of the statutes requiring the plaintiff in error to file with his petition an authenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory." The plaintiff, in his motion previously referred to and in his brief here, cites that case as support for his position that proceeding by petition in error was an alternative remedy open to him.

In Lanc v. Douglas County Welfare Administration, *supra,* we pointed to the provision of section 84-917, R. R. S. 1943, which provides that "Nothing in this section shall be deemed to prevent resort to other means of review," as supporting the plaintiff's position in that

case that he was entitled to review by petition in error as an alternative to proceeding under the Administrative Procedures Act. That, we believe, was clearly correct. Section 25-1901, R. R. S. 1943, provides: "A judgment rendered, or final order made, by a county court . . . or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." Section 25-1903, R. R. S. 1943, provides in part: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error, filed in a court having power to make reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action."

In Lanc v. Douglas County Welfare Administration, *supra,* we were not called upon to decide where venue lay in a petition in error proceeding. Since the plaintiff had clearly failed to comply with the jurisdictional prerequisites to proceeding by petition in error, the issue of venue was immaterial. Nor did we address the claim of the defendant that venue lay in Lancaster County by virtue of section 84-917, R. R. S. 1943, as interpreted in The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369. It is clear that nothing which was said in that opinion can be viewed as determining the proper venue of either error proceedings under section 25-1901 et seq., R. R. S. 1943, or appeals under section 84-917, R. R. S. 1943, as they apply to this case.

We point out that appeal under section 84-917, R. R. S. 1943, is not available "where other provisions of law prescribe the method of appeal." § 84-917(7), R. R. S. 1943. There appear to be no such other provisions applicable to this case. Section 68-1016, R. R. S. 1943, lays down the provisions for the administrative hearing and administrative appeal in case of denials or termination of

public assistance. It provides: "The Director of Public Welfare shall provide for granting an opportunity for a fair hearing before the Department of Public Welfare to any individual whose claim for assistance . . . is denied, not granted in full, or is not acted upon with reasonable promptness by the county board of public welfare." It further provides: "An appeal shall be taken by filing with the county board of public welfare or the director a written notice of appeal .... The director shall thereupon, in writing, notify the appellant and the county board of public welfare of the time and place for hearing, which shall not be less than one week nor more than six weeks from the date of such notice. Hearings shall be before the director or his duly authorized agent. On the basis of evidence adduced, the director shall enter a final order on such appeal, which order shall be transmitted to the appellant and to the county board of public welfare. Such proceedings shall be taken by the county board of public welfare as will carry into effect the final order of the director."

Regulations adopted by the Department of Public Welfare pursuant to the authority granted in section 68-1001.01, R. R. S. 1943, implement the statutory right to a fair hearing and administrative appeal. Among other things, they provide that the appeal forms furnished by the department may be filed with the county division and that the place of hearing shall be in the county in which the appellant resides.

Section 84-917(2), R. R. S. 1943, provides: "Proceedings for review shall be instituted *by filing a petition in the district court of the county where the action is taken.*" (Emphasis supplied.) The regulations of the Department of Public Welfare and the provisions of section 68-1016, R. R. S. 1943, clearly indicate that the action is taken in the county of the applicant's or recipient's residence. The Flamingo, Inc. v. Nebraska Liquor Control Commission, *supra,* cannot be taken as holding that venue for review of appeals under the Adminis-

trative Procedures Act is, in all cases, in the District Court for Lancaster County. In that case the action of the Nebraska Liquor Control Commission was "taken" in Lancaster County. It is clear that "where the action is taken" depends, not upon section 84-917, R. R. S. 1943, alone, but upon the statutory procedure to be followed by the agency in each case.

In the case at hand, it seems clear that the "action taken" is in the county of the plaintiff's residence. Under the provisions of section 68-1016, R. R. S. 1943, and the regulations earlier mentioned, it is the action of the county board of that county which is the subject of the administrative review. The administrative appeal from that action is then taken by filing notice either with the county board or with the director. The appeal hearing itself is held in the county of the plaintiff's residence. The final order of the director is delivered to the affected party and to the county board of his place of residence. After final decision on this administrative appeal, "Such proceedings shall be taken by the county board of public welfare as will carry into effect the final order of the director." § 68-1016, R. R. S. 1943. The sole event that may occur in other than the county of the residence of the affected person is the consideration by the director of his decision. Even that is not mandated by statute for if the hearing is held before the director, as the statute authorizes, then presumably he might also make his decision in the county of the residence of the affected party.

The general statutes on venue, sections 25-401 et seq., R. R. S. 1943, do not appear to have specific applicability except possibly by way of analogy. In State ex rel. Johnson v. Central Nebraska P. P. & Irr. Dist., 140 Neb. 471, 300 N. W. 379, we said: "In the absence of clear and specific statutory provisions as to the venue of an action, the substantial nature of the issues involved in an action and the statutory provisions as to analogous situations may be followed to determine the proper venue. 67 C. J. 20."

Here we have one of those not unusual, but seemingly anomalous, situations where the department which is the tribunal exercising the judicial power becomes upon review the party defendant. Section 25-404, R. R. S. 1943, provides in part as follows: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: . . . (2) an action against a public officer, for an act done by him in virtue of or under color of his office, or for any neglect of his official duty; . . . ." That section of the statute does not cover precisely the situation which we have here, but it is analogous. For reasons already delineated we are constrained to believe that under the provisions of sections 68-1016 and 84-917, R. R. S. 1943, it is clearly the legislative will that venue in the case of review of orders made under the provisions of section 68-1016, R. R. S. 1943, lies in the county of the residence of the appellant. We therefore hold that proceedings by petition in error is an available method of review in addition to appeal under section 84-917, R. R. S. 1943, from decisions of the Department of Public Welfare made under the provisions of section 68-1016, R. R. S. 1943, and that venue in both instances is in the District Court for the county of residence of the plaintiff.

We now proceed to examine the critical question of whether the plaintiff is barred from having his day in court because he failed to comply with jurisdictional requirements applicable to the petition in error proceedings. We see no escape from the conclusion that he is. The order of the Department of Public Welfare from which he sought to appeal was made on December 7, 1973. On December 26, 1973, he filed the petition in error in the District Court for Scotts Bluff County. No authenticated copy of the proceedings, including the order appealed from, was filed with it. He had 1 calendar month from December 7, 1973, to make that filing. § 25-1931, R. R. S. 1943. The special appearance was not entered until January 9, 1974, and the order of dismissal not

made until January 24, 1974. The trial court may have been mistaken in the reason for the dismissal. We cannot, however, overlook the jurisdictional error which exists. See Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49. Even though plaintiff was entitled to proceed without payment of costs, he cannot be relieved of meeting jurisdictional requirements. There is no showing made anywhere in the record that he was denied an authenticated transcript because of nonpayment of costs. It has been held at least since 1905 that the requirement in question is jurisdictional. Smith v. Delane, 74 Neb. 594, 104 N. W. 1054. This holding has since been reiterated in numerous cases, including Anania v. City of Omaha, *supra*, and Lanc v. Douglas County Welfare Administration, *supra*.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LADEAN BRAUNER, APPELLANT.
223 N. W. 2d 152

Filed November 14, 1974. No. 39475.

1. **Assault and Battery: Intent.** In a prosecution for an assault by threatening another in a menacing manner, the State is not required as an element of the crime to prove specific intent.
2. **Assault and Battery: Weapons and Firearms.** The pointing of an unloaded weapon at another is an assault, if the person aimed at does not know but that it is loaded, and has no reason to believe that it is not.
3. **Witnesses: Trial.** The extent of the cross-examination of a witness must be left to the discretion of the trial court.

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

Moyer & Moyer by George H. Moyer, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

SPENCER, J.

Defendant prosecutes this appeal from a conviction for assault with menacing threat. The complaint charged defendant with unlawfully assaulting and threatening Daniel Inselman, a 14-year-old boy, in a menacing manner by pointing a loaded shotgun at him and ordering him to run and thereafter firing a shot from the gun.

Defendant argues five assignments of error: (1) Failure to instruct the jury on specific intent; (2) refusal to sustain defendant's motion to dismiss because there was no evidence that the shotgun was loaded; (3) prejudicial remarks made by the prosecutor within the hearing of the jury; (4) insufficient foundation to permit the local sheriff to testify as to the reputation of defendant; and (5) permitting the State to ask defendant's character witness about a specific act. We affirm.

Defendant's farm lies on a ridge on the northwest corner of the section and from it he can look down into the valley which comprises most of the west half of the section south of his farm. The Inselman farm adjoins his on the south. He testified that when he was planting corn on his farm he observed a white tractor on the Inselman land proceeding in an easterly direction on a field driveway bordering a creek in the south central portion of the farm. He had never seen the tractor before and could not see the driver of it. Some of his cattle had strayed east of his south and east line, and were grazing on a strip of ground which formed a turnrow at the east end of the Inselman farm. The tractor turned north at the east line of the Inselman farm and drove north into the cattle, chasing them toward the north.

Defendant went to his house, got a 12-gauge shotgun, and drove his car down to the pasture. He found the tractor headed south and parked his car straight north of the tractor. He took the shotgun with him when he got out of the car. The shotgun was loaded but the shells were not chambered. It was not until the driver stepped

out from the loader frame that he recognized the driver as Daniel Inselman.

Defendant asked the boy why he was chasing the cattle. Daniel replied that he did not chase any cattle. Defendant called him a liar and told him to "git." The boy was already moving away from him when defendant told him to "git." During the entire conversation defendant was holding the gun by the handgrip with the barrel pointed in the air. Daniel testified the defendant pointed the gun at him, told him to "git," and he started to run in a southerly direction. Defendant admitted after the boy had started running he chambered a round and pulled the trigger.

Defendant was charged under section 28-411, R. S. Supp., 1972, which provides: "* * * whoever unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars or be imprisoned in the jail of the county not exceeding six months, and shall, moreover, be liable to the suit of the party injured."

Defendant's first assignment of error is that the trial judge failed to give an instruction on criminal intent. In a prosecution for an assault by threatening another in a menacing manner, the State is not required as an element of the crime to prove specific intent. There was sufficient evidence to permit the jury to conclude that defendant unlawfully assaulted the 14-year-old boy with a menacing threat. While his intent, on the facts herein, was probably obvious, it is immaterial.

Defendant argues that the State's theory of the case was that he intentionally pointed a loaded gun at Daniel Inselman, therefore the State had the burden to prove that defendant intentionally pointed the gun and that the gun was loaded when he pointed it. The assignment borders on the frivolous. Daniel testified that the gun was pointed at him but he did not testify that it was loaded. It was the defendant's testimony that there was

a shell in the magazine which was not chambered until the gun was fired in the air after the boy started to run. In State v. McGhee (1969), 184 Neb. 352, 167 N. W. 2d 765, we said: "The pointing of an unloaded weapon at another is an assault, if the person aimed at does not know but that it is loaded, and has no reason to believe that it is not. While the statement to that effect in Ford v. State, 71 Neb. 246, 98 N. W. 807, 115 Am. S. R. 591, was not necessary to the decision in that case, we think that it is a correct statement of the law."

Defendant's next contention is that the prosecuting attorney, during the course of the trial, made certain statements within the hearing of the jury which were misleading and prejudicial. We have examined the record in detail and observe that some of the comments were proper replies to defendant's objections. With reference to the others, they contain nothing which would tend to create prejudice or excite the passions of the jury, nor were they in any way misleading or prejudicial.

Defendant's fourth assignment of error is that the sheriff, who was called in rebuttal by the prosecuting attorney, should not have been allowed to testify as to the defendant's reputation in the community for the use of threats and violence over the defense objection that an insufficient foundation had been laid for the opinion of the sheriff. The sheriff testified that he had lived all his life in Platte county; that he had personally known the defendant for more than 10 years; and that he had obtained a familiarity with the character of the defendant from reports which had come to his office and from personal discussion with people who had problems with him, as well as from his own personal knowledge. All this information was elicited during voir dire conducted by defense counsel before the sheriff was permitted to express an opinion. At the conclusion of the voir dire by defense counsel, the sheriff was asked if he was familiar with the defendant's reputation in the community for use of threats and violence. He answered in the af-

firmative. After defense counsel's objection was overruled, the sheriff testified that the defendant had a reputation for the use of threats and violence in the community. The record would indicate that the testimony elicited both on direct and during voir dire clearly established the fact that the sheriff was familiar with the defendant's general reputation as perceived by the community, and that his testimony as to his opinion was based upon a proper foundation.

Defendant's next assignment of error complains that one of his witnesses was permitted to testify over objection about a specific act involving the defendant which occurred prior to the incident on which this charge was based. When called by the defense the witness was asked if during the period of time he lived in the Creston and Leigh communities he had been aware of or familiar with the reputation of the defendant for the use of threats or violence. He answered: "No. Well yes, at times there have been comments to that effect, yes." The defense requested a short recess after which the witness was again asked if he was familiar with the defendant's reputation to which he answered "Yes." On cross-examination the witness was asked to explain his original answer. After several objections and some confusion, the witness answered: "The extent of that particular story has been that Mr. Brauner has not allowed his in-laws to see their grandchild. Again, that is—I don't know if it's true or not, I haven't heard anything." Considering the fact that the witness gave a response to the question asked on direct examination prior to the recess inconsistent with the response given to the same question after the recess, we find no error in the ruling of the trial court. The extent of the cross-examination of a witness must be left to the discretion of the trial court. State v. Newte (1972), 188 Neb. 412, 197 N. W. 2d 403. There was no abuse of discretion herein. The answer elicited was well within the permissible limits of cross-examination.

For the reasons stated, we find there is no merit to any of the defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

IN RE ADOPTION OF TERRENCE DAVID KING ET AL. DONALD D. RIGGERT ET AL., APPELLEES, V. TERRENCE D. KING, APPELLANT.
223 N. W. 2d 155

Filed November 14, 1974. No. 39479.

1. **Adoption: Appeal and Error: Records.** An appeal to the District Court in an adoption proceeding is tried de novo on the record. § 24-541, R. S. Supp., 1972.
2. **Trial: Appeal and Error: Records.** Error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous.
3. **Adoption: Appeal and Error: Records: Evidence.** In an appeal to the District Court in an adoption proceeding, it is the duty of the appellant to see that a record of the evidence in the county court is properly presented in the District Court.
4. **Appeal and Error: Records: Evidence.** In the absence of a record of the evidence in the lower court, it is presumed the evidence sustained the findings of the court.
5. **Trial: Appeal and Error: Records: Evidence.** In the absence of a record of the evidence which was received in the county court, and in the absence of a showing as to what additional evidence should have been received in the District Court and why it was reasonably necessary, it was not an abuse of discretion for the District Court to refuse to receive additional evidence in a trial de novo on the record.

Appeal from the District Court for Lancaster County: DALE FAHRNBRUCH, Judge. Affirmed.

Leroy P. Shuster, for appellant.

Friedman & Berry, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the adoption of

three minor children. The petition for adoption was filed by Donald D. Riggert. The natural parents were divorced in 1967. The petitioner and the mother of the children, Delores M. Riggert, were married in 1969. The appellant, Terrence D. King, who is the natural father, lives in Tucson, Arizona.

The petition alleged the children had resided with the petitioner for more than 6 months and the appellant had abandoned the children for more than 6 months. Consents to the adoption were filed by Mrs. Riggert and the guardian for the children.

The county court ordered the petition be heard on February 8, 1973. Notice of the hearing was served personally upon the appellant on January 23, 1973. The appellant did not appear on February 8, 1973, the date originally fixed for the hearing, or on February 13, 1973, the date to which the hearing was continued. The record shows no adequate excuse for the appellant's failure to appear in the county court. The county court found generally in favor of the petitioner and granted the petition. On March 12, 1973, the appellant filed a notice of appeal to the District Court.

No record of the evidence in the county court was filed or offered in the District Court and the District Court refused to allow the appellant to present additional evidence in that court. The District Court found the decree of adoption of the county court should be ratified and affirmed. The appellant has appealed to this court.

The issues in this case are largely procedural. Prior to the adoption of L. B. 1032, Laws 1972, appeals in guardianship proceedings were tried in the District Court as a suit in equity. §§ 43-112, 30-1606, R. R. S. 1943; Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68.

Section 24-541, R. S. Supp., 1972, now provides that appeals from the county court to the District Court shall be "by petition in error or de novo on the record except those matters referred to in section 30-1606, which matters shall be appealed de novo." The "matters" referred

to in section 30-1606, R. R. S. 1943, are "appeals from the probate or denial of probate of wills and the allowance or disallowance of claims filed against an estate." So far as this case is concerned, the effect of section 24-541, R. S. Supp., 1972, was to change the proceeding in the District Court from a trial de novo to a trial de novo upon the record.

It is a well-established principle of law that error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous. See, Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257; Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281. It was the duty of the appellant to see that a record of the evidence in the county court was properly presented in the District Court. Where no record of the evidence in the lower court is presented to the reviewing court, it is presumed the evidence sustained the findings of the court. The judgment must be affirmed if the pleadings support the judgment.

The appellant also complains of the refusal of the trial court to permit him to introduce additional evidence in the District Court. Section 24-541, R. S. Supp., 1972, provides the District Court may, in its discretion, receive additional evidence if the court determines such evidence is reasonably necessary to determine the issues, make findings of fact, and render judgment thereon.

Where there is no record of the evidence in the lower court there is little basis upon which a trial court could determine that additional evidence was reasonably necessary. There was no showing in this case of what the additional evidence would be or why it was reasonably necessary. The record fails to show an abuse of discretion by the trial court in refusing to permit the introduction of additional evidence in the District Court.

The judgment of the District Court is affirmed.

AFFIRMED.

HENRY BARTHULY AND ELIZABETH BARTHULY, DOING BUSINESS AS BARTHULY'S FRONTIER SERVICE, APPELLANTS AND CROSS-APPELLEES, V. REUBEN BARTHULY, APPELLEE AND CROSS-APPELLANT.
223 N. W. 2d 429

Filed November 14, 1974. No. 39480.

1. **Partnership: Accounting: Trial.** An action for an accounting between partners is equitable in nature and is reviewed de novo in this court.
2. **Partnership: Accounting: Time.** The right of a partner to an accounting accrues at the time of dissolution in the absence of an agreement to the contrary. An agreement between partners that an accounting will be made when accounts receivable are collected prevents the accrual of the right to an accounting at the time of dissolution.
3. **Partnership: Accounting: Trial.** Generally in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items.
4. **Partnership: Accounting.** A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for his services.

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

Lyman, Meister & Olsen, for appellants.

Van Steenberg, Brower & Chaloupka, for appellee.

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

CLINTON, J.

This is an action for an accounting between partners and for recovery of money alleged to be owed after the accounting. Following trial the court entered judgment against the defendant in the sum of $4,470.69. The plaintiffs, Henry Barthuly and his wife, Elizabeth F. Barthuly, who is usually referred to as Frances, appealed, assigning as error the insufficiency of the judgment. The defendant, Reuben Barthuly, cross-appealed,

asserting that all claims were barred by the statute of limitations. We sustain in part the position of the plaintiffs and affirm the judgment as modified.

An action for an accounting between partners is an equitable action and on appeal we review the matter de novo. Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649.

A summary of the background and some of the evidence is necessary. In the following paragraph, insofar as it deals with disputed matters upon which there is conflicting evidence, we state the facts and the evidence as we ultimately resolve them.

Henry and Reuben are brothers. Henry was a fuel jobber and the operator of a retail service station. Reuben was employed by him. On April 26, 1959, they became partners in the business. The partnership agreement was oral and under its terms the partnership profits were to be split equally. Henry initially furnished all the assets. Reuben contributed only his services. It was agreed that Reuben would limit his withdrawals to $400 per month (later increased as costs rose), and leave the balance of his profits in the business to build his equity in the assets. Plaintiffs owned the real estate upon which the partnership business was conducted and the agreement provided that they would receive rent of $250 per month. However, since capital was needed, plaintiffs would not collect the rent as it came due, but that would be settled sometime in the future. Frances, previous to the formation of the partnership, kept the books for the business. She continued to do this after the partnership was formed. On August 16, 1965, the partnership was amicably and voluntarily dissolved. Reuben, at that time, purchased the real estate from Henry and Frances. Henry then delivered the other physical assets of the partnership to Reuben who continued the business as a sole proprietorship. Among the assets at the time of the dissolution were accounts receivable in the amount of approximately $48,000. Reu-

ben bought about $7,000 of these and paid Henry that amount. It was agreed that Henry would collect the remaining accounts receivable and that when all that could be collected had been collected, there would be an accounting between the partners. The process of collection took several years. In 1970 Henry concluded the remaining accounts were worthless. He and Frances then took such records and information of the partnership as they had to a certified public accountant who prepared a "calculation of capital accounts" for the period April 26, 1959, to August 16, 1965. This calculation indicated that Reuben owed the plaintiffs $22,961.67, less $2,488.02 on an account of the plaintiffs to Reuben for purchases after dissolution, and which had been permitted to accumulate because of the unsettled partnership accounts. Reuben challenged the accuracy of the calculations and the premises on which they were founded. Henry and Frances then commenced this action.

On this appeal the dispute centers on only three items: (1) The appellee's contention on cross-appeal that the action for an accounting is barred by the statute of limitations; (2) the amount of rent to which plaintiffs are entitled in the accounting; and (3) whether in the accounting the plaintiffs, Henry and Frances, are entitled to be credited with a salary for services rendered by Frances in keeping the partnership books.

A careful examination of the record leads us to the conclusion that the trial court was correct in determining that the statute of limitations had not run. Dissolution of the partnership by agreement occurred on August 16, 1965. The evidence clearly supports the conclusion that an accounting between the partners would be postponed until the receivables were collected. The effort to collect ended in 1970. Accordingly the provisions of section 67-343, R. R. S. 1943, are applicable. That section provides: "The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding-up partners or the surviving partners or

the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary." Because of the agreement to the contrary, the cause of action for an accounting did not accrue at dissolution. This seems also to have been the rule at common law. Gray v. Green, 21 N. Y. Supp. 533, 37 N. E. 124; Wright v. Armwood (D. C. Mun. App.), 107 A. 2d 702; Burris v. Burris, 140 Kan. 208, 34 P. 2d 127, 96 A. L. R. 432; Hodge v. Kennedy, 198 Va. 416, 94 S. E. 2d 274; Riddle v. Whitehill, 135 U. S. 621, 10 S. Ct. 924, 34 L. Ed. 282.

With reference to the rent to which the plaintiffs were entitled, essentially only the amount is disputed. In about 1959 and 1960, after the formation of the partnership, plaintiffs made improvements on the real estate. Henry claims that he made an agreement with Reuben that, as of January 1, 1961, the rent was to be increased to $300 monthly because of the cost of these improvements. This is disputed by Reuben. In light of the fact the trial court rendered the judgment it did, it is clear that it had concluded that the plaintiffs had not sustained their burden of proof on that issue. We conclude likewise. Generally in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Baum v. McBride, *supra;* Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29. Accordingly, in the accounting, rent will be calculated at the sum of $250 monthly.

With reference to whether Frances was entitled to a salary for her bookkeeping, the following is determinative. The petition of the plaintiffs alleged that Frances was a partner, and together with Henry owned one-half of the partnership, Reuben owning the other one-half. It is therefore established by judicial admission that Frances was a partner. The plaintiffs rely upon Henry's admitted authority to hire employees of the partnership and to fix salaries. Such an authority does not, in our opinion, extend to fixing compensation for a partner

which is not provided for in the partnership agreement itself. The evidence does not support a finding that Reuben agreed to a salary for Frances. Section 67-318(f), R. R. S. 1943, provides: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services. Gee v. City of Sutton, 149 Neb. 603, 31 N. W. 2d 747. It follows, therefore, that the accounting cannot include compensation for Frances' services as a partner since there was no express agreement between the partners for such compensation.

After carefully examining the record, we conclude that there is an error in the trial court's calculations of the amount owed by Reuben to the plaintiffs. Substituting in the calculation of capital accounts supplied by the certified public accountant on line 16, column 1, the figure for rent only in the total amount of $18,750 for the figure of $44,300 used by the accountant to include rent as well as salary for Frances, we arrive at a balance owed plaintiffs of $7,477.36.

Accordingly we remand the cause with directions to enter judgment for the plaintiffs against the defendant in the sum of $7,477.36.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF HUSSAN JAMES, ALSO KNOWN AS HUSSAN SHAMES. ALI SHAMES ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

223 N. W. 2d 481

Filed November 21, 1974. No. 39322.

1. **Statutes.** Section 49-609, R. R. S. 1943, provides that all acts of a general nature, as revised and reported to the fifty-sixth

session of the Legislature by the 1943 Statute Commission, shall be construed, as soon as such report is approved and adopted by the Legislature, as a continuation of such laws and not as new enactments.

2. ———. A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. No presumption arises from changes of this character that the revisors or the Legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears.

3. **Statutes: Aliens: Descent and Distribution: Escheat.** Under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, nonresident aliens may not inherit an interest or title to lands in the State of Nebraska, but the heirs or persons who would have been entitled to such lands shall be paid compensation by the State of Nebraska to the extent of the full value thereof in the manner provided in section 76-408, R. R. S. 1943.

Appeal from the District Court for Cedar County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions.

Mohummed Sadden and Phillip Dandos, for appellants.

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

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

WHITE, C. J.

The essential question involved in this case is whether the plaintiffs, nonresident aliens, are entitled to inherit real estate in the State of Nebraska, and if not, whether they are entitled to reasonable compensation for the value of the land escheated to the State of Nebraska.

Plaintiffs' petition alleges that Hussan James, a resident of Sioux City, Woodbury County, Iowa, died intestate on July 4, 1962. His only heirs are the four

plaintiffs in this case who are aliens, resident nationals of Syria. The decedent owned 80 acres of land in Cedar County, Nebraska, and ancillary probate proceedings were filed in that county on July 6, 1963. The State of Nebraska intervened in the ancillary probate proceeding, asking the court to find that the real estate of Hussan James located in Nebraska escheated to the State of Nebraska for failure of qualified heirs to take. The county court of Cedar County, Nebraska, on January 23, 1969, held in effect that plaintiffs were not entitled to inherit and that the property escheated to the State of Nebraska, with no provision for compensation. The plaintiffs appealed this order to the District Court for Cedar County which sustained defendants' demurrers to the petition and dismissed the case, from which judgment this appeal was taken. We reverse the judgment of the District Court and remand the cause for further proceedings consistent with this opinion.

The right of escheat contended for by the State is founded upon the provisions of sections 76-401 and 76-402, R. R. S. 1943: "Upon the failure of heirs, the title shall vest at once in the state, without an inquest or other proceedings in the nature of office found." § 76-401, R. R. S. 1943.

"Aliens and corporations not incorporated under the laws of the State of Nebraska are prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, except as provided in sections 76-403 to 76-405." § 76-402, R. R. S. 1943. The method by which nonresident aliens may take land in Nebraska by intestate succession has been changed by the Legislature subsequent to the death of

the decedent in the instant case. See § 4-107, R. R. S. 1943.

The nonresident alien plaintiffs claim that section 76-402, R. R. S. 1943, constitutes a deprivation of property without just compensation, and is therefore a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution. Squarely presented to us in this case is the proper construction of section 76-402, R. R. S. 1943, and the subsequent and interrelated statutes dealing with the inheritance by aliens and the escheat provisions therein. We find it unnecessary to reach the due process question that might exist in the absence of a provision for compensation, because we hold that the statutory scheme, whereby this property escheats to the State of Nebraska, does in fact provide for just compensation to the alien plaintiffs in this case, pursuant to section 76-408, R. R. S. 1943. Since our statutory scheme requires compensation to nonresident aliens, it satisfies the demands of due process under any interpretation. See Shames v. State of Nebraska, 323 F. Supp. 1321 (D. Neb., 1971).

The "alien land law," Laws 1889, c. 58, §§ 1, 2, pp. 483, 484, provided in pertinent part as follows: "Section 1. Non-resident aliens and corporations not incorporated under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, * * * (and if such) alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act.

"Sec. 2. Whenever any such lands shall revert and escheat to the state of Nebraska *as provided in this act*, it shall be the duty of the county attorney of the county

in which such lands are situated to proceed against such alien in the district court of the county where the land is situated, for the purpose of having such forfeiture declared. * * * The heirs or persons who would have been entitled to such lands, shall be paid by the state of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law, and shall be disposed of as other lands belonging to the state; Provided, that the expense of the appraisement shall be deducted from the appraised value of the land." (Emphasis supplied.)

After the 1943 revision of the statutes, these sections became sections 76-402 and 76-408, R. R. S. 1943. Until the time of the revision in 1943, the act retained its original character insofar as it is relevant to the instant case. Until the time of the revision, the language "as provided in this act" (article) remained. In the intervening time since 1889 section 76-402, R. R. S. 1943, was amended twice and section 76-408, R. R. S. 1943, once, but only with reference to matters extraneous to the issue under consideration here. See, Laws 1911, c. 100, § 1, p. 365; Laws 1921, c. 142, § 1, p. 608; Laws 1939, c. 97, § 1, p. 417. The language referring to and providing for compensation, "as provided in this act" (article) was retained consistently even though the statutes were amended in various respects. Never were they amended so as to affect a nonresident alien's right to just compensation when land to which he would have been entitled by intestate succession escheats to the State.

Nevertheless, section 76-408, R. R. S. 1943, provides: "Whenever any such lands shall revert and escheat to the state of Nebraska, *as provided in sections 76-403, 76-405 and 76-411*, it shall be the duty of the county attorney of the county in which such lands are situated,

to proceed against such alien in the district court of the county where the land is situated for the purpose of having such forfeiture declared. * * * The heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer, and clerk of the county where such lands lie, and such lands shall become subject to the law, and shall be disposed of as other lands belonging to the state; Provided, the expense of the appraisement shall be deducted from the appraised value of the land." (Emphasis supplied.)

On the face of this statute, as revised in 1943, compensation does not appear to have been authorized by the Legislature when escheat occurs pursuant to the operation of sections 76-401 and 76-402, R. R. S. 1943. However, the 1889 Session Laws show that the statutory scheme as then enacted does provide for compensation when escheat occurs pursuant to sections 76-401 and 76-402, R. R. S. 1943, and this revision was never intentionally altered by the Legislature. The report of the Statute Commission in 1943 deleted the phrase "this article" which appeared in the 1941 counterpart of section 76-408 (C. S. 1941, § 76-503) and substituted "sections 76-403, 76-405, and 76-411," even though the "article" included what is now sections 76-401 and 76-402, R. R. S. 1943. The notes indicate that this change was made in the interests of "definiteness". See notes in the Report of the Statute Commission, Vol. III, Part X.

The Statute Commission appears to have inadvertently narrowed the scope of the right to compensation as provided in section 76-408, R. R. S. 1943, when it made the aforementioned substitution. But the original meaning of the act was never changed. Section 49-609, R. R. S. 1943, provides: "All acts of a general nature, as revised and reported to the fifth-sixth session of the

Legislature by the 1943 Statute Commission, shall be construed, as soon as such report is approved and adopted by the Legislature, as a *continuation of* such laws and *not as new enactments.*" (Emphasis supplied.) As this court stated in Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558 (1942), discussing the effect of the work of the 1913 Statute Revision Commission: " 'A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the *intent to make such change is clear and unmistakable.* * * * *No presumption arises* from changes of this character that the revisers or the legislature in adopting the revision *intended to change the existing law;* but the presumption is to the *contrary,* unless an intent to change it clearly appears.' 59 C. J. 894." (Emphasis supplied.) Hoctor v. State, *supra,* was quoted with approval in Stephenson School Supply Co. v. County of Lancaster, 172 Neb. 453, 110 N. W. 2d 41 (1961). See, also, Semrad v. Semrad, 170 Neb. 911, 104 N. W. 2d 338 (1960). Nowhere is there an intent manifested by the Legislature to deny nonresident aliens entitlement to the just compensation that was accorded them in 1889.

We therefore hold that under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, legal title to the lands involved herein escheats to the State of Nebraska, and that the heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska the full value thereof, in the manner provided in section 76-408, R. R. S. 1943. In the light of our construction of the statutes and our holding herein, it becomes unnecessary to decide any further issues raised in the briefs and the argument of counsel.

The judgment of the District Court is reversed and

the cause is remanded to the District Court for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. THOMAS RALLS, APPELLANT.
223 N. W. 2d 432

Filed November 21, 1974. No. 39459.

1. **Instructions.** All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
2. **Homicide: Evidence: Criminal Law.** In a homicide prosecution, where self-defense is in issue, proof that the deceased was a person of fierce and violent disposition must ordinarily be made by evidence of the general reputation of the deceased and not by evidence of specific acts on his part.
3. **Sentences: Criminal Law.** Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal.

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

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

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

MCCOWN, J.

The defendant was tried on a charge of first degree murder. The jury found him guilty of the crime of manslaughter. He was sentenced to a term of 3 to 8 years imprisonment to run consecutively to a sentence the defendant was then serving.

On April 19, 1973, the defendant was admitted to the Nebraska Penal and Correctional Complex to serve a

sentence for robbery. Shortly after his arrival, the defendant looked out a window and saw inmate Irvin Cooper standing outside the east cellhouse. The defendant had known Cooper as a prison inmate while they were both incarcerated. The acquaintance extended over a period of time going back to 1969. Over that period of time, Cooper had assaulted and threatened the defendant on several occasions. In 1969 Cooper had struck the defendant, and on two other occasions had pulled a knife on him. On one occasion, Cooper made a forcible sexual assault on the defendant. In September or October of 1972, Cooper had tried to poison the defendant. In November or December of 1972, Cooper had threatened to cut the defendant's head off, and also told the defendant that they could not live together in the same environment. After seeing Cooper in the prison courtyard, the defendant then retrieved a knife he had previously hidden in the penal complex, and concealed it on his person.

On the next day, April 20, 1973, the defendant was in the R. D. C. unit, an orientation center for new inmates. The defendant had met another inmate, Victor Leading Horse, at breakfast earlier. Later the defendant and Leading Horse went into the smoke room to talk. They had been seated on a bench in the smoke room for some 2 or 3 minutes when Cooper walked in. Two other inmates, Boston and Barker, accompanied Cooper but remained at the door of the smoke room. Cooper told the defendant to check into solitary because he had warned the defendant that the two could not live together. Cooper then slapped and hit the defendant, causing his head to hit the wall. The defendant and Leading Horse testified that it then appeared that Cooper was reaching for something at his side, and the defendant testified that Cooper always carried a knife. At this point the defendant pulled the knife which he had obtained the day before and stabbed Cooper as the defendant got up from the bench on which he was sitting.

The defendant then grabbed Cooper's right arm and continued to stab him. Cooper backed out of the smoke room in a crouched position, trying to get away from the defendant, who was stabbing him. Cooper did not have a knife in his hands. A guard halted the attack in the hall outside the smoke room. Cooper died a short time later. The medical witness testified that Cooper had five major stab wounds and that the cause of death was a massive blood loss from two of those wounds.

The defendant's major complaint is directed at instruction No. 10 which deals with self-defense. That instruction extends over two pages and includes the self-defense instruction at NJI No. 14.33, together with several paragraphs extracted almost verbatim from the statutory provisions on self-defense in sections 28-833 through 28-836, R. S. Supp., 1972. As a whole the instruction thoroughly and adequately covers the area of self-defense as encompassed by the evidence in this case. The defendant's objections are directed solely at the fourth of ten paragraphs of instruction No. 10. That paragraph states: "Conduct which the defendant believes to be necessary to avoid harm or evil to himself is justifiable if the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." The language comes word-for-word from section 28-834, R. S. Supp., 1972.

Section 28-834, R. S. Supp., 1972, is generally not applicable when other sections of the self-defense statutes provide exceptions or defenses dealing with the specific situation involved. It was, therefore unnecessary here to give paragraph No. 4 of the instruction. Nevertheless, when considered with the instruction of which it was a part, and all that was said in that instruction on the subject of self-defense, it could not have misled the jury under the facts involved here. All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

State v. Jackson, 186 Neb. 22, 180 N. W. 2d 134; State v. Roan Eagle, 182 Neb. 535, 156 N. W. 2d 131.

The defendant also contends that the trial court improperly excluded testimony of certain witnesses offered to prove specific acts of violence upon the defendant by the victim. The defendant here was allowed to testify personally as to previous contacts with Cooper, and extensive testimony as to each assault by Cooper against the defendant was received. In addition, a number of witnesses were allowed to testify as to Cooper's reputation for violence. The defendant's contention in this regard is directly answered in State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422. In that case, in a prosecution for homicide, evidence was offered to prove that the deceased was a person of ferocity and violent disposition so as to make out a case of self-defense. This court said: "Such proof must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opinions of witnesses as to his disposition based on their own observations."

In the case before us, the defendant was permitted to testify as to all the specific assaults and acts of the deceased which involved the defendant and that testimony was uncontradicted. The testimony of other witnesses as to the same specific acts would have been merely corroborative in any event.

Defendant's final contention is that the sentence was excessive. A review of the presentence investigation report discloses an extensive record of felony convictions and the evidence here overwhelmingly establishes that there is no merit to the claim that the sentence was excessive. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. See State v. Sheets, 191 Neb. 153, 214 N. W. 2d 379.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

CLINTON, J., concurring.

I concur in the opinion of McCown, J. However, I believe a further comment with reference to the language of section 28-834, R. S. Supp., 1972, which constituted the fourth paragraph of instruction No. 10, is required. Such language is totally inappropriate for incorporation in a jury instruction. That language is so abstruse that, if it means anything at all, the meaning is not susceptible of ready understanding. It is at best an abstract statement of policy that could not be helpful to a jury in any determination it must make. I cannot imagine any circumstances under which it should be incorporated in a jury instruction.

STATE OF NEBRASKA, APPELLEE, V. ANTONIO ALMIO LARAVIE, APPELLANT.
223 N. W. 2d 435

Filed November 21, 1974. No. 39508.

Homicide: Sentences: Criminal Law. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Judgment of conviction affirmed, and cause remanded for resentencing.

Leo M. Williams, for appellant.

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

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

MCCOWN, J.

The defendant was charged with first degree murder

and pleaded guilty to a reduced charge of second degree murder. The District Court sentenced the defendant to imprisonment for an indeterminate term of not less than 35 years nor more than life.

The statement of facts is summarized from evidence and testimony received at the sentencing hearing. The defendant, Antonio Almio Laravie, was born April 16, 1958; was married November 15, 1972; and is the father of a child born December 27, 1972. On August 17, 1973, beginning at about noon, the defendant, along with various friends and relatives, began a drinking bout which proceeded from bar to bar and residence to residence until approximately 4 a.m. on the morning of August 18, 1973. By then there were four persons still present at the residence of Edward Taylor in Niobrara, Nebraska. The defendant left the Taylor residence, alone and on foot, purportedly to make a telephone call at a public telephone some 6 blocks away. The defendant then entered the house of Mr. and Mrs. Chad Wilson, located about 1½ blocks from the Taylor residence. He gained access through a hooked screen door, and picked up a knife in the kitchen. He went into a bedroom. In the bedroom, the Wilson's 2 ½-year-old child woke up and made a noise. The defendant put his hand over the child's mouth and stabbed him twice in the chest. The autopsy report shows that death was the result of one of the wounds in the chest, and that death occurred virtually instantaneously.

The court, in passing sentence, found that the defendant was a particularly dangerous offender, and that confinement for a minimum term was necessary in order to protect the public from further criminal activities by the defendant.

The sole thrust of the appeal is that the trial court was without authority to impose an indeterminate sentence in this case and that the sentence is therefore erroneous.

Section 83-1,105, R. S. Supp., 1972, provides: "Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may:

"(1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law;

"(2) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law; or * * *."

This statute currently governs the imposition of an indeterminate sentence in Nebraska. In State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, this court held that subsection (1) of section 83-1,105, R. S. Supp., 1972, is not applicable in cases where the maximum sentence fixed by law is a life sentence. This court said: "There is no way to determine the true length of a life sentence. Even taking into account such matters as age, health, and life expectancies, no true measurement can be arrived at. Since the length in years of a life sentence is impossible to determine, so too is it impossible to determine what one-third of such a sentence should be in terms of years. We can only conclude that this section was not legislatively designed to apply in cases of this type." That holding was reaffirmed in State v. Russ, 190 Neb. 130, 206 N. W. 2d 561.

Historically Nebraska statutes which have authorized indeterminate sentences in the past have not extended to the crime of murder. If the current statute does not apply to second degree murder where the maximum penalty authorized by law is life imprisonment, then there is no statute which authorizes an indeterminate

sentence in such cases. The general rule is that an indeterminate sentence is insufficient and invalid unless authorized by statute. That general rule rests upon the proposition that indeterminate sentences were not authorized at common law and may not be pronounced without specific legislative sanction. See, 24B C. J. S., Criminal Law, § 1993a, p. 615; Commonwealth ex rel. Webb v. Cain, 158 Pa. Super. 222, 44 A. 2d 606. Quite clearly, Nebraska has followed that rule. Strong v. State, 106 Neb. 339, 183 N. W. 559, involved an indeterminate sentence of 3 to 20 years for rape. This court remanded the cause with directions to the trial court to impose a sentence of a definite term because rape was excepted from the provisions of the indeterminate sentence statute then in effect. See, also, Larson v. State, 125 Neb. 789, 252 N. W. 195; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Edmonds v. State, 163 Neb. 323, 79 N. W. 2d 453.

Since subsection (1) of section 83-1,105, R. S. Supp., 1972, the indeterminate sentence law, does not apply to a sentence for second degree murder, the defendant must be sentenced under the provisions of section 28-402, R. R. S. 1943. That section provides that upon a conviction for second degree murder, the guilty person "shall be imprisoned in the Nebraska Penal and Correctional Complex not less than ten years, *or* during life." (Emphasis ours.) Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

The conviction here is affirmed, and the cause remanded to the trial court for resentencing.

JUDGMENT OF CONVICTION AFFIRMED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. CAMPBELL, APPELLANT.

223 N. W. 2d 662

Filed November 27, 1974. No. 39495.

1. **Criminal Law: Incompetent Persons: Trial.** If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken.
2. ———: ———: ———. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Rollin R. Bailey of Davis, Bailey, Polsky, Huff and Denny, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

This is a post conviction proceeding under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1972, to set aside a conviction for rape. Defendant was charged with having committed the rape on February 14, 1972. On direct appeal his conviction was affirmed. State v. Campbell, 190 Neb. 22, 206 N. W. 2d 53. The grounds alleged in the motion to vacate are: (1) That there was insufficient evidence to warrant conviction; (2) that the defendant was not afforded effective assistance of counsel; (3) that the defendant was incompetent to stand trial; and (4) that the minimum sentence imposed was illegally high. The District Court granted an evidentiary hearing which was held on

February 14, 1974. It there considered all the issues raised, and after the hearing made findings and denied the motion. The defendant appeals. We affirm.

On this appeal it is claimed that the trial court erred in two respects: (1) In failing to find that the conviction was void or voidable because the defendant was at the time of his trial on the rape charge incompetent to stand trial and unable to participate rationally in his defense; and (2) in failing to find that the conviction was void or voidable because the defendant was denied effective assistance of counsel at his trial.

The two assignments are related in that the claim of denial of effective assistance of counsel rests upon the contention that counsel was or should have been aware of the defendant's alleged incompetence to stand trial and failed to call the matter to the trial court's attention and to request a hearing on the issue. It follows, therefore, that if a proper consideration of the first issue requires its disposition contrary to the defendant's contention then the second issue is moot.

The defendant's main contention is set forth in his brief in the following language: "The gravamen of defendant's complaint herein is that he was denied his constitutionally guaranteed right to effective assistance of counsel when the public defender failed to inform the trial court of the evidence raising doubt as to the defendant's competency to stand trial and to request a hearing on that issue or to delay the trial until he could fortify himself sufficiently to testify." The defendant cites and relies upon Pate v. Robinson, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815, where the Supreme Court of the United States said: "In view of the difficulty of retrospectively determining the issue of an accused's competence to stand trial (particularly where, as here, the time lapse is over six years), a hearing limited to that issue will not suffice; respondent must therefore be discharged unless the State gives him a

new trial within a reasonable time." We have held: "If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken." State v. Cortez, 191 Neb. 800, 218 N. W. 2d 217. See, also, State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766.

In State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821, we held that: "The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense."

At the evidentiary hearing on the motion to vacate, a record of the testimony of the trial on the rape charge was received. It shows that the defense was alibi. The defendant presented testimony by two witnesses tending to establish that he was not at the scene of the crime when it was committed. He, however, at trial declined to testify in his own behalf to buttress the alibi. At trial in his motion to vacate he alleges, and the evidence establishes, that, when he was called by his own counsel to testify, he arose, took two steps towards the witness stand, and then returned to his own chair and advised his counsel that he did not wish to testify in his own behalf. This incident forms the basis, in part, of the defendant's argument of incompetence to stand trial. He asserts that such conduct in the presence of the jury was devastating to his defense, and that it was the result of his mental state. He argues that this conduct, considered together with his previous history of commitment for emotional problems, made it incumbent upon his counsel to ask for hearing on the question of his competency to stand trial. He does not suggest that there was brought to

the court's attention during trial anything which required the court on its own motion to require such a hearing.

Accordingly we examine the record to determine whether the evidence presented to the trial court upon the evidentiary hearing justified its finding that the defendant was competent to stand trial and that counsel was not ineffective, in the constitutional sense, in failing to suggest a hearing on the issue.

The record shows that the defendant had, previous to the occurrence of the rape of which he was convicted, been twice involuntarily committed to the Lincoln Regional Center for observation. These two commitments grew respectively out of harassing phone calls to a female and threats or attempts to commit rape. At the time of his discharge from the first confinement the clinical summary stated in part: "During the 3 months of observation, he had displayed childish behavior with many pranks but no behavior patterns or thinking patterns which we could diagnose as those of psychosis." On the second occasion the diagnosis on admission was "Dyssocial Behavior." The diagnosis on discharge was "Schizoid Personality." The recommendation at that time was: "It is felt that this boy would benefit by out-patient follow-up with medication and an honest attempt to improve his outlook on life and re-establish his impulse control." The defendant's attorney was aware of these previous commitments and prior to trial requested a psychiatric evaluation. This was done. The psychiatrist also had defendant examined by a psychologist. The psychiatric report stated: "My diagnosis of Mr Campbell is Schizophrenia, latent type. He appears to have very little ability to get along with people or in society. He withdraws and seems unable to control his impulses for even moderate stress. I feel that he is in contact with reality at this time and is able to understand the charges against him; however,

he does not seem to realize the benefit to be derived from cooperating with counsel in his defense. There are no instances of acute psychotic episodes in his history to me; however, in my opinion I feel that he could be pushed into these with even moderate to mild stress. I feel that both Mr Campbell and society could best be served by his being sent to a hospital for an extended period of treatment." The summary and recommendation of the psychologist was as follows: "The client displays a psychological disorder closely resembling that of an antisocial personality. Through what is viewed as a basic lack of socialization he has failed to develop adequate ego control mechanisms. As a result, his behavior under stress is severely limited and he is likely to respond in an agressive and impulsive fashion. Although such behavior reflects a disorganization of his thought processes and loss of reality contact, he readily recovers once the precipitating stress is removed. This assessment provides no evidence that Mr. Campbell does not understand the nature of the proceedings against him or his position in reference to those proceedings. Further, his psychological functioning should not prevent him from cooperating with his attorney in the preparation of his defense although he may manifest episodes of the type described above during the proceedings. For these reasons, the client appears competent to stand trial."

Defendant's trial counsel was called as a witness at the post conviction hearing. He testified that in his opinion the defendant was at the time of trial competent to stand trial; that he did cooperate in his own defense; that previous to trial he suggested the names of witnesses he claimed would establish his alibi; he suggested the victim's identification of him be tested by means of a lineup and this was done; and at trial the defendant noted discrepancies in the testimony of witnesses between that given at the preliminary hearing

and that at trial and suggested questions to be asked. Previous to trial defendant had been informed by his attorney that his own testimony was necessary to his alibi defense and it was understood that the defendant would testify. The refusal to testify which occurred during trial was unexpected by his counsel.

At the time of the refusal to testify a recess was taken. The defendant was interrogated in chambers by the judge as to his wishes. He repeated that he did not want to testify. Nothing occurred there which was evidence of incompetency.

Without much question the failure of the defendant to advise his counsel that he had qualms about testifying and the making of the decision in the manner he did indicated poor judgment, but certainly not incompetence within the principle we enunciated in State v. Klatt, *supra.*

Pate v. Robinson, *supra,* is not applicable because of the vastly different factual circumstances involved. One of the principal distinguishing facts, of course, is that we have here the rather clear-cut evidence of a psychiatrist and a psychologist upon the exact point to be determined. The examinations both took place shortly before trial.

The judgment is affirmed.

AFFIRMED.

JAMES RICHARD DUFFACK, APPELLANT, V. JOHN W. KISSACK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.
223 N. W. 2d 484

Filed November 27, 1974. No. 39500.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and George R. Sornberger, for appellant.

Clarence A. H. Meyer, Attorney General and Steven C. Smith, for appellee.

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

WHITE, C. J.

The driver's license of plaintiff Duffack was revoked by the Department of Motor Vehicles as a result of his refusal, on March 13, 1971, to take a sobriety test under Nebraska's implied consent law, section 39-727.03, R. R. S. 1943, now section 39-669.08, R. R. S. 1943. In this action he seeks to declare void the order of the Department of Motor Vehicles revoking his license. The District Court refused to do so and on appeal we affirm the judgment of the District Court.

The essential facts are as follows: On March 13, 1971, Duffack was driving in Omaha, Nebraska, and was stopped by a police officer who secured his driver's license and told him to wait in his car. Duffack got out of his car and approached the cruiser. The officer told Duffack to sit in his car until he gave Duffack his driver's license back. Duffack refused to return to his car and a scuffle between the officer and Duffack ensued. The officer placed him under arrest for driving while intoxicated and placed him in the cruiser. He was taken to the police station and refused to take any of the sobriety tests offered, and the evidence shows that the statutory procedure was properly followed in requesting him to do so.

Subsection (2) of the applicable statute, section 39-669 .08, R. R. S. 1943, requires that the arresting officer must have reasonable grounds for believing the driver to be intoxicated before his arrest. Duffack assigns as error that the evidence was insufficient to support such a determination by the officer. The officer testified that Duffack's car was weaving considerably back and forth and that several times he went up on the curb; that

during their scuffle or altercation Duffack himself was weaving and having a hard time standing up; that Duffack's speech was blurred and "thick-tongued"; and that there was a strong odor of alcohol on his breath at that time. There is other evidence as to his language and attitude that we need not repeat here. The record shows that Duffack admitted at the time of the trial most of the testimony of the officer in this respect. The contention that there was insufficient evidence to arrest the plaintiff is without merit.

The next contention is the evidence was insufficient to support a determination that his refusal to submit to a chemical test of his body fluids was unreasonable. Duffack contends that his refusal was reasonable because his antipathy to the arresting officer and the other circumstances was the result of his upset emotional state due to his pending divorce. Such a contention, of course, if accepted would emasculate the purpose and the enforcement of the statute by the simple expedient of testifying to some subjective, emotional stress or problem as an explanation and an excuse for the conduct and the erratic driving of a vehicle as evidenced in this record. Under the implied consent law, by its express terms, an operator of a motor vehicle is deemed to have consented to submit to a sobriety test if he operates a vehicle on the public highway, and is arrested for driving while intoxicated, upon reasonable grounds. The plaintiff himself voluntarily made the judgment that it was reasonable for him to drive on the public highways in the emotional condition he claims he was in. That being true, it must necessarily follow that he made a reasonable judgment, in spite of his emotional condition, to consent to all the necessary conditions and requirements that the law provides for driving upon a public highway. The plaintiff would have us believe he was entitled to drive upon the highway in an emotional condition that would, at the same

time, excuse him from complying with the implied consent law. Such a contention on its face is unreasonable.

The judgment of the District Court in refusing to void the order of the Department of Motor Vehicles revoking the plaintiff's license is correct and is affirmed.

AFFIRMED.

JOHN THOMAS HEFFERNAN, APPELLANT, V. JOHN W. KISSACK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

223 N. W. 2d 486

Filed November 27, 1974. No. 39502.

1. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles.** A single request to submit to a test is sufficient under the implied consent law.
2. **Trial: Evidence.** In the absence of a showing of diligence, it is not an abuse of discretion to refuse a continuance for the purpose of obtaining additional evidence.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and George R. Sornberger, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

BOSLAUGH, J.

The plaintiff appeals from a judgment of the District Court dismissing his appeal from an order of the Director of the Department of Motor Vehicles revoking his driver's license under the implied consent law.

A verbatim record of the evidence before the District Court was not preserved. However, the record shows the plaintiff was arrested for operating a motor vehicle while under the influence of intoxicating liquor at the

scene of a property damage accident on July 11, 1971. The arresting officer's report, submitted pursuant to section 39-727.08, R. R. S. 1943, shows the plaintiff's clothes were disarranged, he needed support to walk, he could not understand speech, and he had a very strong smell of alcoholic beverage on his breath. When asked to submit to a chemical test as required by statute, the plaintiff stated he would "pass all tests that was available." Upon being asked to repeat his answer, the plaintiff stated, "I'm not taking any kind of tests."

The statute provided that if the person arrested refuses to submit to the test it shall not be given. § 39-727.08, R. R. S. 1943. A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test. See Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906. The procedure followed in this case satisfied the requirements of the statute.

The driver's license of plaintiff and his operating privileges were revoked by the director on October 13, 1971. The trial in the District Court originally set for January 29, 1974, was continued to February 20, 1974. On that date the plaintiff orally moved for a continuance to obtain evidence concerning the license of the operator of the breathalyzer machine. There was no showing of diligence. The denial of the continuance was not an abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES REDWINE, APPELLANT.
223 N. W. 2d 488

Filed November 27, 1974. No. 39515.

1. **Criminal Law: Words and Phrases.** When an offense is not designated by the statute creating it as either a felony or a

misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute.

2. **Criminal Law: Sentences: Work Release.** A person convicted of a felony and sentenced to imprisonment in a city or county jail is not eligible to receive work release privileges under section 47-401, R. R. S. 1943.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Michael J. Swanson, for appellant.

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

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

BOSLAUGH, J.

The defendant was sentenced to 3 months imprisonment in the city jail upon a plea of guilty to unlawful possession of amphetamines. After he had been sentenced, the defendant made application for work release privileges. His application was overruled and he has appealed.

Work release privileges may be granted to persons sentenced to a city or county jail upon conviction for a misdemeanor or nonpayment of any fine or forfeiture. § 47-401, R. R. S. 1943.

The penalty prescribed for unlawful possession of amphetamines is imprisonment for 1 to 2 years in the Nebraska Penal and Correctional Complex, or a fine of not more than $500, or imprisonment in the county jail for not more than 6 months, or both a fine and imprisonment. §§ 28-4,117, 28-4,125(3), R. S. Supp., 1972.

When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. § 29-102, R. R. S. 1943; Case v. State, 177 Neb. 774, 131 N. W. 2d 191;

Carr v. State, 152 Neb. 248, 40 N. W. 2d 677; Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Bright v. State, 125 Neb. 817, 252 N. W. 386. Thus, possession of amphetamines is a felony because it *may* be punished by imprisonment in the Nebraska Penal and Correctional Complex.

Gandy v. State, 10 Neb. 243, 4 N. W. 1019, cited by the defendant, involved an interpretation of federal law. The Nebraska statutes are controlling here. The defendant was not eligible to receive work release privileges because he had been convicted of a felony.

The application was properly overruled. The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL LEEK, APPELLANT.
223 N. W. 2d 489

Filed November 27, 1974. No. 39549.

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

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

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

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

NEWTON, J.

The defendant Michael Leek pled guilty to a charge of assault with intent to inflict a great bodily injury and was sentenced to serve 4 to 6 years in the Nebraska Penal and Correctional Complex. He asserts the sentence was excessive.

Defendant was 22 years of age. He had previously

been committed to Rancho San Antonio Boy's School and had several escapes. He has in the past been arrested for drinking, possession of marijuana, narcotic addiction, aggravated assault, robbery, and attempted murder. He was sentenced to 1 year on the robbery charge and was placed on probation in September 1972, for 5 years. In March 1973, he was sentenced to 1 year for attempted burglary.

The sentence was well within that provided by statute; the charge had been reduced under a plea bargain from assault with intent to kill. In view of this young man's previous record, we do not find any abuse of discretion on the part of the District Court.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CONROY F. FRANS, APPELLANT.
223 N. W. 2d 490

Filed November 27, 1974. No. 39559.

Criminal Law: Probation and Parole. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion.

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

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

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

MCCOWN, J.

The defendant, Conroy F. Frans, pleaded guilty to third-offense drunken driving. He was sentenced to imprisonment for 1 year and revocation of his driver's license.

The sole contention on appeal is that the sentence is excessive and that the defendant should have been placed on probation.

The penalty for third or subsequent offense drunken driving is not less than 1 year nor more than 3 years imprisonment and license revocation. See § 39-669.07 (3), R. R. S. 1943. The sentence here is the statutory minimum, in the absence of probation.

A number of witnesses testified on behalf of the defendant at hearings as to the sentence. That testimony indicated that the 62-year-old defendant was in poor health, had joined Alcoholics Anonymous, and had apparently quit drinking. Most of the witnesses indicated their belief that he was a fit subject for probation.

The presentence investigation report shows that the defendant had been convicted of drunken driving on eight occasions over a period of years dating from 1938. The third-offense drunken driving conviction for which he was sentenced here was his third third-offense conviction. In 1959, he had been placed on 3 years probation. In 1964, he had been placed on 3 years probation, and in 1971, he had been convicted of drunken driving and received a $25 fine. The record of the defendant speaks far more clearly than all the witnesses on his behalf.

In many cases a sentence of probation is more likely to be effective than is a sentence of imprisonment, but where repeated probation has been tried and failed, the trial court is ordinarily in a better position to weigh the probable effectiveness of one more chance for probation than is this court. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion. State v. Dovel, 189 Neb. 173, 201 N. W. 2d 820. We cannot say that the trial court abused its discretion here.

AFFIRMED.

ERNEST C. SIEFFORD AND JOHN C. BEALL, DOING BUSINESS AS BEALL-SIEFFORD CONSTRUCTION COMPANY, APPELLANTS, V. HOUSING AUTHORITY OF THE CITY OF HUMBOLDT, HUMBOLDT, NEBRASKA, ET AL., APPELLEES.
223 N. W. 2d 816

Filed December 5, 1974. No. 39382.

1. **Contracts: Damages.** A contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where there is a breach of contract by the owner or the other party, and the breach of contract results in delay in the work of the contractor and the delay in the work causes damage to him, he has a right of recovery in the absence of a "no-damage clause" or other provisions to the contrary in the contract and even though the contract contains a provision for the extension of time.
2. ———: ———. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract.
3. **Contracts: Damages: Evidence.** Damages for breach of contract which are susceptible of definite proof are recoverable only to the extent that the evidence affords a basis of ascertaining their amount in money with reasonable certainty.
4. **Trial: Evidence.** Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
5. **Trial: Evidence: Witnesses.** Triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.
6. **Trial: Judgments.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Allen L. Overcash of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellants.

Otto Kotouc, Jr., John Kotouc, William L. Walker, and Earl Ludlam, for appellees.

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

BRODKEY, J.

This case involves a contract for the construction of a housing project at Humboldt, Nebraska, entered into between the appellant, Beall-Siefford Construction Company a joint venture consisting of John C. Beall and Ernest C. Siefford, hereinafter referred to as Contractor, and the appellee, Housing Authority of the City of Humboldt, Nebraska, hereinafter referred to as Housing Authority. The Housing Authority opened bids for the project on July 14, 1964. The Contractor's bid of $330,288 was low and was approved on August 17, 1964. Notice to proceed on September 8, 1964, was given the Contractor. According to the construction contract between the parties, the Contractor was to complete the dwelling units in 365 calendar days or by September 7, 1965, and the community building 65 days earlier. However, the project was not fully completed and accepted until January 5, 1966, meaning that there was an overrun of time of 162 days for the community building, and 119 days for the dwelling units.

In its amended petition filed on July 10, 1972, the Contractor sets out three causes of action, or, to be more precise, three theories of recovery, against the Housing Authority. The first cause of action is based on the theory of money due under the contract. It alleges the contract price and extras in the amount of $339,462.16, and that Housing Authority has paid $335,832.16 and still owes $3,630, being the amount of liquidated damages witheld by the Housing Authority for delay of the Contractor in performing the contract, and also claims an additional $70,630.21 for additional labor and material plus $2,009.05 for changes in the

contract with respect to maintaining the lawns. In its second cause of action, based on the theory of quantum meruit, Contractor claims the sum of $72,639.26 for additional labor and materials, in addition to the $3,630 previously referred to as due under the written contract. Contractor's third cause of action was a claim of damages for breach of contract based on the theory of "acceleration" as hereinafter discussed. The amount of these damages is again alleged to be $72,639.26, which is claimed in addition to the $3,630 remaining under the original contract. The Housing Authority filed the appropriate responsive pleadings and the pretrial hearing was held upon the matter on June 8, 1973, at which time the issues were limited for purposes of trial and confined to six items, to-wit:

I.	Extra work for painting	$ 1,235.00
II.	Extra work for carpenter	330.00
III.	Extra charges related to change order for overhead and profit	1,080.00
IV.	Extra charges for lawns and plantings	2,009.05
V.	General damages for breach of contract, including $5,000 for attorney's fees	72,895.21
VI.	Liquidated damages by formula described in the contract	3,630.00

The parties also stipulated and agreed that a jury trial of the matter be waived. It was also agreed that to be considered at the trial was Housing Authority's cross-petition for $3,630 for liquidated damages.

Trial to the court of this matter was commenced on July 11, 1973. The court entered its judgment on September 21, 1973, finding that there was due the Contractor from the Housing Authority the sum of $6,874.05, together with interest thereon at the rate of 9 percent per annum, and dismissing the Contractor's causes of action Nos. II and III because of failure to sustain its

burden. The court also dismissed Housing Authority's cross-petition. Following the subsequent overruling of the motion for new trial filed by the Contractor, this appeal was perfected to this court. We affirm.

It is to be noted that the amount of the judgment awarded by the District Court of $6,874.05 is the precise total of Items I, IV, and VI of the court's pretrial order, and thus included a recovery by the Contractor of the liquidated damages previously withheld by the Housing Authority for delay in completion of the work in the amount of $3,630. The principal issue to be considered on this appeal is clearly stated by Contractor in its reply brief filed herein as follows: "As appellants' Statement of the Case pointed out, the *sole question* before this Court on appeal is whether the District Court should not have entered an order allowing appellants damages for breach of contract by reason of appellee refusing to grant appellants a time extension and forcing appellants to unduly accelerate their performance of the construction contract between appellants and appellees." (Emphasis supplied.) Contractor contends that the Housing Authority published for the purpose of bids, and supplied defective plans and specifications; and that after the project started Housing Authority changed the work, which disrupted Contractor's work. The Contractor further claims that the Housing Authority hindered and prevented it from performing its work in a timely manner, but at the same time refused to extend Contractor performance time in spite of its requests for same. Instead, it is alleged, the Housing Authority required Contractor to unduly accelerate its work under threat of default and termination of its work as a result of which the Contractor suffered substantial damages.

In its judgment the trial court made a specific finding that: "The evidence does not support a finding that the Plaintiffs were forced to accelerate their con-

tract performance by reason of the acts, demands, or the requirements of Defendant," and did not allow the damages claimed by the Contractor for the alleged "acceleration."

We first address ourself to an inquiry as to the nature of a cause of action based upon "acceleration" generally, whether there is such a doctrine recognized in the State of Nebraska, and further, whether under the specific facts of this case and the particular provisions of the contract between the parties, the Contractor herein is entitled to recover damages, providing the amount thereof and the proximate cause thereof are properly proved by the evidence herein.

The term "acceleration" is a very general term and certainly cannot be held to encompass reasonable and legal efforts on the part of the owner to induce his contractor, under a construction contract, to increase the pace of construction in order to complete the contract by the completion date agreed upon and set out in the contract between them. This would seem to be particularly true in the case where a contractor was substantially and continually behind his own established and projected schedule under the contract, and where the delay was not caused by a breach of the contract on the part of the owner, or willful hindrance of the contractor's work by the owner.

We have been unable to find any Nebraska cases discussing or applying the doctrine of "acceleration," at least by that name. Contractor points out in its brief, however, that federal authorities have recognized the obligation of the government to compensate construction contractors for undue acceleration of their work, and cites in support thereof the following cases: Continental Consolidated Corp. v. United States, 17 CCF, Par. 81,137 (1972); Electronic & Missile Facilities, Inc., ASBCA No. 9031 (July 23, 1964), 1963 BCA, Par. 4338; Appeal of Mechanical Utilities, Inc., ASBCA Nos. 7345

and 7466 (Oct. 31, 1962), 1962 BCA, Par. 3556. It appears that most of the cases applying and discussing the doctrine of "acceleration" are decisions or opinions of United States government administrative agencies such as Armed Services Board of Contract Appeals or Board of Contract Appeals, or Appeals to the Court of Claims or to the Federal Courts from such administrative agencies. They principally involve intrepretations of standard provisions contained in United States government construction contracts, mainly involving the "changes" clauses in such contracts which provide for: "An equitable adjustment if the changes caused an increase or decrease in the amount due under this contract, or in the time required for its performance." See, United States v. Rice, 317 U. S. 61, 63 S. Ct. 120, 87 L. Ed. 53 (1942); Crook Co. v. United States, 270 U. S. 4, 46 S. Ct. 184, 70 L. Ed. 438 (1926); United States v. Foley Co., 329 U. S. 64, 67 S. Ct. 154, 91 L. Ed. 44 (1946); Chouteau v. United States, 95 U. S. 61, 24 L. Ed. 371 (1877). It is clear from the above cases that the relief involved as a result of actionable "acceleration" in such contracts is limited to "an equitable adjustment," to-wit, an increase or decrease in the amount due under the contract or in the time required for its performance. We note with interest, however, that in Continental Consolidated Corp. v. United States, *supra,* a case cited by Contractor, the contractor was allowed certain damages for "acceleration" under the contract provision involved therein, but the court specifically stated: "Since it has been previously found that the contractor was *on schedule* at the time of the directives, and since there is no proof to show that at some later date appellant fell behind schedule, appellant is entitled to all of the acceleration costs computed by the Board, in the amount of $191,484." (Emphasis supplied.) The inference is clear from the above language that had the contractor not been on schedule, a different result

might well have obtained. In the instant case, the evidence is clear and undisputed that the Contractor was always continuously and substantially behind its own established progress schedule, and the Housing Authority made continuous efforts to impress that fact upon the Contractor.

We now turn to an examination of the status of the Nebraska law on the point under discussion. In its briefs and oral argument in this case, Contractor stresses the point that it is basing its claim for additional damages upon the alleged acts of the Housing Authority which it claims amount to undue "acceleration" of the time of performance of its contract, and not upon a claim for "delay." It insists that "acceleration" is just the opposite or reverse of "delay." While we can see a distinction between the two terms under certain circumstances, it would seem that in many cases, if not in most cases, the alleged "acceleration" is in fact the result of "delay," or, to put it differently, because of delay caused by or attributable to the owner, a contractor is of necessity forced to compress or speed up the work necessary to be completed before the contract completion date. There is no doubt that in this state delay caused by the owner under a construction contract might well be the basis for an action for damages for such delay on the part of the contractor. In Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767 (1961), we stated: "We believe that the correct rule is that a contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where there is a breach of contract by the owner or the other party, and the breach of contract results in delay in the work of the contractor, and the delay in the work causes damage to the contractor, the contractor has a right of recovery *in the absence of a 'no-damage clause' or other provision to the contrary in the contract and even though*

the contract contains a provision for extension of time." (Emphasis supplied.) In Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211 (1966), this court again held that a contractor who is damaged as a result of delay in the performance of the work which is caused by a breach of contract by the other party may recover his damages *in the absence of an express provision in the contract exempting the other party from liability.* The court cited as authority for its ruling Roberts Constr. Co. v. State, *supra.*

In In re Appeal of Roadmix Constr. Corp., 143 Neb. 425, 9 N. W. 2d 741 (1943), we stated: "Generally, a contract between individuals and the state for construction of highways, and all other public improvements which the state is authorized to make, should be construed and liabilities determined by the same rule as governs contracts between individuals." We believe the same rule should be applied to the contract between the Contractor and the Housing Authority in this case; and we shall, therefore, at this point, review some of the more pertinent and important contract provisions contained in the contract between the parties.

The original signed contract between the parties was not introduced in evidence but the form of such contract with the applicable general and special conditions thereto is in evidence as exhibit 1, being attached to the "Form of Invitation for Bids." We shall assume a form of contract shown in exhibit 1 was duly and legally executed and at all times in full force and effect. Section 3a of General Conditions provides as follows: "Except as otherwise specifically stated in the Contract, the Contractor shall provide and pay for all materials, labor, tools, * * * and all other services and facilities of every nature whatsoever necessary to execute the work to be done under the Contract *and deliver it complete in every respect within the specified time.*" (Emphasis supplied.) Section 8c provides:

"Upon the approval of the breakdown, the Contractor shall, without delay, submit for approval in like manner a carefully considered Progress Schedule, prepared in accordance with a specimen form and instructions supplied by the Local Authority showing the proposed dates of starting and completing each of the various branches of the work, * * *." Section 10 entitled "Changes in the Work" provides that the local authority may make changes in the work by alterations, additions, omissions, etc., and that all such work shall be executed under the conditions of the original contract. Subsection c of Section 10 provides: "Except in an emergency endangering life or property, no change shall be made by the Contractor unless he has received a prior written order from the Local Authority countersigned by the Architect and approved on its face by the PHA, authorizing the change, and no claim for an adjustment of the Contract price or time shall be valid unless so ordered." Section 10h of General Conditions provides: "Subject to the provisions of Sections 11 and 13 of the General Conditions justifiable extensions of contract time because of changes or extra work, authorized by proper written order, *may* be granted by the Local Authority which order shall be approved on its face by the PHA." (Emphasis supplied.) Section 11 of General Conditions is entitled "Claims for Extra Cost" and subsection a thereof provides that if the Contractor claims that any instructions by drawings or otherwise involve extra costs or extensions of time, he shall, within 10 days after receipt of such instructions, and in any event before proceeding to execute the work, submit his protests thereto in writing to the local authority stating clearly and in detail the basis of his objections and further providing that no such claim shall be valid unless so made. Section 11d also provides that if on the basis of the available evidence the local authority determines that an

adjustment of the contract price or time is justifiable, the procedure shall then be as provided for in "Changes in the Work." Section 12 of General Conditions is entitled "Right of Local Authority to Terminate Contract" and provides: "If the Contractor should be adjudged a bankrupt * * *, or if he should persistently or repeatedly refuse or fail to supply enough properly skilled workmen or proper materials, * * * or fail to observe or perform the provisions of the Contract, * * * then the Local Authority may, by at least five days prior written notice to the Contractor, without prejudice to any other rights or remedies to the Local Authority, terminate the Contractor's right to proceed with the work. * * *." Section 13a of General Conditions entitled "Delays — Damages" provides generally that if the Contractor refuses or fails to prosecute the work with such diligence as will insure its completion within the time specified in the special conditions or any extension thereof or fails to complete said work within such time the local authority may by written notice to the Contractor terminate his right to proceed with the work or such part of the work as to which there has been delay, and specifically provides: "Until such time as the Local Authority terminates the right of the Contractor to proceed, the Contractor shall continue the work, and the Contractor shall pay to the Local Authority as fixed, agreed, any liquidated damages (it being impossible to determine the actual damages occasioned by the delay) for each calendar day of delay, until the work is completed, or accepted or until such time as the Contractor's right to proceed shall be terminated, the amount as set forth in the Special Conditions, and the Contractor and his sureties shall be liable for the amount thereof. In the event the Local Authority shall at any time subsequent to the date of completion, as established in the Contract or any amendment thereto, terminate the Contractor's

right to proceed, such termination shall not relieve the Contractor of the payment of the liquidated damages which have accrued from the completion date as established in the Contract, up to and including the date of the termination of the Contractor's right to proceed; Provided; that *the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages* because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to Acts of God, * * * Acts of the Local Authority, * * * and unusually severe weather * * *, if the Contractor shall within 10 days from the beginning of any such delay (unless the Local Authority, with the approval of the PHA, shall grant a further period of time prior to the date of final settlement of the Contract) notify the *Contracting officer* in writing of the causes of delay, who shall ascertain the facts and the extent of delay, and the Local Authority shall, subject to prior approval of the PHA, extend the time for completing the work when in its judgment the findings of fact of the Contracting Officer justify such an extension, and his findings of fact thereon shall be final and conclusive upon the parties hereto." (Emphasis supplied.) Subsection b of Section 13 of General Conditions further provides: "*No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable.*" (Emphasis supplied.) The contract also contains a part entitled "Special Conditions." Section 3 of Special Conditions is entitled "Liquidated Damages," and sets out the formula for determining the amount of such damages.

The foregoing constitutes a résumé of some of the more important provisions of the voluminous contract

entered into between the parties. We shall examine some of those provisions with the purpose of determining whether under the contract between the parties the Contractor is entitled to maintain an action against the Housing Authority and recover additional damages for the reasons alleged by the Contractor in its petition.

We first consider the provision in the contract that: "No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable." This provision, on its face, would seem to preclude the Contractor from recovering such damages in this case. The Contractor argues, however, that this provision cannot possibly apply to damages for delays caused by or attributable to the acts of the other party to the contract. For the purpose of this discussion we shall assume, but not concede, that the evidence in this case sustains the contentions of the Contractor on these points, but we also point out that the trial court did not so find. An interpretation of a similar contractual provision was involved in the case of Mack v. State of New York, 202 N. Y. S. 344, 122 Misc. 86 (1923). In that case the court stated: "The language of the contracts furnishes a complete answer to claimants' contention. It does not absolve the state from liability for the consequences of *reasonable* delays but of delays or hindrances for any cause. * * * It was evidently for the purpose of eliminating the vexatious question of what delays might be regarded as reasonable and what unreasonable that the risk of all delays was placed by the contracts upon the contractors." In Ericksen v. Edmonds School Dist. No. 15, 13 Wash. 2d 398, 125 P. 2d 275 (1942), the court held that where the contract stated positively that the building contractor should not be entitled to damages on account

of delays from any cause and stated that, if delays were occasioned by any act or omission of the owner, additional time for completion of the work should be allowed contractor, if contractor should give written notice, contractor was not entitled to recover from owner for damages sustained because owner allegedly retarded the progress and performance of the work in its proper order and sequence, irrespective of any notice to owner for an extension of time, and further that the provision intended that an extension of time was the contractor's sole remedy for delays encountered in the performance of the contract. Further, in Psaty & Fuhrman, Inc. v. Housing Authority of City of Providence, 76 R. I. 87, 68 A. 2d 32 (1949), the Supreme Court of Rhode Island held that where a "no-damage" clause in contract with housing authority for construction of a housing development provided that contractor should not recover damages because of hindrance or delay from any cause in the progress of the work, whether or not delays were avoidable, the contractor was prohibited from recovering damages for delay caused by arbitrary or unreasonable conduct of the authority, in the absence of any claim of concealment, misrepresentation, or fraud, and could recover only in case of delay or hindrance caused by fraud, bad faith or malicious intent. We are of the opinion that under the above-cited authorities contractor is precluded, by virtue of the contractual provision above recited, from recovering damages for delay caused by the Housing Authority, if any. Nevertheless we shall proceed to consider other provisions of the contract between the parties.

Contractor contends that the refusal of the Housing Authority to grant it certain extensions of time, which it claims it was entitled to under the terms of the contract, because of the redesign of building A-1, and delays occasioned by unusually severe rainfall, amounted

to a breach of the contract on the part of the Housing Authority. Let us examine that contention. To begin with, there are two provisions in the contract dealing with the extension of time. Section 10h, previously cited, provides that subject to the provisions of Sections 11 and 13 of General Conditions justifiable extensions of time because of changes or extra work, authorized by proper written order, *may* be granted by the local authority, which order shall be approved on its face by the PHA. It is obvious from the word "may" that under that section an extension of time is permissive, and not mandatory. However, under Section 13 of General Conditions it is provided: "* * * that the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to * * * Acts of the Local Authority * * * and unusually severe weather * * *, *if* the Contractor shall within 10 days from the beginning of the delay (unless the Local Authority, with the approval of the PHA, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of delay, and the Local Authority shall, subject to prior approval of the PHA, extend the time of completing the work when in its judgment the findings of fact of the Contracting Officer justify such an extension, *and his findings of fact thereon shall be final and conclusive upon the parties hereto.*" (Emphasis supplied.) It is clear that the above provision does not confer a right to damages upon the Contractor, but merely states that the right of the Housing Authority to proceed under the termination clause or the right to charge the Contractor with liquidated damages because of delays shall

not be invoked if, after a hearing before the contracting officer, an extension of time is granted. His findings of fact shall be final and conclusive.

It appears from the record that the Contractor did properly request an extension of 40 days with reference to the change of plans in building A-1, and also that at another time an extension of 21 days was requested because of the construction of a retaining wall not originally contemplated. At the time of the request, the Housing Authority denied the extensions of time, it apparently being its policy to defer such requests until the end of the contract. However, it is clear from exhibit 148, received in evidence during the trial, that a hearing was held before Ivan C. Haith, the contracting officer, to ascertain the causes of delay and that findings of fact were made by him on March 4, 1966, on the various claims of the Contractor. On April 21, 1966, a notification on the assessment of liquidated damages was issued by the Housing Authority, to which was attached the findings of fact by the contracting officer Haith. At that time the Contractor was granted 25 days extension of time because of inclement weather and was assessed $3,630 as liquidated damages under the formula in the contract based upon a delay of 119 days in the completion of the dwelling units and 162 days in the completion of the community building. What Contractor appears to overlook, however, is that the trial court in its judgment in this matter restored to it all the days for which it had been assessed liquidated damages, by restoring the $3,630 previously withheld from it by the Housing Authority as liquidated damages. In effect, therefore, Contractor did receive considerably more time extensions than requested; and, considering the fact that it had received additional monetary compensation by virtue of at least 10 of the 14 change orders involved, and additional amounts claimed for painting, etc., which were included in the

judgment of the trial court, it may well be argued that the trial court in this case did make an "equitable adjustment," even under the rule set forth in the federal cases referred to previously.

There are, however, additional cogent and controlling reasons why Contractor cannot prevail in its appeal. The law is well established that damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318 (1957); Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N. W. 2d 777 (1949). Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent that the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Kroeger v. Franchise Equities, Inc., 190 Neb. 731, 212 N. W. 2d 348 (1973). See, also, Rambo v. Galley, 188 Neb. 692, 199 N. W. 2d 14 (1972). It is clear from the record that Contractor endeavored to prove the amount of damages sustained by the alleged "acceleration" through the expedient of deducting from the amount of its actual labor costs on this project, for which it kept records, the amount of its estimated labor costs upon which it submitted its bid for the contract in question. To this amount it added certain items of overhead and profit. This method of computation of damages would appear to be highly speculative and conjectural. In fact it was specifically disapproved in the case of Continental Consolidated Corp. v. United States, *supra,* a case cited as authority by Contractor. In that case, the Court of Claims, citing the case of F. H. McGraw & Co. v. United States, 130 F. Supp. 394 (1955), stated: "This method of proving damages is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in costs, and *because it assumes plain-*

tiff's bid was accurately computed, which is not always the case, by any means." (Emphasis supplied.)

The only testimony on the issue of proximate cause of the claimed damages came from the members of the joint venture contracting company. John C. Beall testified that the additional amount of damages was the direct and proximate result of the acceleration and that the difference in labor costs in the amount of $49,442 was caused "solely by that order to accelerate." Ernest C. Siefford, who testified by affidavit at the trial, stated in his affidavit: "In my opinion, the sole reason we were behind was the difficulties caused us by the deficiencies in the plans which I have described and the problems resulting from the redesign of building A-1's foundation." We doubt very much if it can be said that any order to accelerate was the sole proximate cause of the additional costs and expenses incurred by the Contractor. The record is replete with evidence that the Contractor was understaffed during the entire course of construction. Daily construction reports of the progress of the project were offered and received in evidence and are too voluminous to set out in full; but they reveal, in graphic language, the shortage of labor, particularly of carpenters and plumbers, on the project. There is also evidence contained in letters between the parties and minutes of the meetings held by the Housing Authority. The following examples are typical: In a letter from the architects to the contracting officer under date of October 29, 1964, it is stated: "The work crew up until now seems inadequate for the size of this project. The contractor has had in his employ the average of 4 carpenters, 2 bricklayers and 3 laborers. In the mechanical division he has had no more than 2 plumbers working and they are holding up the project at this time." The minutes of the meeting of the Housing Authority on December 2, 1964, contain the following statement: "Mr. Vrana gave the

reason for the slow progress as the Contractor not having enough work crew which resulted in a deficiency in the progress and 'No good Job Management' by the Contractor." Daily construction report for November 24, 1964, states: "Up until today they have only had two carpenters and two laborers framing and this is not enough. Progress in this department has been very slow. Up to today they have only partially framed one roof on bldg A 4 and have only the stud walls up on bldg A 1. The progress is ridiculous." The report for February 9, 1965, states: "Today the plumbers added one more man. So now there are 4 plumbers, but they are not first class plumbers, I would say it is more like one plumber and three helpers." The daily construction report for April 20, 1965, states: "If this job was going any slower it would be standing still, they don't have any help that can do the work properly, for instance, Bldg A 1, could have been started long ago but they don't seem to have enough help to get at it.? Concrete is going to be poured in the west half of A 2 tomorrow. I hope." The report of August 24, 1965, states: "The plumbers left about 3:30 PM today? The painters do not get to work until about 8:45 Am in the morn. There are only three painters working and we should have about a dozen working on a job of this size." The report of October 22, 1965, states: "It is a shame such a beautiful day yesterday and to day and the side walk forms are ready and the walks could be poured on the North side of A 2 and between A 2 and A 3 but they do not have enough manpower hired to do the work." Report of October 25, 1965, states: "To day was a very nice day and a lot of yard work could be done but no more help was here, in fact we have one less carpenter working as Russ has gone to California."

The trial court had all this evidence and much more before it and could very well have found that the cause

of the damages claimed by the Contractor was not any acceleration illegally required by the Housing Authority, but was, in fact, the result of the failure of the Contractor to maintain an adequate work force, as required by the contract. The law is well established that evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Triers of fact have the right to test the credibility of witnesses by their self-interests and weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115 (1973); Batterman v. Richardson, 189 Neb. 303, 202 N. W. 2d 613 (1972). We think it is clear from the record that the Contractor failed in its proof of the amount of damages claimed by it and also failed to prove that such damages were the proximate result of any acceleration attributable to the Housing Authority.

We have held that where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. First Nat. Bank of Omaha v. First Cadco Corp., *supra*. In this case we do not believe the findings of the trial court were clearly wrong, and we therefore conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, v. RAYMOND L. KILBERG ET AL., APPELLEES.
223 N. W. 2d 665

Filed December 5, 1974. No. 39411.

Highways: Adverse Possession: Easements. To establish a road

or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, and Dale Babcock, Jr., for appellant.

Smith, Smith & Boyd and Norris G. Leamer, for appellees.

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

MCCOWN, J.

The State of Nebraska, Department of Roads, commenced this injunction proceeding to enjoin the defendants from encroaching upon a certain strip of land allegedly held by the State for public highway right-of-way purposes, and to require the defendants to remove fencing, a sign, and any other property from the disputed strip. The District Court found generally in favor of the defendants, and that the evidence was insufficient to establish plaintiff's right to the disputed strip, and dismissed plaintiff's petition.

The strip of land involved in this controversy is located on the north side of U. S. Highway No. 20 in Section 29, Township 29 North, Range 9 East of the 6th P.M., Dakota County, Nebraska. The defendants' claims stem from a warranty deed dated November 23, 1965, from Philip F. Verzani. The deed conveyed the west 22 rods of the northeast quarter of the northeast quarter of Section 29, Township 29 North, Range 9 East of the 6th P.M., Dakota, County, Nebraska "subject to right-of-way of U. S. Highway 20 which occupies the south

33 feet of this tract." U. S. Highway No. 20 runs generally east and west at this point. The right-of-way is 66 feet wide, 33 feet on either side of the centerline. As it crosses the portion of Section 29 immediately south of the defendant's property, U. S. Highway No. 20 is angling slightly to the south. At a point immediately south of the east line of defendant's property, the centerline of U. S. Highway No. 20 is approximately 64 feet south of the south line of the northeast quarter of the northeast quarter. Twenty-two rods to the west, at a point south of the west line of defendant's property, the centerline of U. S. Highway No. 20 is approximately 72 feet south of the south line of the northeast quarter of the northeast quarter. The south line of the northeast quarter of the northeast quarter is referred to as the 16th section line in some of the testimony.

The defendants and their predecessors in title, for a period of over 40 years, treated a fence along the north line of the right-of-way actually occupied by U. S. Highway No. 20 as the south boundary of defendant's property. Shortly after the defendants took possession of the property, they tore out the old fence and put in a chain link fence, but the new fence was set back 15 feet to the north to allow for planting trees and shrubbery in the future.

The State contends that a right-of-way for a prior road known as the old Island Road had formerly been located on the 16th section line, but at sometime prior to 1925 the location of the road was changed and moved to the south to the present location of U. S. Highway No. 20. The State introduced in evidence a plat from an old plat book dated approximately 1895 which showed the Island Road on the 16th section line between the northeast quarter of the northeast quarter and the southeast quarter of the northeast quarter. The plat book was not a part of the official records of the county clerk's office. The county clerk testified that all the official records known as road records were in his pos-

session and that there is nothing in the indexing of these volumes that makes reference to that Island Road. The State failed to introduce any evidence of any official action establishing the Island Road, either by consent or by resolution. The State conceded on oral argument that a road on the 16th section line involved here could only be a road by prescription. A number of witnesses who were familiar with both the old Island Road and U. S. Highway No. 20 testified. All but one of these witnesses agreed that the road or roads had always been in the same location with respect to the defendants' property, and that to the best of their recollection, the old road had never been located to the north on the 16th section line. Only one witness indicated that he thought the location of the road had been moved to the south at sometime before the road was graveled or paved, but he conceded that he could not tell how it could have been moved. The evidence is uncontradicted that since 1925 the centerline of that portion of the right-of-way of U. S. Highway No. 20 here involved has remained unchanged in its present location.

The District Court found that the evidence was insufficient to establish any right-of-way on the south boundary line of the northeast quarter of the northeast quarter of Section 29 as alleged by the State, and that the right-of-way held by the State is limited to 33 feet on either side of the centerline of U. S. Highway No. 20, and dismissed plaintiff's petition.

In its brief the State advances a number of theories and rules of law to support its contentions here. All of them rest upon the assumption that a road was established by prescriptive use at sometime in the past, and that it was located for at least 10 years on the south boundary line of the northeast quarter of the northeast quarter of Section 29. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use

must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Dunnick v. Stockgrowers Bank of Marmouth, 191 Neb. 370, 215 N. W. 2d 93. The record is devoid of evidence of actual use of a road by the public for the necessary prescriptive period except at the location now occupied by U. S. Highway No. 20.

The bill of exceptions here contains 487 pages of testimony and 45 exhibits. That record establishes that various individuals at various times have assumed that the road now known as U. S. Highway No. 20 was located on the south boundary line of the northeast quarter of the northeast quarter of Section 29. The evidence is equally clear that that assumption was and is wrong. The evidence is wholly undisputed that the 66-foot right-of-way of U. S. Highway No. 20 has been actually located entirely on the southeast quarter of the northeast quarter of Section 29 for a period of almost 50 years. The evidence indisputably establishes also that in the area involved here, the centerline of the right-of-way of U. S. Highway No. 20 is located some 64 to 72 feet south of the south line of the northeast quarter of the northeast quarter of Section 29. That highway has been paved for over 40 years.

The record is almost as persuasive that any road which has existed in that location, including the Island Road, has been located in exactly the same place as U. S. Highway No. 20. A conclusion that a road was in fact located on the boundary line between the northeast quarter of the northeast quarter and the southeast quarter of the northeast quarter of Section 29, and used for the requisite prescriptive period, necessarily rests on assumptions of fact which are not only unsupported, but actually contradicted by the record. Like ghosts, assumptions disappear in the light of factual reality.

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

AFFIRMED.

KATHLEEN H. CHESTER, APPELLEE, V. DOUGLAS COUNTY, NEBRASKA, APPELLANT.
223 N. W. 2d 491

Filed December 5, 1974. No. 39457.

1. **Workmen's Compensation: Evidence.** The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony.
2. ———: ———. 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.

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

Donald L. Knowles and Roger R. Holthaus, for appellant.

Steven M. Luttbeg of Eisenstatt, Higgins, Kinnamon & Okun, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. The employer, Douglas County, has appealed from a judgment of the District Court for Douglas County, affirming, with modification, an award of the Workmen's Compensation Court to the plaintiff.

The plaintiff, Kathleen H. Chester, began work as a nurse's aide at the Douglas County Hospital on September 18, 1972. On the morning of September 22, 1972, she went to the dining area to get some fruit juice for one of her patients. She testified that on her way out of the dining area she slipped and fell. There was a clear liquid on the floor in the area where she fell. There were no eyewitnesses to the actual fall, but another employee

who was walking ahead of the plaintiff heard the plaintiff call out and turned to observe her lying on the floor. She also observed that the floor was wet. She called for assistance and, with other employees, helped the plaintiff into a wheelchair. The plaintiff was crying and appeared to be in pain and her legs were twisted under her. The plaintiff was taken to the emergency room where a doctor examined her and found no fractures and prescribed aspirin and rest. The next day the plaintiff stayed at home since she did not feel well enough to work. On September 25, 1972, she reported to work again but after a short time she again experienced back pains and reported to the emergency room. She was referred to her own personal doctor but in his absence, she was treated by a Dr. Pantano, and was admitted to the hospital by Dr. Pantano on September 25, 1972. The following day she was placed in pelvic traction and remained in traction for approximately 2 weeks. Her personal physician then returned. Some 4 or 5 days later, on October 11, 1972, she was released from the hospital. Early in 1973, the plaintiff again returned to work. She worked for a period of 3 weeks but again experienced back pain. She did not return to work for several days, and on February 27, 1973, the hospital terminated her employment because of her absenteeism.

There was no evidence of permanent physical disability. There was medical evidence that plaintiff had either a back sprain or strain or that plaintiff's condition and subjective complaints may have been due to conversion hysteria. There was no objective evidence of any physical injury of a permanent nature.

The one-judge Workmen's Compensation Court entered an award for temporary total disability for an aggregate period of 13 4/7 weeks; and for the payment of specified hospital and medical bills; and also included a penalty of 50 percent of all delinquent installments of compensation for waiting time; plus an attorney's fee.

The three-judge Workmen's Compensation Court af-

firmed that award, plus an additional attorney's fee. On appeal to the District Court, the award of the Workmen's Compensation Court was affirmed with modification by eliminating the penalty for waiting time and attorney's fees.

On appeal to this court the defendant contends that the evidence and findings of fact in the record do not support the judgment. Essentially, the defendant's position is that the evidence is insufficient to prove that plaintiff sustained personal injury from an accident arising out of and in the course of employment, and that subjective symptoms apparent only to the injured person are insufficient to establish a compensable disability.

The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

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., *supra*.

The findings of fact in this case are supported by the record and the judgment of the District Court is affirmed. An attorney's fee of $500 is allowed to plaintiff's attorney for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE NEVELS, APPELLANT.
223 N. W. 2d 668

Filed December 5, 1974. No. 39524.

1. **Criminal Law: Evidence.** In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting

evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.

2. **Criminal Law: Trial: Attorneys at Law.** A defendant's personal absence from inquiries into jurors' impartiality at in-chambers meetings is not prejudicial where defense counsel is present.

Appeal from the District Court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Alfred A. Fiedler of Fiedler & Fiedler, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

NEWTON, J.

The defendant Willie Nevels was convicted of kidnapping and rape committed on August 21, 1973. His assignments of error charge: (1) Insufficiency of the evidence to sustain the conviction; (2) prejudicial error in excluding defendant from a conference with a juror regarding alleged misconduct; and (3) excessiveness of the sentence. We affirm the judgment of the District Court.

The actual kidnapping and rape of the girl are not challenged but defendant insists he has been mistakenly identified as the offender. It is undisputed that the girl who was victimized passed a black man on the street who then came up behind her, put his hand over her eyes, threatened her with a gun, led her to a car occupied by a white male, Rick Brungardt, shoved her in, ordered her to keep her eyes closed, and blindfolded her. The cloth blindfold was subsequently replaced with tape-covered sunglasses. The girl was driven to a deserted spot and raped by both males.

Two witnesses saw the girl picked up. They could not identify the defendant but gave descriptions which

fit him, except for an Afro haircut. The girl had some difficulty identifying the defendant until an Afro-type wig was produced and with this on him, she positively identified him. All three of these witnesses identified the Brungardt car as the one used. Mrs. Brungardt, mother of Rick, gave the authorities a pair of sunglasses, a wig, and a black hat which her younger son found in a trash barrel. The son Tommy stated he saw the defendant put the hat in the barrel and found the sunglasses and wig there also. This was on September 3, 1973. He also identified a piece of cloth found in Rick's car. The victim could not positively identify the four exhibits but said they appeared to be similar to the ones she saw or wore during the incident. Rick Brungardt testified to the entire incident and identified the defendant as the one who participated in the affair with him. He stated defendant was wearing a black hat, sunglasses, and a wig and had a gun. Michelle Averill testified that on September 3, 1973, she saw a black hat and wig in Rick's car about noon but noted they were gone about 3 p.m. She also saw Rick's glasses with tape on them in the car and identified the sunglasses in evidence as the ones she saw.

The defendant presented a defense in the nature of an alibi and produced five witnesses to verify that he could not have been at the scene of the offense at the time it occurred. Obviously the jury found that the events described by these witnesses occurred on a day other than August 21, 1973. This evidence was based primarily on the allegation that the defendant picked up some furniture in a borrowed truck on August 21 at the Nebraska Furniture Mart. A written instrument was produced indicating the pickup was made on August 22 but the dock foreman at the furniture mart could not say with certainty that an error had not occurred regarding the pickup date.

It is apparent that a jury question was presented and that the State's evidence, if believed by the jury, is suf-

ficient to justify and sustain the conviction. "In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Corfield, 189 Neb. 163, 201 N. W. 2d 818.

During the trial the court was informed that a juror had discussed the case with an individual and had given the impression that he did not believe the State had proven its case against the defendant. The court called the juror and both counsel into chambers and questioned the juror about the incident. The juror did not recall the remark and stated he had not made up his mind at that time. Both counsel waived objection and there was no motion for a mistrial. The record fails to show whether or not the defendant was personally present during the incident. Defendant relies on People v. Medcoff, 344 Mich. 108, 73 N. W. 2d 537, and People v. Harris, 43 Mich. App. 746, 204 N. W. 2d 734, to sustain the allegation that it is error to exclude a defendant from such conferences. These cases were discussed in People v. Carroll, 49 Mich. App. 44, 211 N. W. 2d 233, and were distinguished as in those instances both the defendant and his counsel had been excluded. In People v. Carroll, *supra,* defense counsel was present and the court found the distinction to be a crucial one. It was held that no error occurred. We hold that a defendant's personal absence from inquiries into jurors' impartiality at in-chambers meetings is not prejudicial where defense counsel is present. Furthermore, the partiality of which the juror was accused in this case was in the defendant's favor.

In regard to the charged excessiveness of the sentences and the fact they were more severe than the one given Rick Brungardt, we find no error. Brungardt was a younger man, a follower, and not very bright. He pled guilty following a plea bargain and testified for the

State. The defendant had two previous felony convictions and appears to have been the prime mover in the offense committed. The sentences he received were well within those authorized by statute.

No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK S. HOLZAPFEL, APPELLANT.

223 N. W. 2d 670

Filed December 5, 1974. No. 39573.

1. **Criminal Law: Courts: Evidence.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed within the limits fixed by statute and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
2. ———: ———: ———. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable to a formal criminal trial.
3. **Criminal Law: Courts: Sentences.** The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Ernest H. Addison and J. Bruce Teichman, for appellant.

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

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

WHITE, C. J.

On a plea of nolo contendere, the District Court sen-

tenced the defendant to a period of 1 year in the Nebraska Penal and Correctional Complex on a reduced charge of possession of a controlled substance. The defendant appeals, asserting that the District Court abused its discretion in not granting probation and improper use and application of the presentence investigation in imposing the sentence that it did. We affirm the judgment and sentence of the District Court.

We have recently held that the action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Cottone, 188 Neb. 102, 195 N. W. 2d 196. The defendant was initially charged with the more serious offense of possession with intent to deliver a controlled substance. This charge was amended to allege mere unlawful possession, to which the defendant pled nolo contendere. The court ordered, and had available for consideration, an extensive presentence investigation report of some 100 pages at the time of the imposition of sentence. This presentence investigation report covers, in comprehensive detail, the defendant's age, his social, family, educational, work, and personal background. It also recites with considerable detail the history and involvement of the defendant in the drug traffic. It reveals that the defendant, prior to the commission of this offense, had been grossly involved in drug trafficking. We summarize in conclusionary form the extensive information recited in the report. It is abundantly clear that the defendant had been closely associated with a number of people in a large-scaled drug marketing operation and that the defendant personally was a hard drug user. The defendant admitted to having made frequent commercial air line flights to California for the purpose of receiving drug deliveries for subsequent distribution in Lincoln and Omaha, Nebraska. In mitigation of this situation the defendant contended to the probation officer that he was merely acting as an agent for an acquaintance of his and

that he did not personally take part in the subsequent distribution and sale of the narcotics. There is in the presentence report persuasive evidence to the contrary of this contention. However that may be, the defendant by his own admission, was involved far beyond mere possession of one-half gram of cocaine as charged in the amended information. It reveals a continuous and consecutive commission of more serious offenses directly related to the offense to which he pled nolo contendere, continuing over a considerable period of time. Considering the designed purpose of the statute to prohibit the trafficking in controlled substances and their possession and use thereof, and the comparative propriety of probation for this particular type of offense, we can find no abuse of discretion on the part of the District Court in imposing the minimum sentence on a reduced charge as it did.

We also point out that in this particular case the trial court afforded the defendant and his counsel an opportunity to examine the presentence investigation report and to provide additional information for the court's consideration. The transcript of the presentence hearing discloses that defense counsel had an opportunity to study the presentence report and that no additional information was tendered, nor was any question raised as to the accuracy of the facts related in the report.

Faced with this situation the defendant further contends that the court, in considering the presentence investigation report, took into consideration facts, "which would not have been admissible in a trial on the charge of possession." He contends that it is an abuse of discretion to utilize facts of an evidentiary nature to aid in sentencing on a plea of nolo contendere. He further contends, in substance, that it was an abuse of discretion for the court to consider the defendant's history with reference to trafficking in drugs when the only issue presented under the information was the mere possession of one-half gram of cocaine by the defendant. These

contentions in a similar form have been presented to this court before and have been rejected. A complete answer to the defendant's contention is found in our holding in State v. Minor, 188 Neb. 23, 195 N. W. 2d 155. That case was also a controlled substance case. Every facet of the defendant's argument is disposed by this court in State v. Minor, *supra,* as follows: "In State v. Rose, 183 Neb. 809, 164 N. W. 2d 646, we said: 'It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, *police reports, affidavits,* and *other information including his own observation of the defendant. A presentence investigation has nothing to do with the issue of guilt.* The rules governing due process with respect to the admissibility of evidence *are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue.* The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.'

"Due process is not violated by the Nebraska procedure. This is definitely a universal practice, as evidenced by the following from Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949): '* * * both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed

by law. * * * A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge may *not be denied* an opportunity to obtain *pertinent information by* a requirement of *rigid adherence to restrictive rules of evidence* properly applicable to the trial.'" (Emphasis supplied.)

In conclusion we hold that there was no abuse of discretion by the District Court in imposing the sentence that it did as an alternative to probation, and that there was no error in the trial court's sentencing procedure in ordering, receiving, considering, and using the information supplied in the presentence investigation report. In fact, the record in this case is a model of compliance with the requirements and the purposes of a presentence investigation and sentencing procedure contemplated by section 29-2261, R. S. Supp., 1972, concerning presentence investigations and their applications to sentencing procedure.

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

AFFIRMED.

ROBERT E. DEWEY, APPELLEE AND CROSS-APPELLANT, V. M. ELLEN SIM DEWEY, APPELLANT AND CROSS-APPELLEE.
223 N. W. 2d 826

Filed December 12, 1974. No. 39324.

Divorce: Courts: Jurisdiction: Time. The power of the District Court to modify or vacate a decree of marriage dissolution

under the provisions of section 42-372, R. R. S. 1943, within 6 months of the entry of the decree does not exist after an appeal has been made to this court and the appellant has suffered an involuntary dismissal here.

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

Paul E. Galter, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit and Walter E. Zink, for appellee.

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

CLINTON, J.

This is an appeal from an order of the District Court made upon an application under section 42-372, R. R. S. 1943, to vacate and modify a decree dissolving a marriage. The District Court affirmed its earlier decree of dissolution, but modified it with respect to the order on alimony. The respondent wife appeals. Here she seeks to raise many issues, including the propriety of the decree of dissolution and the constitutionality of sections 42-347 to 42-372, R. R. S. 1943.

One procedural issue is dispositive of the appeal and requires its dismissal. The issue may be stated in this way: Does the power of the District Court, under the provisions of section 42-372, R. R. S. 1943, to modify a decree of dissolution within 6 months of its entry, survive an intervening order of this court dismissing an earlier appeal of the wife from the same decree?

A summary of what occurred will clarify the issue. After trial the court on November 16, 1972, entered a decree dissolving the marriage, dividing the property of the parties, and awarding minimal alimony to the wife. The wife perfected an appeal from that decree by taking the necessary procedural steps on December 15, 1972. The husband filed a motion to dismiss the wife's appeal. The principal basis of the motion was

that the respondent had accepted benefits under the decree and that consequently, under our holding in Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520, her appeal was barred under the principle that a party cannot accept a part of a judgment and appeal the remainder. Further grounds of the motion were that she had not caused to be prepared and filed in the District Court a bill of exceptions within the time required by rule of this court and that she had made no request for an extension of such time as required by Rule 7 f, providing as follows: "A request for extension must be made within the time originally prescribed or within an extension previously granted." We acted upon the motion and dismissed the appeal on April 2, 1973.

On May 8, 1973, less than 6 months after the entry of the decree, the wife filed an application to modify in the District Court. This application asked, among other things, that the decree of dissolution be set aside and set forth various grounds for such relief. On June 13, 1973, the application was heard, and on August 30, 1973, the District Court modified the decree to the extent previously mentioned. Its journal entry recites that in so doing it had reexamined the evidence of the original hearing and received evidence cumulative thereto. The District Court determined that section 42-372, R. S. Supp., 1972, "should be interpreted to mean that, although the respondent herein instituted within one month an appeal from the decree entered November 16, 1972, and suffered an involuntary dismissal on April 2, 1973, by the Supreme Court of said appeal nevertheless said respondent may institute thereafter but within six months of November 16, 1972, proceedings in the district court to modify said decree; and that this court, the District Court which rendered said decree of November 16, 1972, has jurisdiction of said proceeding so instituted to modify."

Section 42-372, R. R. S. 1943, provides as follows: "A decree dissolving a marriage shall not become final or operative until six months after the decree is rendered, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered. If an appeal is instituted within one month, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the court may, at any time within such six months, vacate or modify its decree. If such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court."

The wife argues that the primary purpose of the statute "is to *prevent* the premature finalizing of decrees" during the time an appeal is pending and that accordingly the power of the District Court to modify continues as to any application filed within the 6-month period irrespective of the outcome of the appeal. She further argues: "Section 42-372 does no more than take all jurisdiction away from the trial court while the appeal is pending. Once the appeal is disposed of, the Supreme Court is out of the picture, and for the remainder of the six-month period (if any) the trial court may vacate or modify."

We must reject the respondent's contention both on the basis of the language of the statute and principles applicable to the finality of determinations of an appellate court.

The first sentence of the statute has the apparent purpose of permitting review in this court of the trial court's determinations before the decree becomes final and not, as respondent argues, of preventing premature finalization. No special statute would be needed for that latter purpose. An appeal properly perfected un-

der the provisions of sections 25-1911 and 25-1912, R. R. S. 1943, prevents any final judgment or order from becoming final while the appeal is pending. See Westphalen v. Westphalen, 115 Neb. 217, 212 N. W. 429. The second sentence of the statute is simply a reiteration of the effect of the perfection of an appeal upon the judgment appealed from. It also necessarily implies, what would be the case even without such statute, that an affirmance by this court makes the decree and the judgment final. It is obvious, of course, that if this court reverses for further proceedings there is no immediate finality. The third sentence of the statute gives the District Court the power to vacate judgments within 6 months if no appeal is perfected. The converse is also implied, namely, that if the appeal is perfected, the District Court has no power to vacate or modify.

Any other construction of the statute would in effect give the District Court the power to review, upon subsequent motions to vacate and modify in marriage dissolution cases, final determinations of this court. Such a procedure would have the effect of making litigation in such cases endless. It is not significant that in most instances the 6-month period will have elapsed before the court has an opportunity to act. This opinion should not, of course, be considered as determining the effect of section 42-372, R. R. S. 1943, where an appeal has been perfected and then voluntarily dismissed by the appellant. Neither do we suggest that the rule we have set forth here has application where the appeal is dismissed by us for want of jurisdiction. See United States v. Fremont, 59 U. S. 30, 15 L. Ed. 302. Nor do we purport to decide the question of whether, after a dismissal such as we have here, the District Court may still, during the 6-month period upon application of both parties, set aside a decree of dissolution for purposes of reconciliation.

The suggested construction would also violate well-established, but seldom enunciated, principles applicable to the finality of appellate court determinations. Anderson v. Richards, 173 Ohio St. 50, 179 N. E. 2d 918, 96 A. L. R. 2d 307, illustrates the principle involved. In that case it was argued that, because the dismissal of an appeal for want of prosecution was not a hearing on the merits, the dismissal did not have the effect of res judicata. The Supreme Court of Ohio rejected the contention, holding that there could not be a second appeal even though time for perfecting the same after the first dismissal still remained. See, also, the concurring opinion of Mr. Justice Catron in United States v. Fremont, *supra*.

The appeal must accordingly be dismissed.

APPEAL DISMISSED.

BOSLAUGH, J., concurs in the result.

BARBARA JEAN SCHWANINGER, APPELLEE AND CROSS-APPELLANT, V. EDGAR L. SCHWANINGER, APPELLANT AND CROSS-APPELLEE.

223 N. W. 2d 829

Filed December 12, 1974. No. 39400.

1. **Divorce: Alimony.** The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable.
2. ———: ———. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown.
3. **Divorce: Alimony: Parent and Child.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account.

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

Littrell & Patz and Joseph J. Cariotto, for appellant.

H. Jeanne Thorough of Kelley & Thorough, for appellee.

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

McCOWN, J.

The petitioner, Barbara Jean Schwaninger, commenced this proceeding for dissolution of marriage against the respondent, Edgar L. Schwaninger. The District Court for Lancaster County entered its decree and dissolved the marriage; granted custody of the two minor children to the petitioner; and provided for a division of property and award of child support. The respondent perfected his appeal to this court and thereafter on his motion, the appeal was dismissed. Our mandate was recalled for the petitioner to complete a cross-appeal. The matter is now before this court on the cross-appeal of the petitioner. There is no issue as to the dissolution of the marriage or custody of the children. The only dispute involves property and support awards.

The parties were married on February 2, 1957. The petitioner was 35 and the respondent 36 years old at the time of trial. They have lived continuously in or near Lincoln, Nebraska, since their marriage. They have two children, Scott Hilton and Shelly Jo, aged respectively 15 and 12 at the time of trial in June 1973.

A few years after their marriage, the parties moved to a farm located approximately 13 miles south of Lincoln, Nebraska. For the 5 years prior to trial, in addition to farming, the respondent was employed as an operating engineer for American Stores in Lincoln, Nebraska. His gross wages for the year 1972 were $12,629, and his take-home pay at the time of trial was

approximately $700 per month. The petitioner, a licensed practical nurse, had been employed by the Norris School for about 1 year at time of trial. Her take-home pay was approximately $343 per month. The respondent sustained a loss on his farming operations averaging approximately $10,000 per year for the 5 years preceding trial, and the farming loss reported on his federal income tax return for the year 1972 was $12,123.77.

At the time of trial, the parties had virtually completed the construction of a new residence on a 75-acre tract comprising a part of the land which they farmed. The cost of construction was approximately $50,000. Some $15,000 of that cost was still unpaid at the time of trial.

The land owned by the parties consisted of five separate tracts, totaling approximately 485 acres. Two expert witnesses, one for the petitioner and one for the respondent, testified as to the value of the land, tract by tract, excluding the value of the newly constructed residence. The petitioner's expert witness placed the value at $222,000, while the respondent's expert witness placed the value at $130,000. The variance in valuation arose because the petitioner's expert witness based his valuation upon subdividing the property for rural living as the highest and best use, while the respondent's expert witness based his valuation on the present market value of the real estate for agricultural purposes and the current market value of similar agricultural land in the area. There was approximately $119,000 of mortgage indebtedness against the real estate.

The parties owned a Chevrolet pickup truck valued at $4,000 which had a mortgage against it in that amount; and a GMC truck valued at $7,000 which had a mortgage in that amount. Other farm equipment and machinery was valued at approximately $37,000 and

was encumbered by two mortgages, one to International Harvester for $15,000 and one to the Martell Bank for $22,000. The latter mortgage also covered the cattle. The 31 cows, 15 heifers, and 12 calves were valued at $15,000. The parties also had four riding horses and four yearlings. The most expensive horse, named Harmony, was worth between $2,500 and $3,500, and the remaining horses were worth approximately $3,000 collectively. There were two automobiles, a 1968 Chevrolet and a 1969 Ford Galaxy.

The respondent used $20,000 inherited from his mother's estate in the purchase of some of the real estate and had also borrowed $13,000 from Arthur Schwaninger. The petitioner testified that she inherited $1,000 from her father and that her mother loaned them the amount of the downpayment on a house and later forgave the indebtedness.

The decree of the District Court granted the care and custody of the two minor children to the petitioner, subject to reasonable visitation rights, and ordered the respondent to pay child support of $85 per child per month until each child shall reach majority or become fully self-supporting. The court also directed the respondent to maintain his present life insurance of $30,000, with the children as beneficiaries during the period of child support, and also required him to maintain health insurance for the children. The petitioner was granted the right to claim exemptions for both children for income tax purposes. The court also set aside to the petitioner as her sole and separate property, the newly constructed residence, together with a continuous 35 acres of real estate, which was to have reasonable road access. The property was set aside to the petitioner free and clear of all liens, debts, and encumbrances thereon; and the respondent, in lieu of further alimony, was ordered to hold petitioner harmless from any debts, encumbrances, or liens on said

property, and to remove any liens from the property as soon as possible and at least within 2 years from the date of the decree. All other real estate was assigned to the respondent, who was to assume the indebtedness and encumbrances thereon. The petitioner was granted all household goods and furnishings, and all the horses except the horse named Harmony. The petitioner was also granted both automobiles, one of them to be placed in the name of the minor son and the petitioner. The respondent was to have the right to receive and retain funds from all growing crops, cattle, farm equipment, and any income tax refunds, and the right to remove and keep a machine shed presumably located on the 35 acres assigned to the petitioner. Each party was to keep and retain bank accounts in his separate possession. The respondent was also directed to pay all debts of the parties existing at the time of filing of the petition in lieu of further alimony, and to hold petitioner harmless therefrom. Respondent was also charged with the costs of the action, including attorney's fees of $1,100 for the petitioner's attorneys.

The petitioner contends that the property and child support awards are insufficient, and that the court also erred in failing to award alimony.

The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168. On the record here the value of the real estate and residence received by the petitioner was somewhere between $55,000 and $66,000. This does not take into account the value of the horses, automobiles, or household goods and furnishings. The record also establishes that if

the real estate appraisal valuations based upon agricultural use of the land are accepted, the total value of all the property assigned to the respondent is approximately $5,000 more than the total amount of debts and liabilities, not including interest, which the respondent is required to assume and pay. Even if the real estate valuations were assumed to be midway between the valuations of the two expert witnesses, the petitioner's net property share was still at least arguably larger than the respondent's.

It might well be that petitioner received more than an equal division of the property, but in view of the unusual posture of this case on cross-appeal, the trial court's division should be approved. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Reisig v. Reisig, 191 Neb. 612, 216 N. W. 2d 731.

On the issue of the amount of child support, it should be noted that the decree grants to the petitioner the right to the personal exemptions of both children for income tax purposes. The decree also requires respondent to maintain life and health insurance for the children in addition to the specified support payments. The record shows that both parties are in good health and working. Petitioner's take-home pay of $343 per month is approximately half of the respondent's take-home pay of $700 per month. It is a fair assumption from the record that respondent's wages alone may be the sole source for the payment of child support, as well as for his own support.

In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into ac-

count. Any judgment of what is a fair amount of child support includes not only a consideration of the circumstances of the children but of the father as well. Bliven v. Bliven, *supra*. While the amount of child support may be somewhat small in an inflationary economy, it was not unreasonably so under the circumstances disclosed by the evidence.

Petitioner also makes some contentions with respect to the rights to a certain well. The bill of exceptions fails to disclose any factual basis to support the contention, nor was any possible issue on this point ever presented to or passed on by the trial court. Questions not presented to or passed on by the trial court will not be considered on appeal. Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694.

The decree of the District Court is affirmed. Each party is to pay his or her own costs and fees.

AFFIRMED.

PAUL E. HOLLISTER ET AL., APPELLEES, V. GOVERNMENT EMPLOYEES INSURANCE COMPANY, APPELLANT.
224 N. W. 2d 164

Filed December 12, 1974. No. 39487.

1. **Words and Phrases.** Ordinarily the term "incurred" is construed to mean that one has become obligated or liable for the expense involved.
2. **Soldiers and Sailors: Hospitals.** When a serviceman, or his dependent, is treated in a government hospital free of charge, no expense is incurred.
3. **Contracts.** Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services.
4. **Contracts: Insurance: Parties.** Medical and hospital services charged to an insured and for which he is legally liable are "incurred" within the meaning of an insurance policy agreeing to pay only expenses actually incurred, notwithstanding the payment of such expense by another party.

5. ———: ———: ———. An insurance policy providing for the payment of medical and hospital expense incurred "for" or "on behalf of" an insured renders the insurer liable for payment of the expense whether or not the insured incurred the expense if it was incurred by another party for him.

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

Boland, Mullin & Walsh, Stephen M. Swartz, and Robert D. Mullin, Jr., for appellant.

James F. Fenlon and Victor J. Lich, Jr., for appellees.

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

NEWTON, J.

This is an action to recover under a contract of insurance issued by defendant to plaintiff Paul E. Hollister for hospital and medical services rendered to his wife. Judgment was entered for plaintiffs and we affirm that judgment.

Plaintiff Paul Hollister was on active duty with the United States Army and, as such, was entitled to have medical expenses incurred in behalf of his dependents, in other than government hospitals, paid by the United States in accordance with the provisions of Title 10, U.S.C.A., chapter 55, sections 1071 et seq. The medical expense amounted to $2,199. Plaintiffs paid a nominal sum and the rest was paid by the United States.

The policy was limited to $2,000 and provided that defendant agreed "To pay all reasonable expenses *incurred* * * *." (Emphasis supplied.) The sole question presented is whether or not plaintiffs incurred that portion of the expense paid by the United States. It is generally held that when a serviceman, or his dependent, is treated in a government hospital such as a public health service hospital or a veterans hospital that no expense is incurred. The theory upon which these cases

rely is that since no charges are made by such hospitals, no expense is incurred. See, Irby v. Government Employees Ins. Co. (La. App.), 175 So. 2d 9; United States v. St. Paul Mercury Indemnity Co., 238 F. 2d 594 (8th Cir., 1956).

Title 10, U.S.C.A., chapter 55, contemplates the treatment of servicemen in other than government hospitals, that charges for the services rendered will be made, and that the United States shall pay for the greater part of such services. The statutes do not exonerate the servicemen from personal liability for charges made and there is nothing in the record before us regarding any contract or governmental rule to this effect. The record discloses that the charges made by the hospital were fair and reasonable. "Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services." Bush v. Kramer, 185 Neb. 1, 173 N. W. 2d 367. The hospital services were furnished to plaintiffs and accepted by them with the knowledge that a charge would be made for them. The fact that as part of their remuneration for services rendered to the United States the government would pay for the hospital expense does not alter the fact that plaintiff Paul Hollister was himself primarily liable for the expense and would have had to pay it if the government did not.

Ordinarily the term "incurred" is construed to mean that one has become obligated or liable for the expense involved. See, American Indemnity Co. v. Olesijuk (Tex. Civ. App.), 353 S. W. 2d 71; Lefebvre v. Government Employees Ins. Co., 110 N. H. 23, 259 A. 2d 133.

Are expenses "incurred" by a serviceman when he receives assistance under Title 10, U.S.C.A., chapter 55? In Lefebvre v. Government Employees Ins. Co., *supra*, it was held that they were not. The case refers however to treatment received free of charge in a

government hospital and indicates that the defendant insurer *has paid* for medical expense received for civilian treatment. It is consequently not in point.

We have been unable to find a case directly in point under the Title 10 provisions. There are, however, a number of cases in which the fundamental issue is the same. In American Indemnity Co. v. Olesijuk, *supra,* a serviceman received treatment from civilian sources, paid for such services, and was reimbursed by the United States Navy as provided in Title 10, U.S.C.A., section 6203. It was held that he had incurred medical charges and could recover from the liability insurer. The case holds further that when Olesijuk received treatment there was created an implied contract to pay for such services that he became liable therefor and that the fact he had other arrangements for the reimbursement of his expenses does not operate to relieve insurer from its obligation to pay.

The situation is analogous to one where the expense is paid by the workmen's compensation carrier of the employer of debtor. In Thomas v. Universal Life Ins. Co. (La. App.), 201 So. 2d 529, it was held: "Hospital expenses and doctor services which were charged to insured and for which he was legally liable were 'incurred' within meaning of hospital and surgical expense policy agreeing to pay only expenses actually incurred, notwithstanding the entire payment of these medical expenses by his employer's workmen's compensation carrier." See, also, Rubin v. Empire Mut. Ins. Co., 25 N. Y. 2d 426, 255 N. E. 2d 154.

In Dillione v. Deborah Hospital, 113 N. J. Super. 548, 274 A. 2d 597, insured's expenses were paid by the State Rehabilitation Commission but the insurer was held liable and the court stated: "The general rule is that the insured will not be barred from recovery on a policy providing for payment of hospital or medical services, etc. for which he has 'incurred expense,' or

similar language, by mere reason of the availability of collateral means of discharging his liability therefor so as to have relieved him of the need to pay the charges personally."

In Kopp v. Home Mut. Ins. Co., 6 Wis. 2d 53, 94 N. W. 2d 224, plaintiff had Blue Cross insurance which covered his medical expense but he was permitted to recover under an automobile policy providing medical payments coverage. To the same effect is Feit v. St. Paul Fire & Marine Ins. Co., 209 Cal. App. 2d 825, 27 Cal. Rptr. 870.

In Rubin v. Empire Mut. Ins. Co., *supra,* recovery was permitted under an automobile liability policy with a medical expense provision notwithstanding such expense had been paid by the workmen's compensation insurance carrier of the employer.

In each of the foregoing cases the medical expense was held to have been "incurred" within the meaning of the term in the applicable policies. The principle underlying these cases is equally applicable to the situation here presented.

The policy here at issue under medical coverage provided insurer would "* * * pay all reasonable expenses incurred * * *: To or *for* the named insured and each relative * * *." (Emphasis supplied.) It further states: "The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the company's liability for all expenses incurred by or *on behalf of* each person * * *." (Emphasis supplied.) This language indicates that the insurer is liable even though the expense is incurred by some other party "for * * * or on behalf of" the insured. Such was the holding in Kopp v. Home Mut. Ins. Co., *supra,* in Smith v. United Services Auto. Assn., 52 Wis. 2d 672, 190 N. W. 2d 873, and in Feit v. St. Paul Fire & Marine Ins. Co., *supra.*

We conclude that under the circumstances prevailing

in this case, the plaintiffs incurred the expense in question but that irrespective of this feature, the expense would have been incurred for or on their behalf and would have entitled them to collect under the terms of the policy.

The judgment of the District Court is affirmed and plaintiffs are allowed an attorney's fee in this court in the sum of $750.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY G. GUNDLACH, APPELLANT.

224 N. W. 2d 167

Filed December 12, 1974. Nos. 39488, 39489.

1. **Constitutional Law: Governmental Agencies.** The Fourth Amendment to the Constitution of the United States was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.
2. **Searches and Seizures: Police Officers and Sheriffs: Criminal Law.** Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them.
3. **Constitutional Law: Confessions.** Volunteered statements of any kind are not barred by the Fifth Amendment to the Constitution of the United States.
4. **Trial: Witnesses.** Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he had ever made such statements.
5. **Criminal Law: Property: Evidence.** Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which one may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
6. **Instructions.** Instructions must be considered as a whole in

determining whether a particular instruction or a part thereof is prejudicial.

7. **Criminal Law: Sentences.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
8. **Criminal Law: Sentences: Probation and Parole.** One of the basic principles in determining the appropriate sentence is the possibility of rehabilitation. Before one can be successfully rehabilitated, he must cooperate, and a lack of cooperation prior to sentencing could be a strong indication that the lesser restrictions of probation may not be sufficient to effect a purposeful rehabilitation.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and George R. Sornberger, for appellant.

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

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

SPENCER, J.

The State instituted two felony actions against the defendant which were consolidated prior to trial. Each action had one count for receiving or buying stolen goods and another count for receiving, buying, or concealing a stolen automobile. There were a total of four counts, two in each action. Each count covered the property of a different owner. Defendant was convicted on each of the four counts and sentenced to a term of 1 to 3 years on each count, the sentences to run concurrently. Defendant alleges nine assignments of error. They will be discussed seriatim. We affirm.

On June 19, 1973, Harold Cheesman, a parts manager for Omaha Airplane Supply, received a telephone call from the landlady of an apartment complex where

defendant had rented a garage. She inquired of Cheesman whether his company was missing any inventory. She told Cheesman she was suspicious of items in the garage rented to defendant, and he had her permission to check the garage.

Cheesman called the burglary division of the Omaha police department to give them the information. He was told to come to the police station the next morning. He did so, and there talked to two officers. The police told Cheesman they would not act without a criminal complaint, and suggested before he filed one he should establish that there was property missing from his inventory. Cheesman was also told that if he found something he should report back to the police.

Cheesman went to the garage and checked it after the landlady unlocked it for him. He returned to the police station and reported. At that time he did not definitely know if his company was missing any items. Two officers returned to the garage with him; they spoke to the landlady; and she identified the garage. The officers did not then have a search warrant and neither of them entered the garage on that trip.

Search warrants were later obtained for two garages rented to defendant. Items were discovered in both garages which subsequent investigation indicated had been obtained from Omaha Airplane Supply, defendant's employer, and Lang Aviation, both of which were located at Epply Field in Omaha. A pickup truck, missing since April 1972, was found in one garage, and another truck missing since January 1973, was found in the other garage.

Dallas Baker, an Omaha police officer who was not involved in the investigation, testified that sometime after June 20, 1973, the foreman at Lang Aircraft informed him that defendant wished to talk with him about whether there was a warrant for defendant and the procedure as to turning himself in to the author-

ities. Defendant subsequently called Baker. Pursuant to defendant's suggestion, they met in Council Bluffs, Iowa, and visited about the situation. Baker testified that during this conversation he indicated to defendant he did not believe defendant was "the one who instigated the caper," and asked him who was involved. Baker testified that defendant replied " 'I cannot answer that, Dallas. What good will it do to implicate the others?' " Defendant then stated "that he was sorry that he got involved."

Defendant's first assignment of error is that the evidence introduced against him was obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution. It is his theory that the police directed a private party to perform a search which would have been improper if the police had done so themselves. The warrants were obtained upon information learned through this allegedly illegal search. The evidence indicates there was no police participation or direction in Cheesman's search of the garage. The police refused to have anything to do with Cheesman's complaint until he found property missing and had reasonable grounds to believe the property was in the possession of the defendant. As defendant concedes, the action of the landlady in looking into the garage is not governed by the Fourth Amendment. The constitutional safeguard "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies * * *." Burdeau v. McDowell (1921), 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159.

Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them. Cheesman was acting in the interests of his employer and not under the direction of the police. At no time prior to the search pursuant to a valid warrant did any police officer enter the garage.

The facts do not constitute an agency or representative situation as urged by the defendant.

Defendant's next two assignments of error concern his conversation with Dallas Baker. Defendant argues the trial court erred in not making a finding prior to trial that defendant's statement was voluntary, and in not instructing the jury on that issue. The conversation was instigated by the defendant. At defendant's request it took place in Council Bluffs, Iowa, where Baker was no more than a private citizen from another state. Baker was a friend of the defendant. Although he was a police officer he was in no way connected with the official investigation of the case. There was no "in-custody interrogation," and the statements on the record were volunteered.

Prior to trial defendant filed a motion to suppress and exclude the statement made to Baker, on the theory that it was obtained in violation of the requirements of Miranda v. Arizona (1966), 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. In that case the United States Supreme Court held: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." After hearing, this motion was overruled and suppression denied.

In Hoffa v. United States (1966), 385 U. S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374, the court dealt with the testimony of an informer who was present during conversations between Hoffa and his trial counsel. In Hoffa, the court said: "The petitioner argues that his right under the Fifth Amendment not to 'be compelled in any criminal case to be a witness against himself' was violated by the admission of Partin's testimony. The claim is without merit. * * * In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The peti-

tioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case."

Baker was called to testify for the State. Defendant's motion to suppress Baker's testimony had been heard 2 weeks previously before another judge and was overruled. No objection was made at the trial to the voluntariness of the conversation. The only objection made during Baker's direct examination was an objection on foundation to a question: "What was the substance of the conversation?" This objection was properly overruled.

Defendant's fourth assignment of error alleges the trial court erred in not allowing witness Junge to offer testimony which would impeach the credibility of Dallas Baker. No attempt had been made to confront Baker with any alleged prior inconsistencies. Our rule is: "Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." Meyers v. State (1924), 112 Neb. 149, 198 N. W. 871. The record is in some confusion. The witness was asked if he had received a phone call from Mr. Baker. His answer was, "Well, he came in person." The offer of proof was as to a statement made in the alleged telephone conversation which the witness had impliedly stated he had not had. In any event, the testimony as offered would not have contradicted any of Baker's testimony as it related to Baker's conversation with the defendant.

The fifth assignment of error complains of the refusal of the trial court to sustain defendant's motion for a directed verdict made at the end of the prose-

cution's case-in-chief and renewed at the end of the defendant's case. This is a perfunctory assignment of no conceivable merit. Defendant was found in the possession of stolen property and no explanation for such possession consistent with innocence was offered in defendant's defense.

Defendant's sixth assignment of error complains that the references to aiding and abetting in instructions Nos. 5, 6, 7, and 8 were confusing and misleading. He argues that except for Baker's testimony there is insufficient evidence to support the inclusion of aiding or abetting in the instruction. It may well be true that were it not for Baker's testimony the evidence would have been insufficient to support these instructions, but the fact remains that Baker's testimony was properly admitted and was sufficient to support them.

The seventh assignment of error attacks instruction No. 15 and supplemental instruction No. 1. Instruction No. 15 reads in part as follows: "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." Because this is exactly the same instruction approved in Barnes v. United States (1973), 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380, defendant does not challenge it. His objection is directed to the point that the jury during the course of its deliberations requested a definition of the word "possession" as used in the instruction.

The trial court gave the following supplemental instruction: "Possession means to have a thing under ones (sic) dominion and control. There is actual possession, which means in the personal custody of the individual or there is constructive possession which means that the property is not in the actual physical

possession of the person charged but such person has dominion and control over the property." Defendant objects to this instruction because it omits any reference to knowledge. He claims the supplemental instruction puts undue emphasis on a part of the evidence.

Instructions, including supplemental instructions, must be considered as a whole. As we said in State v. Brown (1962), 174 Neb. 393, 118 N. W. 2d 332: "Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial." The instructions as a whole made it clear that knowledge was a necessary element to be found before a guilty verdict could be rendered. When the jury asked for clarification of "possession" it was not asking what knowledge meant, but was asking for a definition of possession. The supplemental instruction was not prejudicial and did not over-emphasize one part of the evidence.

Assignments of error 8 and 9 complain that the sentence imposed is excessive and constitutes a breach of judicial discretion. Defendant was sentenced to a term of 1 to 3 years on each of the four counts, the sentences to run concurrently. The sentence under section 28-508, R. R. S. 1943, for receiving stolen goods, is imprisonment in the Nebraska Penal and Correctional Complex not more than 7 years nor less than 1 year. The penalty under section 28-522, R. R. S. 1943, for stealing or receiving stolen automobiles, is imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 year nor more than 10 years. The sentences imposed were well within the range provided by law, and were made to run concurrently. Considering the volume of the property taken, and the fact it was taken over a long period of time, the trial court did not abuse its discretion. As we said in State v. Harig (1974), *ante* p. 49, 218 N. W. 2d 884: "We have repeatedly ruled that where the punishment of an of-

fense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion."

Defendant argues that the sentencing court abused its discretion in considering defendant's failure to cooperate as a factor militating against probation. It is true, as defendant notes, that section 29-2260, R. S. Supp., 1972, says nothing about cooperating with a probation officer. However, one of the basic principles in determining the appropriate sentence is the possibility of rehabilitation. Before one can be successfully rehabilitated he must cooperate, and a lack of cooperation prior to sentencing could be a strong indication that the lesser restrictions of probation may not be sufficient to effect a purposeful rehabilitation.

Referring specifically to subdivisions (i) and (j) of section 29-2260(3), R. S. Supp., 1972, we cannot say that the record herein shows an attitude on the part of the defendant such as to indicate that he is unlikely to commit another crime, or that he is likely to respond affirmatively to probationary treatment. The same factors which prevented him from cooperating fully with the authorities would certainly be sufficient to indicate that he could easily be further involved in criminal activity. The trial court, with its more personal knowledge of the defendant, is in a better position to judge the likelihood of the effectiveness of probation than this court. We are unable to say that the trial court abused its discretion in refusing probation and sentencing the defendant to the Penal and Correctional Complex.

For the reasons given, the judgment of the trial court is affirmed.

AFFIRMED.

MARIE THORIN, APPELLANT AND CROSS-APPELLEE, V. EUGENE W. KURKOWSKI, APPELLEE AND CROSS-APPELLANT.
224 N. W. 2d 173

Filed December 12, 1974. No. 39491.

1. **Partnership: Contracts.** Generally, in the absence of an agreement to the contrary, upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place without liability to account for the good will of the firm.
2. **Partnership.** A method of valuation appropriate to the sale of a going business is not applicable where the surviving partner has the right to continue in the same business in the same locality.
3. **Partnership: Accounts and Accounting.** In an action for an accounting following the dissolution of a partnership, the court has jurisdiction to settle all rights between the parties arising out of the partnership.

Appeal from the District Court for Perkins County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Albert W. Crites, of Crites, Shaffer & Slavik, for appellant.

Thomas M. Shanahan of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

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

BOSLAUGH, J.

This is an action for an accounting following the dissolution of a partnership composed of Eugene W. Kurkowski and Clarence Thorin. The plaintiff, Marie Thorin, is the widow and sole beneficiary of Clarence Thorin, who is deceased. The estate of Clarence Thorin has been administered and all his property has been distributed to the plaintiff. The defendant, Eugene W. Kurkowski, is the surviving partner.

The trial court found the partnership was dissolved as of September 6, 1964, the date on which Clarence

Thorin died; that on that date, the value of the interest of Thorin in the partnership was $2,352.89; and that in addition to the value of his interest in the partnership, the plaintiff should recover $5,923.30 as "profits attributable to the use of her right in the property of the dissolved partnership" as provided in section 67-342, R. R. S. 1943.

The plaintiff has appealed and contends the trial court erred in determining the value of the interest of Thorin in the partnership and the amount of profits the plaintiff should recover. The defendant has cross-appealed and contends the trial court should have found Thorin had no interest in the partnership at the time of his death and no right to recover any profits after the dissolution.

The partnership was known as the "Kurkowski and Thorin Agency." The partnership agreement provided the partnership would operate a general insurance agency, a real estate brokerage business, and "any and all types of business and enterprises as may be unanimously agreed upon by the partners."

The defendant and Thorin entered into several business ventures or operations in addition to the sale of insurance and real estate. One of the major ventures was a feed mill. A central issue in the case is whether it was an activity of the partnership. The trial court held it was not a venture of the partnership.

In 1962, "Eugene W. Kurkowski and Clarence Thorin, a partnership" executed an equipment lease and a franchise agreement with Nutrena Mills, Inc. The lease provided Nutrena would construct bins and related buildings and install machinery for the operation of a feed mill by the lessee. The franchise agreement authorized the lessee to operate a Nutrena Customatic Service Center upon the leased property in accordance with the terms of the franchise agreement.

On the day the lease was signed, advance rental in

the amount of $3,300 was paid to Nutrena Mills by a check drawn on the agency account. The defendant testified he and Thorin intended the feed mill to provide investment income as a part of the agency.

The feed mill was constructed for Nutrena by Jones Construction Company. There was additional work done on the mill by Jones Construction Company pursuant to a contract with the lessee. This construction was financed in part by a promissory note in the amount of $7,671.01 signed by Thorin and the defendant and their wives. There are canceled checks in the record drawn on the agency account showing payments to the Jones Construction Company of $729.41 on August 16, 1962, $400 on October 6, 1962, and $3,070.78 on June 17, 1963. The October 6, 1962, check was signed by Thorin. The note to Jones Construction Company was eventually paid by the defendant out of personal funds in the amount of $8,135.11.

On April 24, 1964, a complaint was filed in federal District Court against Thorin and the defendant alleging they had failed to make the rental payments due under the lease and that Cargill, Inc., as successor to Nutrena Mills, Inc., had taken possession of the property on or about June 30, 1963. The action was dismissed with prejudice on October 23, 1967, upon the stipulation of the parties. The defendant paid $2,000 in attorneys' fees out of his own funds to defend the action for which he was not reimbursed.

We think the record sustains a finding that Thorin and defendant intended the feed mill to be a venture of the partnership and at least $10,135.11 of the amounts attributable to the feed mill should be accounted for as transactions of the partnership. The effect of this holding is to charge an additional $5,067.55 against the interest of Thorin in the partnership.

Other issues relate to the valuation of good will, a transaction known as the Curtis property, accounts re-

ceivable, advances to the partnership by the defendant, and proceeds from an insurance policy upon the life of Thorin.

The defendant valued good will at $1 in his accounting and the trial court confirmed this figure. The plaintiff contends a value should have been fixed upon the basis of commissions earned from the sale of real estate and insurance by the partnership.

Generally, in the absence of an agreement to the contrary, upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place without liability to account for the good will of the firm. Johnson v. Munsell, 170 Neb. 749, 104 N. W. 2d 314. The partnership agreement contained provisions regarding the valuation of the assets of the partnership including good will, but the record indicates these provisions were not followed and no effort was made to dispose of interest of the deceased partner in accordance with these terms of the agreement.

The method of valuation urged by the plaintiff is appropriate to the sale of a going business where the vendor is not going to continue in the same business in the same locality. It is clear from the record that such a method is not applicable if the surviving partner intends to continue in business. As stated in Spalding v. Spalding's Administrator, 248 Ky. 259, 58 S. W. 2d 356: "When a member of a partnership conducting an insurance agency dies, the surviving partner is not required to retire from the insurance business in order that the good will of the firm may be sold." Since the defendant had the right to continue in the insurance business, the good will had but a nominal value.

The Curtis property is a residence in Grant, Nebraska. In 1961, the defendant made a loan from personal funds to Donald L. Curtis. Curtis was unable to pay this indebtedness so in 1963 he conveyed his

residence property to the defendant in return for credit on the note. At the time of the conveyance there was a balance of $5,750 due on a mortgage to the Tecumseh Building and Loan Association. Curtis and the defendant agreed the property had a value of $8,000 so Curtis received a credit of $2,250 on his indebtedness to the defendant which was then $4,741.34. The testimony of Curtis supports this version of the transaction.

The conveyance was to both Thorin and the defendant and, apparently, a new mortgage to the Tecumseh Building and Loan Association was executed by Thorin and the defendant and their wives. Thorin had furnished no part of the consideration for the conveyance and had no interest in the property. At the time of his death the balance due on the mortgage had been reduced to $5,421.03. At the most, Thorin might have been entitled to a credit of $164.48.

The trial court found Thorin had no interest in the Curtis property and ordered the plaintiff to convey the property to the defendant. This was proper because the court had jurisdiction to settle all rights between the parties arising out of the partnership. See, 68 C. J. S., Partnership, § 411 b, p. 934; Danico v. Ford, 230 Iowa 1237, 300 N. W. 547. The plaintiff's claim to some interest in the property was a matter which could be determined in the action.

With regard to the accounts receivable, the controversy concerns an account in the amount of $386.96 which the plaintiff claims was omitted. The testimony of the bookkeeper indicated this account had been included in the corrected total of accounts receivable. Although the evidence concerning the business records and books of the partnership left much to be desired, the record sustains the finding against the plaintiff on this item.

The defendant claimed he had advanced funds to the partnership from time to time and there was a

balance of $4,200 due him because of these advances. The defendant produced canceled checks drawn on his personal account which supported his testimony in this regard. We think the record sustains the finding by the trial court in favor of the defendant on this issue.

The proceeds from the insurance policy upon the life of Thorin was clearly an asset of the partnership. There appears to be no dispute concerning this matter at this time and the finding of the trial court was correct.

As we view the record, Thorin was indebted to the partnership and had no interest in the partnership at the time of his death. The amount due the defendant as a result of the feed mill venture exceeds the balance due Thorin as found by the trial court. This finding makes it unnecessary to consider the contentions of the parties in regard to profits after dissolution.

In the cross-appeal the defendant contends he should have recovered judgment on his counterclaim. The counterclaim alleged Thorin was indebted to the partnership at the time of his death and the defendant sought judgment against the plaintiff for this amount. Any indebtedness of Thorin to the partnership would not be a liability of the plaintiff. The finding against the defendant on the counterclaim was correct.

The judgment of the District Court is affirmed in part, and in part reversed and the cause remanded for entry of judgment in accordance with this opinion.

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

KENNETH R. KOCH, APPELLANT, V. SAM GRIMMINGER, ET AL., APPELLEES.
223 N. W. 2d 833

Filed December 12, 1974. No. 39494.

1. **Public Officers and Employees: Immunity.** Where an officer

is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption.

2. **Public Officers and Employees.** When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial.
3. **Public Officers and Employees: Prosecuting Attorneys: Immunity.** A public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and, where he acts in good faith, he is immune from suit for an erroneous or negligent determination.
4. **Pleadings: Criminal Law.** An allegation that an act was done maliciously but without any pleading of the ultimate facts from which malice may be inferred is a mere legal conclusion and is insufficient to raise an issue of fact so as to withstand a general demurrer.

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

Healey, Healey, Brown, Wieland & Burchard, for appellant.

John A. Wagoner, for appellees.

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

CLINTON, J.

Plaintiff-appellant brought this action for false arrest and imprisonment against the defendant Sam Grimminger, county attorney of Hall County, and the defendant Willa Koch, former wife of the plaintiff. The defendant Grimminger filed a general demurrer, which the District Court sustained. The plaintiff elected to stand on his petition and the defendant Grimminger

was dismissed from the action. Plaintiff appealed. We affirm.

The issue in the trial court and here is whether the third amended petition of the plaintiff pleaded facts sufficient to constitute a cause of action against Grimminger. The determination of that issue turns upon whether or not, under the facts alleged, the county attorney was immune from suit.

The petition alleged: That the defendant Grimminger was the county attorney of Hall County and at the times mentioned in the petition was acting "within the scope of his office as County Attorney"; that the defendant Willa Koch had been divorced from the plaintiff on October 26, 1967, in Hall County and that the decree in the action ordered the plaintiff in this case to pay Willa Koch child support in the amount of $100 per month; that on February 23, 1971, the plaintiff had made advance payments in the amount of more than $700 on the child support judgment and had paid them into the office of the clerk of the District Court for Hall County; that on February 23, 1971, the defendant Willa Koch reported to the defendant Sam Grimminger that the plaintiff was in arrears in the support payments and she that day requested Grimminger to file a criminal complaint against the plaintiff; that on February 23, 1971, Grimminger did file a criminal complaint against him; (the petition does not allege under what section of the statute the complaint was filed, but apparently it was section 28-450, R. R. S. 1943); that as a consequence a warrant was issued and the defendant was placed under arrest; and that the complaint was dismissed without prosecution. The petition alleged the particulars of the claimed damage. It further alleged that such damage was proximately caused by the following acts and omissions of Grimminger: "a) He executed said complaint and filed said charges without probable cause, when in the exer-

cise of reasonable care he would not have done so. b) He failed to ascertain the status of said child support payments by the plaintiff prior to executing said complaint and filing said charges, when in the exercise of reasonable care he would have done so. c) He failed to ascertain the status of said child support payments prior to proceeding with the prosecution of plaintiff even though the plaintiff informed him said payments had been made, when, in the exercise of reasonable care he would not have so acted." The petition then, under the heading of other theories of recovery, but without further factual allegation, characterized the conduct of Grimminger as "intentional and wreckless (sic)," "malicious," and done "with the intention to confine the plaintiff within boundaries set by the defendants," and that the acts constituted "false imprisonment" and "false arrest."

This court has on many occasions considered the question of immunity from suit of a public officer for torts committed in the course of his official duties. The applicable principle has always been stated in approximately the same language. In Allen v. Miller, 142 Neb. 469, 6 N. W. 2d 594, we quoted from 22 R.C.L., § 163, p. 485, as follows: " 'Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption.' " In School Dist. of Minatare v. County of Scotts Bluff, 189 Neb. 395, 202 N. W. 2d 825, we restated the rule in the same language and also said: "When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a dis-

cretion in its nature judicial, the function is quasi-judicial." Both of the above cases involved the acts of county commissioners. No Nebraska cases have been cited and we have found none from this jurisdiction which considered the question of the liability of a public prosecutor for errors committed in the scope of carrying out his duties as the prosecutor. The apparent rule in most jurisdictions is that the public prosecutor's conduct is privileged and that he is absolutely immune from suit. Restatement, Torts, sets forth the rule in the following language: "A public prosecutor acting in his official capacity is absolutely privileged to initiate or continue criminal proceedings." Restatement, Torts, § 656, p. 392.

The rationale for the rule of absolute privilege is set forth in Gregoire v. Biddle, 177 F. 2d 579. It is there held to apply even though the motive is corrupt. Policy considerations as to the extent of the doctrine of the immunity of public officers generally is extensively discussed in the various opinions in Barr v. Matteo, 360 U. S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434.

Section 895D of Tentative Draft No. 19, Restatement 2d, Torts, p. 38, would afford absolute immunity to judicial and legislative officers for acts within the general scope of their authority while exercising a judicial or legislative function and a qualified immunity to officers performing administrative acts. The qualified immunity applies, among other situations, when the officer is exercising a discretionary function. The rationale for the immunity is stated in Comment *c* in the following language: "A judge of a court of general jurisdiction or a legislator is given an immunity which is general in character. He is not liable for his discretionary acts or omissions, even though he is found to have acted with malicious or other improper motives. The reason for this holding has been held to lie not in the desire to protect the individual from liability for

his own unjustifiable conduct, but in the necessity of protecting all such officers, and with them the public service and the public interest, from the deterrent effect of suit, or threat of suit, alleging improper motives in every case in which there has been no more than a mistake, or a disagreement on the part of the complaining party, with the decision taken. The policy is to free the officer from the necessity of submitting his purposes, motives and beliefs to the uncertain appraisal of juries, or even judges. The policy is the same as that which frees the state or the local government entity from liability." The comment also says: "The immunity may extend beyond judges and legislators. It may apply, for example, to a prosecuting attorney, ..." In discussing the inclusion of prosecutors and certain others in this category, the comment states: "The immunity existing for these officers, however, may not extend to improper motive."

The plaintiff argues that defendant Grimminger, in filing the complaint, was performing merely a ministerial act and is therefore liable for his negligence. Plaintiff also contends we should adopt the holding of the Supreme Court of Michigan in Schneider v. Shepherd, 192 Mich. 82, 158 N. W. 182, and that if we do so the petition must be taken as stating a cause of action.

We can consider both contentions together because both involve interpretations of statutes defining the duties of the prosecutor. Section 23-1201, R. R. S. 1943, provides in part as follows: "It shall be the duty of the county attorney, when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person and to appear in the several courts of his county and prosecute the appropriate criminal proceeding on behalf of the state and county. It shall be the duty of the county attorney to prosecute or

defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested." Plaintiff contends this statute imposes a ministerial function because if the evidence is insufficient no duty exists and if, on the other hand, evidence exists, the county attorney has no discretion for he must file the complaint. The argument then moves to its next step and asserts that since, under the factual allegations of the petition, the prosecutor in this case could have determined the insufficiency of the evidence by the simple expedient of checking the records in the office of the clerk of the District Court for Hall County, he is liable for filing an unfounded charge.

In Comment *f*, section 895D, Tentative Draft No. 19, Restatement 2d, Torts, there is an extensive discussion of what is a discretionary function. It is in part as follows: "There is no single test. Attempts to solve the problem by setting forth a precise definition of the term, discretionary function, have been less than helpful. The expression is not only a standard (see Comment *d*); it is also a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it." It seems apparent to us that, in making the determinations of fact and of law that a prosecutor must make in deciding whether he will file a complaint, he must determine what the law is, whether the facts presented to him constitute a violation of some penal statute, and also in many, if not most, cases he will be called upon to make a judgment upon the reliability of the evidence that he has before him. Such a function is clearly quasi-judicial and discretionary within the meaning of those terms as we have recently defined them in School Dist. of Minatare v. County of Scotts Bluff, *supra.*

In Schneider v. Shepherd, *supra,* the prosecuting at-

torney was held liable for false arrest. The Michigan Supreme Court upheld the finding because, based upon the court's interpretation of the duties imposed by statute, the prosecutor was held as a matter of law to be acting outside the scope of his authority. The Michigan statute is in part like the Nebraska statute, section 23-1201, R. R. S. 1943, and that part is quoted in the opinion as follows: " 'The prosecuting attorneys shall, in their respective counties, appear for the State or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions, whether civil or criminal, in which the State or county may be a party, or interested.' Section 1152, How. Stat. (2d Ed.)" In the case cited, the prosecutor, through private persons, was investigating prostitution. Based upon information furnished him by these private persons and without any complaint having been filed or warrant obtained, he ordered the police to arrest all persons found at a certain address. The only information the prosecutor had was a report that a house at the address was a house of prostitution. It was in fact the home of the plaintiff and his family and had been their residence for 30 years. The Supreme Court of Michigan upheld a finding of the trial court as follows: " '. . . The investigation of alleged crimes by the prosecuting attorney, through private individuals, the acceptance of their reports as basic information upon which is issued a peremptory order to the police to arrest, without warrant, the suspected criminals, finds no statutory sanction in the prescribed powers and duties of a prosecuting attorney. If he proceed upon such a course of action, he does so at the same peril as does the unofficial citizen. His office is not a cloak to protect him from liability from a wrong thereby resulting to an innocent person subjected to a false arrest. The statute affords no such robe of immunity for it neither delegates any such duty

nor grants any such power.'" The court further held that as a matter of law there existed no probable cause and since he was acting outside the scope of his authority he stood in no better position than the ordinary citizen. The holding in that case has no application under our statute and the facts alleged in the petition.

We hold that a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination. This rule would not protect a prosecutor who, knowing that a particular charge is groundless in law or in fact, nonetheless intentionally files a charge and thus acts through a corrupt motive. In such a case he would not be acting within the scope of his authority.

It is true, as we have pointed out earlier in this opinion, that the plaintiff alleged that the defendant Grimminger acted maliciously, intentionally, and recklessly. The use of such words alone without allegations of fact from which malice or corruption may be inferred is insufficient to allege malice, corruption, or intentional wrongdoing in fact so as to take the acts outside the scope of his authority. The words in question constitute mere legal conclusions. Where it is necessary to allege actual corruption or bad motive or malice in order to state a cause of action, there must be an allegation of the ultimate facts from which the conclusion may be inferred in order to withstand a demurrer. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P. 2d 396. This accords with our own holdings to the effect that the pleading of a legal conclusion is insufficient to raise an issue of fact. Degmetich v. Beranek, 188 Neb. 659, 199 N. W. 2d 8.

AFFIRMED.

WILLIAM RUTHERFORD, APPELLEE, V. CHIEF INDUSTRIES, INC., A CORPORATION, APPELLANT.
223 N. W. 2d 838

Filed December 12, 1974. No. 39512.

1. **Contracts: Trial: Instructions: Parties: Evidence.** In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it.
2. **Contracts: Trial: Parties: Evidence.** The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction.
3. **Trial: Motions, Rules, and Orders.** This court on appeal will not consider an issue involving a motion for a directed verdict where the party making the motion withdraws it before it is ruled on by the trial court.

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

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellant.

Cronin, Shamberg & Wolf, for appellee.

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

CLINTON, J.

This is an action by the plaintiff to recover from the defendant, Chief Industries, Inc., plaintiff's former employer and a manufacturer of mobile homes, compensation for services rendered as the defendant's district sales manager. The question involved in the lower court was whether the plaintiff, whose compensation was determined "on a Commission basis of 1% of the gross selling price of all units shipped into his territory," was entitled to commission after his employment

was involuntarily terminated by his employer for units sold before the termination but delivered thereafter. The question of the right to recovery was submitted to the jury which found for the plaintiff. The defendant, after its motion for new trial was overruled, perfected its appeal. It assigns as error: (1) The refusal of the trial court to direct a verdict in its favor. (2) The giving of instruction No. 2. (3) The refusal to give defendant's requested instruction No. 1 which was as follows: "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great weight (influence)." The last assignment raises the principal question on appeal and we deal with it first.

There is little conflict in the evidence. It consisted of a written stipulation of facts, which was supplemented by the testimony of the plaintiff in his own behalf, and that of his immediate superior, Joel Gooch, Chief Industries' sales manager, on behalf of the defendant, and two memoranda issued by the latter during the plaintiff's employment. There was some other documentary evidence but it is unnecessary that we take note of it.

The plaintiff was hired on April 27, 1970, and was at that time paid a weekly salary. The Chief Industries' mobile home division was not then in production as the factory at Aurora, Nebraska, was still being prepared for the manufacturing process. The first units were produced in the latter part of June 1970. On June 10, 1970, Gooch advised his superiors by memorandum that the plaintiff's method of compensation was being changed. This memorandum was in part as follows: "Bill Rutherford is presently on Salary which will cease on July 1, 1970. Effective that date, he will go on a Commission basis of 1% of the gross selling price of all units shipped into his territory up to $3

million in gross sales. For everything over $3 million, he will be paid at the rate of 1-½% commission.

"His territory will consist of the states of Minnesota, Iowa, Missouri, Kansas, and the portion of Nebraska East of Highway 81.

"Effective July 1, 1970, he will begin receiving $200.00 plus reimbursement of his expenses which will be deducted from his monthly commission settlement. We have established a goal of 50 dealers with three units of inventory as a standard in this territory." Thereafter the plaintiff was paid on the 10th of each month a commission on all units delivered into his territory during the preceding month. Advancements were made to him during the month and these were deducted from the commission when paid. For the month of July 1970 he was credited with commissions of $424.58, which was less than his expense and advancements received for the month of July; thereafter, he received or was credited with commissions each month which, up to the date of his discharge on July 22, 1971, totaled $20,895.56. On the latter date there were 68 units on order for delivery in plaintiff's zone; these units were all delivered to dealers after termination of his employment and before September 1, 1971. The gross selling price of the units was $384,783. It is commission on these units which is the subject of the action.

The plaintiff, in his petition, pled essentially the facts recited in the preceding paragraph and prayed for judgment in the amount of $3,847.83. The defendant's answer admitted the employment, the basis of compensation as set forth in the memorandum previously mentioned, and by general denial made the issue of whether any amount was owed.

The evidence shows that, in addition to developing and procuring sales, plaintiff also performed other duties such as getting sales confirmed, and assisting dealers in arranging floor planning, collections, and handling

service complaints. The evidence would permit a jury to find that these latter duties were not exclusively his, but were shared with others who performed them in his absence. The evidence would also permit the jury to find that, although the duties were shared, the ultimate responsibility in these respects was his. The evidence shows that the manufacture of units was not begun until confirmed orders had been received. It is the defendant's position that, because the plaintiff received for the month of July 1970, commissions on units manufactured in June 1970, a time when the plaintiff was still being paid a salary, the parties themselves have in effect construed the contract of employment to mean that no commission would be paid on units, orders for which were confirmed prior to the plaintiff's discharge but delivered later. It is on this basis that the defendant claims it was entitled to the requested instruction.

As to the 68 units on order when the plaintiff's employment was terminated, the evidence shows that the sales contracts had, at that time, been confirmed and the units "released for production," and that floor planning had been arranged.

In support of its position that it was entitled to the requested instruction, the defendant relies upon the principles we most recently stated in Knight Bros., Inc. v. State, 189 Neb. 64, 199 N. W. 2d 720, as follows: "When a contract is ambiguous, the court must determine the parties' intent and an ambiguity must be resolved so as to give effect to that intent.

"The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence, and the court should ordinarily enforce such construction.

"Where evidence relating to ambiguities and contradictory provisions in a written contract is conflict-

ing, the interpretation to be given the contract is for the jury."

In the case at hand, the memorandum itself was not a complete contract. It did not purport to cover all the terms of the employment. In particular, it did not cover the matter of compensation for services rendered in the form of sales procured previous to termination but which were delivered afterward. As we view it, the circumstances and conditions under which the method of compensation was changed from salary to commission were not a practical construction of the terms of employment as they might relate to compensation on termination. That particular situation had not previously occurred. By its nature it could not, unless there had been a termination and a later rehiring. The circumstance of the change of method of compensation afforded, at most, merely a basis for argument by way of analogy as to how compensation on termination was to be handled. All the facts which supported such an argument were before the jury, including some which were wholly unrelated acts of defendant following termination of plaintiff's employment. In James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, we discussed the matter of the practical construction of a contract by the parties and said: "'. . . The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction.'" The evidence in this case did not support *a practical construction by the parties* of an ambiguous or contradictory provision of the contract and the defendant was not entitled to the requested instruction.

The defendant assigns as error the failure of the trial court to grant its motion for a directed verdict. At the close of the plaintiff's case the defendant moved for a directed verdict. The motion was denied. At the close of all the evidence, the defendant renewed its

motion for a directed verdict and, then, after some discussion with the court and counsel for the plaintiff, withdrew that motion. The withdrawal of the motion prevents us from considering its merits for by defendant's election to withdraw it, it has consented to have the jury consider the issues.

The defendant objected to instruction No. 2. That instruction was in part as follows: "In defense to plaintiff's claim, defendant alleges that plaintiff has been paid all moneys due and owing to him under the fair, just and reasonable interpretation of the contract. Plaintiff denies that he has been paid all money due him." No more specific instruction was requested. The only issue raised by the defendant's answer was whether the money claimed was owed. In the absence of some more specific instruction to which he might have been entitled and under the evidence and the issues made by the pleadings, the instruction was not erroneous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY R. TORRENCE, APPELLANT.
224 N. W. 2d 177

Filed December 12, 1974. No. 39535.

1. **Criminal Law: Evidence: Controlled Substances: Intoxicating Liquors.** 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.
2. **Criminal Law: Evidence: Controlled Substances.** To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic.
3. **Criminal Law: Evidence: Trial.** Proof of guilty knowledge

may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found.

4. **Criminal Law: Evidence.** A trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion.
5. **Statutes: Motions, Rules, and Orders.** Section 25-1315.02, R. R. S. 1943, outlining the procedure for a motion for judgment notwithstanding the verdict, is limited to civil proceedings.
6. **Statutes: Motions, Rules, and Orders: Criminal Law.** Chapter 29, article 21, R. R. S. 1943, covering motions for new trial and arrest of judgment, details remedies dealing with criminal procedure after a verdict of guilty is entered in a criminal action.

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

Clayton H. Shrout of Shrout, Caporale, Krieger, Christian & Nestle, for appellant.

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

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

SPENCER, J.

Defendant appeals from a conviction for possession of heroin. He alleges four assignments of error: (1) Failure to grant a speedy trial; (2) insufficiency of the evidence; (3) receipt in evidence of an ice bucket described as State exhibit 1; and (4) overruling his motion for judgment notwithstanding the verdict. We affirm.

On February 25, 1972, pursuant to a no-knock search warrant, the premises at 4110 John Creighton Boulevard were searched by Omaha police officers. At that time an ice bucket and several other items were seized. On March 6, 1972, the defendant was charged with possession of heroin. The charge was based on a positive

test on the residue in the ice bucket. The charge was dismissed March 15, 1972, at the conclusion of a preliminary hearing in the Omaha municipal court.

Subsequently, in State v. McElroy (1972), 189 Neb. 376, 202 N. W. 2d 752, we clarified the law on quantity as an essential element of the offense of unlawful possession of a controlled substance. The State, on April 9, 1973, refiled the charge against the defendant. The case was tried to a jury in District Court starting October 22, 1973.

The search pursuant to the warrant was conducted at 4110 John Creighton Boulevard. Defendant was not present at the time but was brought to the residence during the search. On a card table in the basement, the police found the ice bucket which contained a large tablespoon. There was a powdery substance in the bottom of the bucket. It was a small amount, roughly 10 milligrams. A test proved it to be heroin. The police also discovered some foil-wrapped papers in the same area.

Did the trial court err in not sustaining defendant's motion for dismissal for failure to grant a speedy trial? The delay complained of occurred between March 15, 1972, when the charges against defendant were dismissed following a preliminary hearing, and April 9, 1973, when the charges were refiled. This represents a delay of 13 months. A municipal judge dismissed the charge because he erroneously believed the amount of heroin involved was not sufficient to support a criminal complaint. Defendant concedes that although the charge had been dismissed, the State was not precluded from refiling it. Van Buren v. State (1902), 65 Neb. 223, 91 N. W. 201.

Five months after this court clarified the law on the point erroneously decided by the municipal judge, the State refiled the charge. Defendant then had been arrested on another narcotic offense. Defendant asserts that the reason for the delay was a bad faith ef-

fort on the part of the prosecution to justify unreasonably high bail. The obvious answer to this is that the defendant was able to post an appearance bond. In any event, if defendant felt the bond was unreasonably high, he was not without remedy.

It is more likely to believe that the reason for the delay was the uncertainty of the law which uncertainty was removed 5 months before the refiling of the information. We do not doubt that one of the factors influencing the prosecutor's decision to refile was the arrest of the defendant on another drug-related charge. The trial proceeded expeditiously after the refiling.

Defendant asserts the delay was prejudicial to him, but makes no attempt to show in what manner or degree he was prejudiced. Rather, his claim is premised on his argument that the denial of a constitutional right is inherently prejudicial. The question of prejudice along with the other variables set out in Barker v. Wingo (1972), 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101, is still pertinent on the issue of whether a constitutional right was violated. Barker teaches that a balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis to identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. These were identified as length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to him. Applying the Barker criteria to this case, we conclude that the motion to dismiss was properly overruled.

Defendant's next assignment of error is premised on his contention that the State never established that he ever possessed or controlled the ice bucket found at 4110 John Creighton Boulevard. It is conceded that defendant did not have physical possession of the heroin at the time of his arrest. Specifically, it is contended the jury might reasonably find the place where the

narcotic was discovered was the residence of the accused and from that finding rationally infer that the defendant had constructive possession of the drug.

Three Omaha police officers testified that 4110 John Creighton Boulevard was the residence of the accused. That residence had been under surveillance for some time. While the search at the residence was going on, another search warrant was served on the Fish House Cafe where the defendant was found. After completing that search, one of the police officers testified he accompanied the defendant to his residence, 4110 John Creighton Boulevard. They arrived while the search was in progress.

The ice bucket was taken to the police station and subsequently to the Lutheran Medical Center where a test was made of the white residue. The officer who took the bucket to the station thought he had marked it with his initials and had placed a tag on it. These were not present at the time the exhibit was offered in evidence. The officer, however, identified the bucket as the one taken from 4110 John Creighton Boulevard on the basis of a gold band around the top of the bucket.

The officer who transported the articles taken in the search at 4110 John Creighton Boulevard to Lutheran Medical Center identified the ice bucket as one of the articles turned over to the chemist. In 2 years of taking articles to the Center this was the only ice bucket tested. The chemist who received the bucket from the officer and made the test recognized the exhibit as that item. After testing, the bucket was kept in the vault at the Center. The substance in the bottom of the bucket tested positive for heroin. After the preliminary hearing, the bucket was returned to the chemist. He placed an identifying number tag on it. This was present at the time of the trial.

The question presented is, having a reasonable basis for finding that the place where the narcotic was

found was the residence of the defendant, whether the jury might then rationally infer that the defendant had constructive possession of drugs found at his residence? The answer to that question is set out in State v. Rys (1971), 186 Neb. 341, 183 N. W. 2d 253, where 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."

In State v Faircloth (1967), 181 Neb. 333, 148 N. W. 2d 187, we held: "To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. Here, the ice bucket containing the narcotic was found with a tablespoon on a card table in the center of the "rec room" in the basement. This was sufficient to give rise to an inference of knowledge and possession by the defendant sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts or explanations which might raise a reasonable doubt of the defendant's guilt.

Defendant's third assignment of error is that the ice bucket was admitted into evidence without sufficient foundation. Defendant concedes the ice bucket was taken into custody following a search conducted at 4110 John Creighton Boulevard. The fact that the bucket tested positive for heroin is undisputed. Defendant contends the State did not sufficiently establish a chain of custody so as to exclude the possibility that the evidence was altered. A trial court's deter-

mination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Waits (1970), 185 Neb. 780, 178 N. W. 2d 774. We must, therefore, determine whether or not there was an abuse of discretion in the admission of the ice bucket.

The police officer who took the bucket to the police station testified he thought he had marked his initials on it, but could not find them when it was offered in evidence. Further, the municipal judge testified the number of the identification tag was 6503 F. The number on the ice bucket when offered in evidence was 6508 F. Relative to the officer's testimony, he was unsure whether he initialed the ice bucket at the time it was taken into custody. He assumed he had, but even if he had his initials could easily have been obliterated during the interim between the time of seizure and the time of trial. Insofar as the municipal judge's testimony is concerned, he got the number in his notes from a third party who might well have misread the number. Moreover, the notes were precisely that—notes, and not a certified bill of exceptions.

Against these apparent discrepancies the officer who took the ice bucket into custody identified it as the one taken from 4110 John Creighton Boulevard. The officer who transported it to the Lutheran Medical Center identified it as one of the articles taken there. The chemist who made the test recognized it as the one tested. On this record, there is no clear abuse of discretion in the admission of the ice bucket into evidence.

Defendant's last assignment of error is that the trial court erred in overruling his motion for a judgment notwithstanding the verdict. Section 25-1315.02, R. R. S. 1943, outlining the procedure for a motion for judgment notwithstanding the verdict, is limited to civil proceedings. Chapter 29, article 21, R. R. S. 1943, covering motions for new trial and arrest of judgment,

details remedies dealing with criminal procedure after a verdict of guilty is entered in a criminal action.

For the reasons given, we find no merit in any of the defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRENT WILLIAM WIITALA, APPELLANT.
223 N. W. 2d 841

Filed December 12, 1974. No. 39536.

1. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.
2. **Criminal Law: Presentence Reports: Sentences.** The court is not and should not be bound by the recommendation of a probation officer made in a presentence investigation report.

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

David Herzog, for appellant.

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

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

WHITE, C. J.

The only issue presented by this case is the excessiveness of the sentence by the District Court of the defendant to the minimum term of 1 year imprisonment for the offense of unlawful possession of marijuana with intent to distribute, deliver, or dispense. We find no abuse of discretion by the District Court in imposing the sentence that it did and therefore affirm the judgment and sentence of the District Court.

The defendant was convicted by a jury of the crime charged. The record reveals the evidence is so overwhelmingly persuasive that the defendant's counsel in this court contends the defendant should have pleaded guilty in District Court. It is not contended there are any mitigating circumstances or doubt about the guilt of the defendant.

The court was furnished with a comprehensive presentence investigation report pursuant to the statute.

The record leads itself to an inference of an extensive and continuous involvement in the drug traffic. The defendant was selling marijuana that had a Mexican or Acapulco origin. The record of his conversations with the undercover agent reveals an emphasis upon the high quality of the marijuana he was selling. At one point he advised the undercover agent that he had several pounds of marijuana available and wanted about $200 per pound. In connection with the negotiations the evidence reveals involvement with several other parties in a common enterprise. The trial court undoubtedly came to the conclusion, as we do, that the defendant was engaged continuously or consecutively in the business of making a living or profit off the sale of controlled substances. In his residence was found one large silver suitcase containing twelve baggies of suspected marijuana, a separate box of baggies, a large baggie of marijuana stems, one plastic hashish pipe with a mask and pipe fittings, a rolled marijuana cigarette, three packages of cigarette papers, two pipes, a box of cokesnuff in a matchbox, three baggies wrapped in a rubber band, one baggie that contained eleven small baggies of marijuana, a cigarette case containing marijuana, and a picture depicting the defendant smoking a hashish pipe. There is further detailed evidence in the presentence investigation report, and the record that confirms the conclusion, the defendant was no transitory or episodic conveyor of drugs, but was engaged calculatedly and designedly in a concerted en-

terprise with other people in the sale of drugs in Omaha, Nebraska.

In light of this situation the defendant's contention seems to be that the trial court abused its discretion in not granting probation to the defendant because the probation officer in the presentence investigation report made such a recommendation. The fact is that the probation officer stated: "I would recommend probation and a fine if the defendant would have pled guilty." The record reveals that the District Court did not disregard the feeling, opinion, or conclusion of the probation officer. It reveals affirmatively that it did read and consider the investigation. The trial court specifically found that it did consider the presentence investigation report and, after discussion, determined the conclusion reached by the writer of the presentence investigation report was not supported by the facts. We point out that the trial court had before it the defendant and was aided by a full familiarity with the facts as adduced in the trial before the jury and its observation of the defendant, together with all the facts as brought out by the presentence investigation report. Contrary to the contention of the defendant, the court is not and should not be bound by the conclusion of a probation officer. Such a holding, directly or impliedly, would amount to an unconstitutional and an illegal delegation of the sentencing power by the trial judge. The sentence of the court shows that the court affirmatively considered the age and the personal history of the defendant and the needs of the defendant and the duty of the criminal justice system to protect society. We are not met in this case with the usual argument that the defendant is entitled to probation because the offense committed was a "victimless" crime. Considering all the facts and the circumstances involved in this particular offense the trial court undoubtedly came to the conclusion that it was inappropriate when applied to the defendant who was at-

tempting to harm others by supplying illicit drugs. On the other hand the imposition of the minimum sentence shows a fair and impartial consideration of the other factors of age and the defendant's record which militated in his favor. The District Court's decision to impose the *minimum sentence* provided by statute was reached fairly, impartially, and with due deliberation, and we can find no abuse of discretion in the imposition of the sentence that it did.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEIR JONSSON, APPELLANT.
224 N. W. 2d 181

Filed December 12, 1974. No. 39545.

1. **Criminal Law: Statutes: Sentences: Time.** Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence and does not include an appeal in or from a collateral or related proceeding.
2. **Post Conviction: Appeal and Error: Sentences.** An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case.
3. **Post Conviction: Sentences.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.

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

Paul F. Beetz, III, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

PER CURIAM:

On September 13, 1973, the defendant, Geir Jonsson, filed a motion for leave to file notice of appeal, or, in the alternative, to vacate sentence. The District Court, after reconsideration, overruled the motions and the defendant has appealed.

On January 26, 1973, the defendant, after trial, was found guilty of possession of cocaine with intent to deliver. On March 27, 1973, the defendant was sentenced to 5 years imprisonment. No appeal from that sentence was taken and no further action followed until the filing of the motion involved here on September 13, 1973.

The factual basis for defendant's contentions here is that an amendatory statute serving to mitigate the criminal punishment for the offense for which defendant was committed was passed by the Legislature on May 24, 1973, and took effect on September 2, 1973.

Section 28-4,125, R. S. Supp., 1972, at the time the defendant was sentenced, provided for imprisonment of 5 to 20 years. Under the amendment of September 2, 1973, it provided for imprisonment of 1 to 10 years for first offenders. The defendant was a first offender.

As to the finality of judgments in criminal cases, and their vulnerability to collateral or indirect attack, this case is controlled by State v. Warner, *ante* p. 438, 222 N. W. 2d 292. In that case we reaffirmed the principle that where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Warner, *supra*, held that an appeal within the meaning of that rule does not include an appeal in or from a

collateral or related proceeding. It also held that matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. In the case before us, the judgment and sentence became final on April 27, 1973, and this court lost jurisdiction to hear a direct appeal. The judgment and sentence of the District Court then became final and are not subject to attack in a collateral post conviction proceeding.

The judgment of the District Court is therefore affirmed.

AFFIRMED.

McCOWN, J., concurring.

I deem it advisable to note that the opinion here is correct so far as it goes, but it stops when it should proceed. The opinion responds to the argument that the Legislature intended to have the mitigated punishment statute applied wherever it could constitutionally be applied by holding that the defendant is too late because the judgment became final before the statute became effective. No matter how correct that technical holding may be, its justice and logic are wholly invisible to a defendant who was sentenced only 2 months before the mitigating statute was enacted. The fact that the court no longer can alter or change the defendant's final judgment and sentence does not mean that a mitigated punishment statute cannot be applied by the board of parole to appropriate cases within its jurisdiction in determining the date of eligibility for parole.

Exactly the same legal and equitable principles which support the rule that a court shall grant the defendant the benefit of a legislative act mitigating punishment, adopted prior to final judgment, also support the proposition that a board of parole, in exercising its jurisdiction, should grant the benefit of such an amendatory act to committed offenders in determining the date of eligibility for release on parole. The determination of the time when a prisoner becomes eligible for parole is a

legislative function relating to prison government and discipline and is not part of a judicial sentence. See People ex rel. Kubala v. Kinney, 25 Ill. 2d 491, 185 N. E. 2d 337. That legislative determination in this state is set out in section 83-1,110, R. S. Supp., 1972, and related statutes.

Where a criminal statute is amended by reducing the minimum sentence provided by law, after the judgment of conviction and sentence of a defendant have become final, the amendatory act should be applied to the defendant's sentence by the board of parole in determining the date of eligibility of the committed offender for release on parole under the provisions of section 83-1,110, R. S. Supp., 1972. It is only logical and reasonable to assume that the Legislature intended the new mitigated punishment, which it now feels fits the crime, to apply whenever possible. The defendant here may be entitled to have the amendatory act applied by the board of parole.

SPENCER, J., concurring.

I am in full agreement with the Per Curiam opinion herein and believe that it goes as far as it legally may, unless we wish to usurp a legislative prerogative. If we were to attempt to tell the board of parole to apply the amendatory act to the defendant's sentence in determining his eligibility for release on parole under the provisions of section 83-1,110, R. S. Supp., 1972, we would assume authority we do not have. Instead of interpreting the law, which is our proper function, we would be invading the legislative domain by making law, which is not our function.

WHITE, C. J., and NEWTON, J., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. LITTLE ART CORPORATION, A FOREIGN CORPORATION DOING BUSINESS AS ART 16 THEATER, APPELLANT.
224 N. W. 2d 183

Filed December 19, 1974. No. 38672.

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

Walter J. Matejka, Arthur Schwartz, and Frank P. Slaninger, for appellant.

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

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

NEWTON, J.

This case has been remanded by the United States Supreme Court for a construction of the Nebraska statutes in the light of Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, and other recent decisions. Our original opinion in this case is found in 190 Neb. 289, 207 N. W. 2d 527. We there called attention to the fact that the decision in this case was controlled by the decision in State v. Little Art Corp., 189 Neb. 681, 204 N. W. 2d 574. That case also had been remanded in a similar manner and for the same purpose by the United States Supreme Court. Our opinion on the remand may be found in 191 Neb. 448, 215 N. W. 2d 853. Our opinion on the remand on the former case where the issues are identical with those in the present case controls in this instance and we reaffirm our holding in the former opinion.

AFFIRMED.

CLINTON, J., dissenting.

I dissent for the reasons set forth in my dissenting opinion found at 191 Neb. 454, 215 N. W. 2d 857.

MCCOWN, J., joins in this dissent.

WILLIE PODESTA YOUNG, APPELLEE, V. EMERSON D. YOUNG, JR., APPELLANT.
224 N. W. 2d 361

Filed December 19, 1974. No. 39442.

1. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.
2. ———: ———. Alimony awards are not subject to solution by mathematical formula.

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

L. W. Weber of Weber & Fugit, for appellant.

Richard M. Fellman, for appellee.

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

SPENCER, J.

This is a divorce action. The only questions raised deal with the propriety of the division of property and allowance of alimony and child support. We affirm the judgment as modified.

Emerson D. Young, Jr., and Willie Podesta were married at Chanute Air Force Base, August 8, 1969. Emerson is now a major in the United States Air Force, stationed at Offutt Air Force Base. Both parties had been married previously. Emerson is paying $130 per month for the support of a child adopted during his previous marriage. Willie had a child by her previous marriage who also was adopted by Emerson. This child was 8 years old at the time of the hearing. The petition for divorce was filed July 20, 1973, and was heard in October 1973. There is no question this marriage of less than 4 years was irretrievably broken. The husband testified: "There really hasn't been a marriage for the last two years."

The record reveals the property brought into the mar-

riage by each of the parties, and its value at that time, is as follows:

EMERSON:	
Stock in Young's Department Store, Inc., Mattoon, Illinois	$ 5,810.00
House, 701 East Patton Drive, Papillion, Nebraska	30,000.00
Car, 1965 Chevrolet	800.00
Household goods	6,412.00
Cash	1,100.00
Gross value of property:	$44,122.00
Indebtedness:	
First National Bank, Mattoon, Illinois	$ 1,500.00
Mortgage on 701 East Patton Drive, Papillion, Nebraska	24,171.00
Total indebtedness:	$25,671.00
Net equity in property at time of marriage:	$18,451.00
WILLIE:	
Rental property, 1505 Wabash Avenue, Mattoon, Illinois	$20,000.00
Jewelry and clothing	8,800.00
First National Bank, Mattoon, Illinois	400.00
Stock, Airlift International — 100 shares	769.00
Car, Plymouth	1,500.00
Household goods	6,785.00
Gross value of property:	$38,254.00
Indebtedness:	
First National Bank of Mattoon, Illinois	1,500.00
Mortgage on 1505 Wabash Avenue, Mattoon, Illinois	18,000.00
Total indebtedness:	$19,500.00
Net equity in property at time of marriage:	$18,754.00

At the time of the divorce the parties still had the following property, the values indicated being the values at the time of the divorce:

EMERSON:	
Stock in Young's Department Store	$ 5,810.00
House, Papillion, Nebraska	38,000.00
Car, 1965 Chevrolet	$ 200.00
Household goods	4,798.00
Gross value of property at time of divorce:	$48,808.00
Indebtedness:	
First National Bank, Mattoon, Illinois	800.00
Mortgages on Papillion property	26,670.00
Total indebtedness:	$27,470.00
Net value:	$21,338.00
WILLIE:	
1505 Wabash Avenue, Mattoon, Illinois	$28,000.00
Jewelry and clothing	6,500.00
Cash, First National Bank, Mattoon, Illinois	1,344.00
Stock, Airlift International — 100 shares	50.00
Coles National Bank shares	180.00
Household goods	1,236.00
Gross value of property	$37,310.00
Indebtedness:	
Mortgage on 1505 Wabash Avenue, Mattoon, Illinois	8,955.25
Net value at time of divorce:	$28,354.75

In addition thereto, the parties had the following property acquired during the marriage:

C. D., Bank of Bellevue, Nebraska	$ 500.00
175 shares, John Hancock Company	4,331.00
Coles National Bank stock	165.00
Joint account, Bank of Bellevue	50.00

Personal account, Bank of Bellevue	30.00
Personal account, Harlingen National Bank	15.00
Business account	250.00
Business account	1,500.00
1973 Mercury	3,800.00
Commercial building, 1624 Broadway Avenue, Mattoon, Illinois	27,000.00
Household goods	3,960.00
Total:	$41,601.00
Indebtedness:	
Mortgage on 1624 Broadway Avenue, Mattoon, Illinois	$22,193.00
Mrs. Emerson D. Young, Sr. — money borrowed on note for downpayment on 1624 Broadway Avenue, Mattoon, Illinois	5,700.00
Total indebtedness:	$27,893.00
Current equity at time of divorce	$13,708.00

Subtracting the indebtedness, there would be a combined total net estate of $64,220.75.

The District Court awarded Emerson:	
1965 Chevrolet	$ 200.00
Commercial property, 1624 Broadway Avenue, Mattoon, Illinois	27,000.00
Stock in Young's Department Store	5,810.00
Personal items and household goods	5,858.00
Certificate of deposit and bank accounts	845.00
Gross value of property awarded to Emerson:	$39,713.00
Encumbrance on commercial property, 1624 Broadway Avenue, Mattoon, Illinois, and note for downpayment	27,893.00
Net value of property awarded Emerson:	$11,820.00

The District Court awarded Willie:	
Papillion residence	$38,000.00
1973 Mercury	3,800.00
Commercial building, 1505 Wabash Avenue, Mattoon, Illinois	28,000.00
John Hancock fund — 175 shares	4,331.00
Personal items and household goods	12,395.00
Bank account	1,500.00
Gross value	$88,026.00
Subject to encumbrances of:	35,625.25
Leaving a net value of property award to Willie:	$52,400.75

Of a net estate of $64,220.75, the wife was awarded $52,400.75, or approximately 81 percent. In addition, the trial court awarded to the wife $6,000 alimony, payable at the rate of $250 per month; $300 per month child support for 6 months, and $250 per month thereafter; $1,250 attorneys' fee, in addition to a $175 temporary allowance; and defendant was directed to maintain a $10,000 insurance policy on his life, naming the child of the parties as the beneficiary.

Analyzing the above figures, it is obvious, in the absence of some extenuating circumstances, that the property award to the wife is excessive. Except for the Papillion residence, which was titled in Emerson's name, the trial court gave the parties substantially the property they brought into the marriage. In dividing the after-acquired property, we assume the trial court ignored the note to Emerson's mother for $5,700, the proceeds of which were used to purchase 1624 Broadway Avenue, Mattoon, Illinois, assigned to Emerson. The equity in the property is less than the note.

There is no satisfactory way on the record to adjust the inequity in the property distribution if Willie is given the entire equity in the Papillion home. The

present equity is between $11,000 and $12,000. We direct that this home be sold by June 1, 1975, and the proceeds be divided equally between the parties. Willie, who is occupying the home, should keep up the payments on the two mortgages in lieu of rent. As an alternative to sale, if Willie does not desire to have the property sold, she may pay Emerson $5,500 on or before June 1, 1975, in full payment of his equity therein.

The fixing of the amount of alimony rests in each case within the sound discretion of the trial court, and this court has observed many times that the problems of alimony awards are not subject to solution by mathematical formula. Hoffmann v. Hoffmann (1972), 188 Neb. 408, 197 N. W. 2d 373. Plaintiff herein was allowed $6,000 alimony, payable $250 per month for a period of 24 months. In view of the relatively short period of the marriage, and the value of the property set off to plaintiff, an award of $200 for 12 months, or $2,400, is much more equitable.

We also hold that an allowance of $300 per month for 6 months, and $250 per month thereafter for child support is excessive for an 8-year-old child on the record herein. Defendant now is paying $130 per month for the support of a child from his first marriage. We direct that future child support be fixed at $175 per month until further order of the court.

For the reasons given, we direct that the decree entered by the trial court be modified in the particulars noted herein, and the decree be affirmed in all other respects. Each party is to pay his respective attorneys and the costs incurred by him on this appeal.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MICKEL L. KEIL, APPELLANT.

224 N. W. 2d 363

Filed December 19, 1974. No. 39501.

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

Richard J. Bruckner of Schrempp, Bruckner & Dinsmore, for appellant.

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

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

CLINTON, J.

The defendant was charged under the provisions of section 39-6,104.01, R. R. S. 1943, with having, on August 26, 1973, left the scene of a personal injury accident. After a plea of not guilty, defendant was convicted by a jury and sentenced to a term of 3 years in the Nebraska Penal and Correctional Complex.

On this appeal it is contended that the sentence is excessive and that the defendant should be placed on probation or the sentence reduced.

In support of the defendant's claim for leniency, his present counsel urges the following considerations: (1) The defendant is a product of a broken home and was deprived of normal parental guidance; (2) his relative youth, having been born November 10, 1951; (3) the fact that he was regularly employed and a good and competent worker; (4) his trial counsel was willing to undertake the supervision of his probation; (5) he had no prior felony convictions; and (6) since his conviction on the charge he has refrained from operating a motor vehicle, has spent his evenings at home, and has thus rehabilitated himself. Urging the desirability

of considering probation as a first alternative in imposing sentence, counsel cites our policy statements in State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172; State v. Curry, 184 Neb. 682, 171 N. W. 2d 163; and State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498; and the A.B.A. Standards relating to Sentencing Alternatives and Procedures.

We have stated frequently that the sentence imposed by the trial court should not be disturbed on appeal in the absence of an abuse of discretion. State v. Combs, *ante* p. 551, 222 N. W. 2d 833.

The sentence limits provided by statute for the offense charged are either a 30-day to 1-year term in the county or municipal jail, or 1 year to 5 years in the Nebraska Penal and Correctional Complex. § 39-6,104.03, R. R. S. 1943. The statute further provides for suspension of the motor vehicle operator's license for a period of 1 year after completion of the sentence. The great differences between the minimum and the maximum sentence authorized by the Legislature indicates a recognition by it of the varying degrees of culpability of a defendant dependent upon circumstances surrounding the offense and his attitude toward the responsibilities of operating a motor vehicle.

In this case both the circumstances of the crime and the defendant's prior record indicate a callous disregard for the life and limb of others as well as an unwillingness to learn from the imposition of previous lesser penalties.

The record discloses that at the time of the offense the defendant in his car and an acquaintance in another car were drag racing on McKinley Street near 45th Avenue in Omaha, Nebraska. They first raced westerly on McKinley Street and then turned about and raced easterly on the same street. At the point where the collision occurred McKinley Street is a four-lane street divided by a narrow median. The car in which the

injury victim was a passenger, driven by one Cecil Life, was proceeding easterly at a speed of about 40 or 45 miles per hour. The car with which the defendant was racing apparently passed the Life car on the right. The defendant's car was seemingly unable to pass, and struck the Life car in the rear, propelling it forward. When Life had almost regained control of his car, it was struck again and severly damaged by the defendant's car. The defendant, without stopping, either drove or, out of control, continued into an adjacent parking lot where his car spun about. From there the defendant fled the scene by driving past the Life vehicle, crossing the median, and proceeding west in the eastbound lane of traffic. Later he and friends were observed removing broken and damaged parts of his car in a garage near his home. The defendant was identified as the driver of the car involved in the collision by, among others, an acquaintance who was near the accident scene and observed the start of the drag race.

The defendant, following his conviction by the jury, maintained his innocence to the probation investigator, but finally acknowledged his guilt at the time of sentencing.

The record of the defendant's convictions for driving offenses indicates that the imposition of relatively mild sentences has been fruitless in bringing about a change in his driving habits. He was first convicted of a minor traffic offense on September 7, 1968. Defendant was granted probation and required to attend traffic school. Beginning about 6 weeks later, and continuing until February 21, 1970, he was convicted of five considerably more serious charges for which fines on a generally increasing scale were imposed. On April 28, 1970, his license was suspended for having accumulated 12 points within a 1-year period. On June 29, 1970, he was convicted of willful reckless driving and driving while his operator's license was under suspension.

For this he was sentenced to, and apparently served, 30 days in jail and his license was suspended for an additional year. Thereafter he was again convicted for driving while he was under suspension and again received a 30-day sentence and an additional 6-months suspension of his license. In 1972 he was convicted of driving while intoxicated and fined $100 and his license was again suspended.

At the time of the offense here charged and of which he was convicted, he was again driving while his license was suspended. For this latter offense he received a 30-day jail sentence and another suspension. At that time there were charges pending against him for having assaulted and resisted an officer on July 8, 1973, the disposition of which is not shown. The record also shows the defendant served a 90-day sentence for burglary in 1970.

It is not possible to say that the trial court abused its discretion in imposing the sentence it did.

AFFIRMED.

IN RE PETITION OF NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC.

MCMILLAN CO., A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLEE AND CROSS-APPELLANT.

224 N. W. 2d 184

Filed December 19, 1974. No. 39503.

1. **New Trial: Appeal and Error.** Whether the trial court's decision on a motion for a new trial was to grant a new trial or to deny one, the questions on appeal are whether error or errors appear in the record; whether they were called to the attention of the trial court; and whether they constitute prejudicial error to the party complaining.
2. **Eminent Domain: Damages.** Where pasture lands forming the

principal acreage of a cattle ranch, upon a portion of which an easement for electric transmission lines is taken by condemnation, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken.

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

Quigley, Dill & Quigley, for appellants.

Olds & Swarts and David & Clark, for appellee.

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

MCCOWN, J.

This is a condemnation case involving an easement for an electric transmission line across a portion of a sandhills cattle ranch. The jury returned a verdict of $34,616. Upon the landowner's refusal to accept an ordered remittitur of all damages in excess of $19,000, the District Court granted a motion for new trial. The landowner has appealed.

The plaintiff, McMillan Co., a corporation, is the owner of a sandhills grazing ranch located in Thomas County, Nebraska. The ranch contains a total of 12,808 acres comprised of a part or all of 30 sections of land in three townships. The land is contiguous but is not compact. Two portions of the ranch are connected to the main body by "necks" of land that are approximately half a mile wide. The 100-foot-wide easement is for a 115,000 volt electric transmission line. There are 34 two-pole structures and 1 three-pole structure, set at intervals of approximately 750 feet. The easement extends across the plaintiff's ranch for a distance of approximately 4.8 miles. The total number of acres within the 100-foot easement is 58.54 acres. Approximately 20.72 acres of that total is in an area suitable

for irrigation and the remaining 37.82 acres are on land too hilly to be suitable for irrigation. A portion of the right-of-way crosses the only substantial amount of level land on the ranch. In this level area there are approximately 410 acres of land which are suitable for the development of center pivot irrigation. Of this 410 acres, 250 acres would still be irrigable by center pivot irrigation after the construction of the line. The other 160 acres would still be irrigable by systems of smaller size, but such irrigation might not be economically feasible. At the time of trial none of the plaintiff's land was irrigated and there were no agreements or arrangements for its irrigation in the immediate future, although there was evidence that plaintiff had considered the possibility of irrigation. Approximately 800 head of cattle had been grazed on the ranch prior to the time of trial.

On March 21, 1973, in the condemnation proceedings in county court, the appraisers awarded $5,500 damages to plaintiff. From that award the plaintiff appealed to the District Court. The major issue at the trial in the District Court and on appeal in this court involves the amount of damage to plaintiff's property.

Tony A. Wiese operated the ranch under a lease from the plaintiff and was also a stockholder in the plaintiff corporation. He testified that the value of the ranch before the taking was $100 an acre or $1,300,000, and that the amount of damage by virtue of the easement was $200,000. He testified that his opinion was based upon his own feelings and not his knowledge of sales of property in the area. He also testified that in May of 1973, after the entry of the condemnation award in the county court, as lessee, he had executed a new 5-year written lease of the ranch at a rental of $2.50 an acre, and that the new lease replaced a 5-year lease executed in 1968 under which his rental was $2 an acre.

The plaintiff's only expert real estate witness was Keith Sorum. He testified that the development of ir-

rigation makes property more marketable, and that if the 410 acres suitable for irrigation were developed, the cattle-carrying capacity of the ranch would increase from 800 to a total of 1,000 to 1,050 head. Another witness testified that irrigating the 410 acres would increase the capacity to approximately 1,200 head. Sorum also testified that the total value of the ranch before the taking of the easement was approximately $70 per acre and after the taking was approximately $60 per acre, and that the total damages were therefore $128,080. Some of his testimony was conflicting and some of the formulas he used were confusing, but he did testify that the damage of $10 per acre extended to the entire 12,808 acres of the ranch. His testimony as to that damage rested upon the conclusion that the easement interfered with the development of future irrigation on the 410 acres suitable for that purpose.

The expert witnesses for the defendant testified as to numerous sales of similar properties in the area. Mr. Fischer valued the unirrigated land on plaintiff's ranch at $60 an acre, and the land that could be irrigated at $125 an acre, and testified that the damage to plaintiff's property was $3,400. Mr. Clayton testified that in his opinion the plaintiff's ranch was worth approximately $65 an acre at the time the transmission line was constructed and that the total damages to plaintiff's land were $5,500. These witnesses also testified that the 410 acres could still be irrigated with a center pivot system.

Virtually all witnesses agreed that the easement did not damage the remainder of the plaintiff's property for grazing purposes nor affect the grazing capacity of the land. The issues on damage center on the land actually covered by the easement and on the future irrigation development of the 410 acres suitable for such development.

The jury verdict fixed plaintiff's damage at $34,616. The defendant filed a motion for new trial which was

argued and submitted. The trial court found that the only two items of damage of consequence were the inconvenience caused by the construction and maintenance of the transmission line easement and the limitation of use of the land in constructing center pivot irrigation systems. The court further found that the evidence that damage extended to the entire area of the ranch was logically and evidentially unsupportable, and that at best plaintiff's evidence established only that 160 acres of land might be lost for development for center pivot irrigation. The court assumed that the value of the 160 acres of land might be enhanced $100 per acre if it were irrigated. The court also added 70 percent of the value of the entire 58 acres covered by the 100-foot easement, which was less than $3,000, and found that $19,000 was the maximum amount of damages that the evidence would sustain. The court entered an order requiring the plaintiff to file a remittitur for all amounts in excess of $19,000 or otherwise the motion for new trial would be sustained. When the plaintiff filed its election not to file a remittitur, the court sustained the motion for new trial and this appeal followed.

Unless we can say that there is no legal cause or reason for ordering the conditional remittitur or granting a new trial, the action of the trial court must be sustained. Whether the trial court's decision on a motion for new trial was to grant a new trial or to deny one, the questions on appeal are whether error or errors appear in the record; whether they were called to the attention of the trial court; and whether they constitute prejudicial error to the party complaining. The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion, and in that connection judicial discretion means the application of statutes and legal principles to all the facts of a case. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

Among other reasons, the motion for new trial alleged that the verdict was excessive and unsupported by the evidence, and that the court erred in failing to give certain requested instructions.

The defendant requested an instruction that the plaintiff was not entitled to damages to the remainder of the entire ranch because the transmission line crosses a portion of the ranch, unless a preponderance of the evidence shows that the construction of the transmission line had an adverse effect upon the market value of the entire ranch at the time of the taking. The requested instruction also included an instruction that the jury was not permitted to speculate as to the peculiar value of the land to the owner for special purposes or reasons. The instruction was refused.

Although the instruction may not have been entirely accurate, it reflects the pertinent issue here of whether pasture lands whose use is in no way restricted by the taking are damaged or depreciated in value as a consequence of such taking. We have held that in the case of a transmission line easement, the only thing to be considered is the damage to the land resulting from a restriction of use, and that consideration must be limited to that portion of a farm or ranch whereon the use has in fact been restricted. See Wahlgren v. Loup River P. P. Dist., 139 Neb. 489, 297 N. W. 833. We have not limited recovery of damages under Wahlgren to the boundaries of the electrical transmission line easement itself. See Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc., 182 Neb. 791, 157 N. W. 2d 384. Nevertheless, we have held that consequential damages may not be recovered for land not taken and not injured or restricted as to use, simply because it is owned and used as a part of a contiguous unit, some other part of which is damaged. In McGinley v. Platte Valley P. P. & Irr. Dist., 133 Neb. 420, 275 N. W. 593, we denied recovery of claimed consequential damage to 46,000 acres of pasture land. In that case we held that where pas-

ture lands, forming the principal acreage of a cattle ranch partly taken for a public purpose, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken. We said: "The jury were left free to find that all the land not taken was diminished a dollar in value on each acre, if the evidence so proved, though there was no proof that the summer pasture land in the sand-hills was of any less value for ranch purposes after the taking than it was before. There must be a limit to remote, unaffected lands that may be considered in estimating depreciation in their value by condemnation of contiguous lands taken for public purposes."

The evidence in this case is undisputed that the vast majority of the land comprising the contiguous area of plaintiff's ranch will not be affected or restricted in its use by virtue of the easement. Aside from the 58 acres within the boundaries of the easement proper, the evidence is persuasive that at best only 160 acres of land otherwise suitable for irrigation may no longer be suitable. It is not necessary that we find that the proper amount of damages was $19,000. It is only necessary that we find tenable grounds to support the conclusion that the jury verdict of $34,616 is excessive. Such grounds are clearly present.

The trial court was acting within the proper bounds of its discretion in entering the order granting a new trial upon the refusal of the plaintiff to file the remittitur. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM L. HERT (BILL), APPELLANT.
224 N. W. 2d 188

Filed December 19, 1974. No. 39596.

1. **Constitutional Law: Statutes.** For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by this court.
2. **Criminal Law: Trial: Time: Waiver.** Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to speedy trial provided for by section 29-1208, R. S. Supp., 1972.
3. **Criminal Law: Trial: Records: Attorneys at Law.** Where, upon direct appeal to this court from a finding of guilty in a criminal prosecution, a constitutional claim of ineffectiveness of counsel is made, we will not consider the issue where the determination of its merits may depend upon the existence of facts not shown in the record.
4. **Criminal Law: Trial: Time: Waiver.** It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207, R. S. Supp., 1972. However, under the provisions of section 29-1209, R. S. Supp., 1972, it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute.

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

Michael T. Levy, for appellant.

Clarence A. H. Meyer, Attorney General, and Michael R. Johnson, for appellee.

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

CLINTON, J.

Defendant was charged under the provisions of section 28-510, R. R. S. 1943, with having concealed certain cattle which he knew had been stolen. He entered a plea of not guilty, waived a trial by jury, and asked to

be tried by the court alone. At the conclusion of trial by the judge he was found guilty and sentenced to a term in the Nebraska Penal and Correctional Complex.

On appeal he assigns as error the following: (1) The evidence is insufficient to sustain the finding of guilty; (2) the statute defining the charge, section 28-510, R. R. S. 1943, is unconstitutional because in its enactment the following provisions of Article III, section 14, of the Constitution of Nebraska, "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," were violated; (3) the defendant did not have effective assistance of counsel under the Sixth Amendment to the Constitution of the United States because counsel failed before trial to move for the defendant's absolute discharge under the terms of section 29-1209, R. S. Supp., 1972; and (4) the trial court erred in failing on its own initiative to determine whether the defendant intended knowingly and voluntarily to waive his right to absolute discharge under section 29-1209, R. S. Supp., 1972, for failure of the State to bring him to trial within the time provided by section 29-1207, R. S. Supp., 1972. We affirm.

We will not enter into a recital of the State's evidence. Suffice it to say that the bill of exceptions has been carefully read by us and that record demonstrates that the finding of guilty is supported by evidence which is not only legally sufficient, but also highly persuasive of its truth. The defendant's first assignment is without merit.

None of the other issues raised here were presented to the trial court for determination. The issue of the constitutionality of a statute under which a defendant is prosecuted may be raised in a variety of ways, including demurrer, motion, and by plea of not guilty. 16 C. J. S., Constitutional Law, § 96, p. 343. However, we have long held that the issue must be specifically called to the trial court's attention in some way so that it has an opportunity to rule upon it and that we will

not ordinarily consider for the first time in this court the constitutionality of the statute. Pill v. State, 43 Neb. 23, 61 N. W. 96; State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421; State v. Tucker, 183 Neb. 577, 162 N. W. 2d 774. Cf. State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258. In Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933, the United States Supreme Court made the observation that, even where a federal constitutional question is involved, state procedural requirements governing the assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. This observation certainly applies a fortiori where a provision of our own state Constitution is concerned. Erving v. State, 174 Neb. 90, 116 N. W. 2d 7. We, therefore, do not consider the constitutional question raised by the second assignment.

Assignments (3) and (4) are related and will be considered together. The information in this prosecution was filed May 18, 1973. The defendant was arraigned on August 10, 1973. The trial commenced on January 2, 1974, which is more than 6 months after the filing of the information and, under the provisions of section 29-1208, R. S. Supp., 1972, the defendant would have been entitled to his absolute discharge provided he made a timely motion and provided that none of the excluded periods mentioned in section 29-1207, R. S. Supp., 1972, were applicable. Whether any such excluded periods might have been applicable we have no way of knowing. Section 29-1209, R. S. Supp., 1972, states: "Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." The rule set forth in the statute is one which is universally applied. State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171; Annotation, 57 A. L. R. 2d, § 11, p. 336, 57 A. L. R. 2d Later Case Service, § 11, p. 148; A. B. A. Standards Relating to Speedy Trial, § 4.1. If a

defendant claims to have a right to discharge under the statute, he must raise the question by timely motion. See State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604.

Does the failure of trial counsel to make a motion for discharge indicate ineffective assistance of counsel under the Sixth Amendment? We feel that we cannot pass upon the question even if we are to assume that it has been properly raised. It is evident that some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record. This is one of those situations. It may well be that the failure to file a motion for discharge was deliberate. It is, for example, quite possible that the defendant may have desired the vindication of an acquittal and gambled upon that result rather than seeking a discharge upon a technical ground which, in most minds, would lead to an implication of guilt. The defendant took the stand in his own defense and denied the charges. The success of his defense depended mostly upon his own credibility. His retained and experienced counsel conducted the trial in a highly competent manner and presented much more than just a token defense. What the facts are with reference to the failure to file the motion for discharge requires evidence outside the record, including, in all probability, the testimony of counsel whose effectiveness is now under attack. See A. B. A. Standards Relating to The Defense Function, § 8.6. We hold that upon direct appeal we will not consider claims of ineffectiveness of counsel where the determination of the merits of such a claim may require an evidentiary hearing.

We do not wish to be taken as determining or implying that the failure to file the motion for discharge would necessarily constitute ineffectiveness of counsel under the Sixth Amendment to the Constitution of the

United States or under the comparable provision of the Constitution of this state. The procedure provided for by the statute in question obviously has nothing to do directly with the merits of the charge or of the fairness of the trial. Neither do the statutes in question necessarily define what constitutes a speedy trial within the meaning of the federal and state Constitutions. Another caveat is noted. Whether the defendant can take advantage of such a failure by his personally retained counsel and thus impute such action to the State may be an open question. See, Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557; McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763.

It was not the duty of the trial court to suggest to the defendant or his counsel that he file a motion for discharge or to suggest to him that he had a right to do so. The statute, section 29-1209, R. S. Supp., 1972, placed this burden upon the defendant. It is apparent that we did not suggest otherwise in State v. Alvarez, *supra*. In that case a motion was timely filed. The procedural recommendations we made there for the trial court to follow were not only for the purpose of avoiding such claims as are here made, but also to assure the making of a proper record. If the trial court in this case had followed those suggestions, the issue under section 29-1209, R. S. Supp., 1972, would probably not be here before us because the trial may well have been commenced within the 6-month period had defendant declined to make an express waiver.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD POPE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. EVELYN KILGORE, APPELLANT.
224 N. W. 2d 521

Filed December 26, 1974. Nos. 39394, 39395.

1. **Appeal and Error. Any assignment of error that requires an**

examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.

2. **Criminal Law: Evidence: Trial.** Section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that the trial court is not precluded from correcting errors at the trial.
3. **Criminal Law: Constitutional Law: Searches and Seizures: Probable Cause.** A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception.
4. **Criminal Law: Searches and Seizures: Probable Cause.** Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.
5. ———: ———: ———. The existence of probable cause must be determined by a practical, and not by any technical, standard.
6. **Criminal Law: Indictments and Informations.** In the absence of a showing that the defendants involved would be prejudiced by the consolidation for trial of criminal prosecutions, such consolidation is proper where it could have been alleged that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.
7. ———: ———. Even where criminal prosecutions are otherwise properly consolidated for the purpose of trial, the court may grant the defendants involved therein separate trials under section 29-2002(4), R. R. S. 1943, upon a showing that prejudice will result from a joint trial.
8. ———: ———. The ruling of a trial court upon a motion for consolidation or severance of criminal prosecutions that were properly joinable in a single indictment, information, or complaint will not be disturbed on appeal in the absence of an abuse of discretion.
9. ———: ———. In determining if separate counts in an indictment constitute the same offense, the test to be applied is whether each provision requires proof of additional facts or evidence.
10. **Criminal Law: Trial: New Trial.** In order to obtain a review

of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.

Appeals from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed as modified.

Frank B. Morrison, Sr., and Ivory Griggs, for appellants.

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

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

BRODKEY, J.

The defendants herein were each charged in separate informations with two counts of possession of a controlled substance with the intent to deliver, count I in each information charging the respective defendant with the possession of heroin; and count II charging the possession of cocaine. The cases were thereafter consolidated for trial and each defendant was convicted on both counts. The defendants now appeal their convictions raising the several assignments of error hereinafter referred to. We modify and affirm.

The relevant events leading up to the charges filed against the defendants in these cases began at approximately 11:55 p.m., June 10, 1973, when Sergeant Charles Parker of the vice and narcotics unit of the Omaha police department began a surveillance of a house located at 2534 North Sixteenth Street in Omaha. The officer at that time was particularly interested in two cars parked behind that house, including a red Volkswagen. Prior to beginning the surveillance, Officer Parker had arranged to have three other police officers located in the vicinity of the intersection of Twenty-eighth and Bristol Streets in Omaha. At approximately 12:55 a.m., June 11, 1973, Officer Parker observed a Negro female

leaving the house at 2534 North Sixteenth Street. He testified that he saw her go to the rear of the house and that immediately thereafter he saw the red Volkswagen driven away. As Officer Parker followed the Volkswagen in his cruiser, he made radio contact with the officers located at Twenty-eighth and Bristol Streets and informed them that the suspect was proceeding toward their location. When the Volkswagen arrived at that location, it was stopped by the officers who had been waiting there and the woman driving the automobile was arrested. That woman was identified as the defendant, Evelyn Kilgore. A brief search of the purse of the defendant Kilgore was conducted at the scene. At that time it was discovered that the purse contained quantities of substances which were later identified as heroin and cocaine. While Officer Parker maintained custody of the defendant Kilgore, the other three officers proceeded to the house at 2534 North Sixteenth Street. Upon arriving there, they entered the house and discovered the defendant Richard Pope in the act of attempting to dispose of or destroy certain powdery substances which were later identified as heroin and cocaine. The defendant Pope was arrested at that time.

The defendants were thereafter charged with the offenses previously referred to. Motions were made by each of the defendants to suppress certain of the physical evidence seized at the time of their arrest. On July 17, 1973, hearing was held on those motions and the matter was taken under advisement by the court. Each of the motions was subsequently overruled.

We shall first consider the contention of the defendants that the District Court erred in overruling their motions to suppress, their claim being that the exhibits and other physical evidence received during the trial were the result of an unlawful search and seizure and therefore in violation of their constitutional rights. We

wish to point out, however, that the pretrial motions to suppress made by the defendants pursuant to section 29-822, R. R. S. 1943, were overruled by the court after a hearing. It is altogether possible that certain evidence and testimony were presented at that hearing which might be of assistance in disposing of defendants' claim. However, defendants failed to preserve in the record the evidence upon which the District Court based its decision to overrule the motions to suppress at the hearing set for that purpose.

It is the general rule that any assignment of error which requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. State v. Kortum, 176 Neb. 108, 125 N. W. 2d 196 (1963). We are faced with the issue of whether the State, in spite of the fact that it had apparently once sustained its burden of proving the legality of the searches in question, was nevertheless obligated at trial to prove again the legality of those searches. If the State had no such obligation, it would seem our consideration need only be addressed to the District Court's rulings on the motions to suppress.

We believe that the State, having once established the legality of police searches, is not again obligated, at trial, to prove that legality when introducing the evidence obtained through those searches. As was stated in the case of State v. Smith, 184 Neb. 363, 167 N. W. 2d 568 (1969): "It is clearly the intention of section 29-822, R. R. S. 1943, that motions to suppress evidence are to be ruled on and finally determined before trial * * * unless within the exceptions contained in the statute. * * * We conclude that section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that the trial court is not precluded from correcting errors at the trial." Thus, although it is true that State v. Smith,

supra, does give the trial court the option to rule anew during trial on the question of the legality of a police search, it does not require the court to do so, the obvious reason being that such a requirement would completely undo the statutory scheme established by sections 29-822 and 29-824, R. R. S. 1943. We note that section 29-824, R. R. S. 1943, gives the State the right to appeal from an order sustaining a motion to suppress. If the State, after once prevailing on the motion to suppress, was again required to prove the legality of the search at trial, the State's right, under section 29-824, R. R. S. 1943, to bring appeal before jeopardy attached would be defeated in many cases. We are also impressed by that part of section 29-822, R. R. S. 1943, providing that unless a pretrial motion to suppress is made as provided therein, objections to the use of the property as evidence thereafter shall be deemed waived. It is clear to us that the purpose of that requirement is to avoid interference with the progress of the trial by freeing the trial court from the necessity of determining the collateral issue of the legality of the searches during the trial itself. See State v. Conner, 59 Idaho 695, 89 P. 2d 197 (1939), discussed in Annotation, 50 A. L. R. 2d 531 at 585. Obviously, that purpose would be defeated if, in every case, the State was obligated to prove the legality of police searches at the trial, as well as at the suppression hearing. We believe, therefore, that the trial court has the option, but not the obligation, to reconsider during trial the legality of police searches. It is, of course, true that evidence relating to the legality of police searches is relevant and admissible at trial, State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267 (1969), but the mere fact that evidence obtained from such searches is objected to at trial does not mean that the State, having once established the admissibility of such evidence at the suppression hearing, is compelled to prove again during

trial that the searches were legal. The question of whether or not the State introduced sufficient evidence at trial to establish that the searches in question were legal does not seem to be controlling in this situation. It seems to us that what is controlling is whether or not there was sufficient evidence to establish such legality introduced at the hearing on the motions to suppress. However, as indicated above, we are prevented from making such a determination by the failure of the defendants to preserve the record of that hearing. We cannot know what evidence the State introduced at the suppression hearing to establish that the searches in question were legal. We do know that the District Court concluded that the State had sustained its burden of proving that legality.

In this case, the record reflects that in a hearing before the court during the trial out of the presence of the jury the defendants' renewed their objection to the offer in evidence of the exhibits in question on the ground that they were the result of an unlawful search and seizure and in violation of their constitutional rights. Notwithstanding what we have stated above, we shall consider the claims of the defendants in this regard, but must of necessity do so only upon the basis of evidence appearing in the record of the trial itself which we shall now review. It is undisputed in the record that when the police entered and searched the duplex located at 2534 North Sixteenth Street where much of the physical evidence was obtained, they had no warrant authorizing them to do so. The law is well settled, and we have recently held, that a search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception. State v. Patterson, *ante* p. 308, 220 N. W. 2d 235 (1974), a case factually similar to the instant cases.

We believe the following additional facts are fairly deducible from the record of the trial in these cases. Prior to the search in question, the police had received information from an informant that narcotics were going to be delivered at a residence at Twenty-eighth and Bristol Streets. And, they were also given information by the informant that the delivery would be made either in a red Volkswagen or a white Mustang automobile. Police officers were dispatched to the area of Twenty-eighth and Bristol Streets to await the arrival of the described vehicle. Sergeant Charles Parker, the supervisor of the other police officers, testified that at 11:55 p.m., on Sunday, June 10, 1973, he went to the duplex at 2534 North Sixteenth Street and found a white Ford Mustang and a red Volkswagen with Nebraska license 1-AA415 located behind the duplex. He thereupon went back and set up a surveillance on 2534 North Sixteenth Street. At approximately 12:55 a.m., five minutes to one in the morning, he saw a negro female leave the house. She had on a black blouse and a pair of long white pants. She went to the rear of the address she had left, entered the red Volkswagen with the license 1-AA415 and departed. He followed the automobile but made radio contact with the other officers stationed at Twenty-eighth and Bristol Streets, advising them that the car he had described to them earlier had left the residence and was enroute to their location. The lady driving the red Volkswagen referred to did appear at the Twenty-eighth and Bristol Streets area shortly thereafter and the police officers opened the car door, advised her that they were police officers, and requested she should step out. They observed a purse in her possession which they searched and found 15 small tinfoil packets of a powdery brown substance and also a small bag of powdery substance, which later proved to be heroin and cocaine. They then advised the party that she was under arrest. The evidence is

clear and undisputed that at that time she yelled quite loudly to some people across the street and to a lady and her husband who came out on a porch nearby "Call my husband. I am being arrested." We add, parenthetically, there is evidence in the record that the defendants either were husband and wife, or had been living together as husband and wife. At that time she also yelled out the telephone number "346-4411." Police officers further testified that they were familiar with the telephone number and that it was listed for 2534 North Sixteenth Street, the same house they had under surveillance and the same house the woman in the Volkswagen had just left. After a consultation between Sergeant Parker and the other police officers it was determined there would not be a chance to obtain a search warrant and Sergeant Parker thereupon advised the officers to go to 2534 North Sixteenth Street to gain entry and search the house. This the officers immediately did, entered the house, and apprehended the defendant Pope in the act of flushing certain drugs down the toilet, and also located in the duplex drugs and other physical evidence which was confiscated. The drugs later proved to be heroin and cocaine. There is also other evidence in the record to the effect that the defendant Kilgore was a narcotics addict and that the police knew that; and also that she owned and drove a red Volkswagen.

We believe the foregoing evidence established probable cause and the existence of exigent circumstances warranting the police officers to enter and search the duplex in question. In State v. Patterson, *supra,* we held that where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a war-

rant can be obtained, then exigent circumstances may be said to exist. We also conclude that under the circumstances there was probable cause for the arrest of the defendant Kilgore in her automobile at the time in question. We are also mindful of the rule set out in State v. Goings, 184 Neb. 81, 165 N. W. 2d 366 (1969), that information given by an informer to an officer leading to the search and subsequent arrest of the defendant for a violation of the carrying of a concealed weapon's law, *even though hearsay, and even though not legally competent evidence in a criminal trial,* can be considered in determining whether the officer had probable cause and reasonable grounds to search and subsequently arrest the defendant without a warrant. This court on many occasions has stated that 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 (1969); State v. Goings, *supra;* State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129 (1967). We are also mindful of the language of this court in State v. Harding, *supra:* "Police officers must be given reasonable latitude in judging whether probable cause exists. Unless their actions are based on an unwarranted belief that probable cause exists and are therefore unreasonable, their arrests and searches conform to constitutional guidelines. The right of an individual to be free from unwarranted intrusions on his person and property should be balanced against the need for effective law enforcement which can only exist where an officer's actions are measured objectively against a standard of reasonableness." We conclude that the action of the trial court in overruling the motions to suppress of the defendants was correct.

We now consider defendants' motions for severance. Objections to consolidation were made by the defendants "for the reason that it is inherently prejudicial

to the defendants and each of them to be tried at the same time." Those objections were treated as motions to sever by the District Court, which thereupon overruled the motions, and required the cases to be tried together. The cases were tried to a jury which returned verdicts of guilty against both defendants on both charges. Richard Pope was given consecutive sentences of 10 years on count I and 5 years on count II. Evelyn Kilgore was given concurrent indeterminate sentences of from 3 to 10 years.

On appeal, the defendants have assigned as error the action of the District Court in overruling their motions for severance. The matter of the consolidation of criminal prosecutions for the purpose of trial is controlled by section 29-2002, R. R. S. 1943. Section 29-2002(3), R. R. S. 1943, provides in part: "The court may order two or more indictments, informations, or complaints or any combination thereof, to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint." Section 29-2002(2), R. R. S. 1943, provides in part: "Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Section 29-2002(4), R. R. S. 1943, provides: "If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires." It is clear from the statute set out above that the matter of the propriety of a joint trial of criminal

prosecutions involves basically two questions, that is, whether the *consolidation* was proper in that the defendants could have been joined in the same indictment, information, or complaint, and secondly, whether there was a right to *severance* because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. Upon consideration, we have concluded that the joint trial in these cases was proper.

In the absence of a showing that the defendants involved would be prejudiced by the consolidation for trial of criminal prosecutions, such consolidation is proper where it could have been alleged that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627 (1973). The defendants herein made no factual showing in the record before trial to indicate that the consolidation of these prosecutions would be prejudicial. Furthermore, the record affirmatively establishes that consolidation was proper. There is evidence in the record to indicate a common scheme or plan on the part of these two defendants to distribute drugs illegally. It is clear that the defendants could have been charged in the same information with having participated in the same transaction constituting the offenses charged. We conclude that the consolidation of the cases for trial was proper under section 29-2002, R. R. S. 1943.

It is true, of course, that even where criminal prosecutions are otherwise properly consolidated for the purpose of trial, the court may grant the defendants involved therein separate trials under section 29-2002(4), R. R. S. 1943, upon a showing that prejudice will result from a joint trial. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328 (1962). The trial court herein obviously determined that no prejudice to the defendants would

result from the consolidation of these prosecutions for trial. The ruling of a trial court upon a motion for consolidation or severance of criminal prosecutions that were properly joinable in a single indictment, information, or complaint will not be disturbed on appeal in the absence of an abuse of discretion. State v. Bazer, 189 Neb. 711, 204 N. W. 2d 799 (1973); State v. Shimp, *supra*. Defendants do not point out in their brief anything to indicate that they were prejudiced by the consolidation in this case, and an independent review of the record by this court fails to disclose the existence of such prejudice. Under the circumstances we must conclude that the District Court did not abuse its discretion in overruling the defendant's motions for severance.

The defendants further allege that the District Court erred in not striking from the informations the multiple charges against them arising out of the same transaction. The defendants argue that trying them on those multiple charges had the effect of submitting them to double jeopardy in violation of their rights under the Constitution of the United States. In support of their argument, the defendants cite Ashe v. Swenson, 397 U. S. 436, 90 S. Ct. 1188, 25 L. Ed. 2d 469 (1970). That case involved an armed robbery of six poker players. The petitioner was charged with the robbery of one of the participants in the poker game, but was acquitted on that charge. Subsequently, the State brought the petitioner to trial on the charge of robbery of one of the other participants and he was convicted. The United States Supreme Court reversed the conviction, applying the doctrine of collateral estoppel to the second prosecution. We understand the theory of the Ashe case, but are convinced it does not apply here. As stated by the majority in the Ashe case: "The question is not whether (the State) could validly charge the petitioner with six separate offenses for the robbery

of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." Thus, it is clear to us that Ashe v. Swenson, *supra,* is not controlling in this case.

The case that actually controls the outcome in the matter now before us is Morgan v. Devine, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915). In that case, as here, the defendants had been charged with and convicted on two separate criminal counts. In that case, as here, the defendants contended that the "protection against double jeopardy set forth in the Fifth Amendment to the Constitution of the United States required their discharge, because the several things charged in the two counts were done at the same time and as a part of the same transaction." In the Morgan case, the United States Supreme Court held that double jeopardy was not present, stating that: "* * * the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes." In this connection, in defendants' brief they argue: "If Evelyn Kilgore and Richard Pope would have been acquitted of Count I could they be retried for Count II where the statute defines the offense in terms of 'possession of a controlled substance?' The offense is not heroin, cocaine, specifically but collectively, 'controlled substances.'" What defendants are, in effect, arguing is that charging them in separate counts with possession of heroin and cocaine is, in fact, charging them with the same offense. The same situation was involved in the case of Normandale v. United

States, 201 F. 2d 463 (1953). In that case the appellant Normandale was indicted on three counts charging violations of the federal narcotic laws, section 2553(a), Title 26 U. S. C. A. On motion of the government, the first count was dismissed; and the appellant entered a plea of guilty to the second count, which was for the unlawful purchase of heroin hydrochloride, and also a plea of guilty to the third count, which was for the unlawful purchase of raw opium. He was sentenced to serve 4 years on the second count, and to serve 18 months on the third count, the sentences to run consecutively. Appellant filed a motion to vacate the sentence with reference to count III under section 2255, Title 28 U. S. C. A., based on the contention that the narcotics designated by the second and third counts were purchased at the same time and constituted only one offense. The court overruled the motion. Appellant claimed this placed him in double jeopardy in violation of his rights under the Fifth Amendment. Section 2553(a), Title 26 U. S. C. A., of the Harrison Narcotics Act, provided that it should be unlawful to purchase, sell, dispense, or distribute opium, isonipecaine, coca leaves, opiate, or any compound, salt, derivative, or preparation thereof, except in or from the original stamped package. The court held that it was the intention of Congress in enacting the law to make it an offense to purchase each kind or type of narcotics so named. Actually section 2553(a) of Title 26 U. S. C. A., in effect at that time, provided: "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; * * *." Section 2550(a), referred to therein provides that there shall be "levied, assessed, collected, and paid upon opium, isonipecaine, coca leaves, opiate, * * * (etc.), an internal revenue tax at the rate of 1 cent per ounce, * * *." The violation of

section 2553, Title 26 U. S. C. A., was made criminal and penalties were provided and set out in section 2557 of Title 26 U. S. C. A. A comparison may be drawn and similarity noted between the arrangement of the Harrison Narcotics Act involved in the Normandale case and the Nebraska Uniform Controlled Substances Act involved in these cases. Section 28-4,125, R. S. Supp., 1973, is the section which sets out the prohibited acts and the penalties and prohibits the manufacture, distribution, delivery, dispensing, or possession, etc. of a "controlled substance." Section 28-4,117, R. S. Supp., 1972, enumerates and defines the various controlled substances, setting them out in Schedules I, II, III, IV, and V. While the Harrison Narcotics Act does not have multiple schedules, as does the Nebraska act, nevertheless they are similar in that the prohibition section adopts by reference the various controlled drugs. In any event, in Normandale, *supra,* the court concluded that it was the intention of Congress to make it an offense to purchase each kind or type of narcotics so named, notwithstanding the fact that they were all contained in one section, rather than separate schedules. In that case the court stated: "In determining if separate counts in an indictment constitute the same offense, the test to be applied is whether each provision requires proof of additional facts or evidence. Heroin hydrochloride and raw opium, although the former is a derivative of the latter, are entirely different drugs. The appellant could not have been convicted on each count by the same evidence, since proof of the purchase of heroin hydrochloride would not have satisfied the requirements of proof as to the purchase of the other, and vice versa. Therefore, the fact that the appellant purchased two kinds or quantities of narcotics at the same time and in the same transaction did not integrate the two offenses into one. The same course of conduct upon the same occasion may result in separate offenses

and be separately punished. Ebeling v. Morgan, 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151; Morgan v. Devine, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153; Walsh v. White, 8 Cir., 32 F. 2d 240, 241; Blockburger v. U. S., 7 Cir., 50 F. 2d 795; Haggerty v. U. S., 8 Cir., 52 F. 2d 11. See Gavieres v. U. S., 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Albrecht v. U. S., 273 U. S. 1, 11, 47 S. Ct. 250, 71 L. Ed. 505; U. S. v. Sharpe, D. C., 61 F. Supp. 237; Bacom v. Sullivan, 5 Cir., 200 F. 2d 70." See, also, Garcia v. Beto, 348 F. Supp. 884 (S. D. Tex., 1972).

We believe that the Legislature, in enacting sections 28-4,117, R. S. Supp., 1972, and section 28-4,125, R. S. Supp., 1973, intended to define two separate offenses for the possession of heroin and cocaine with the intent to distribute, deliver, or dispense. Furthermore, it is clear to us that in spite of the fact that the charges involved herein arise out of the same transaction, those charges may not be regarded as constituting an identical offense. Different evidence was required to sustain a conviction on each of the charges. It was entirely possible for either or both of the defendants to have been found not to be in the possession of heroin, for example, and still be found guilty of the possession of cocaine. We further point out that in the Nebraska act, the types of heroin and cocaine involved in these cases are listed in different schedules, and we further point out that in some instances different penalties are provided, depending upon the type of the controlled substance involved in the various schedules. This further supports our conclusion that our Legislature intended to provide for separate offenses for the various types of controlled substances under the facts involved in these cases, and not merely one offense.

Thus, under the circumstances, there was no identity of offenses and the defendants were not submitted to double jeopardy in the form of double punishment.

The defendants assign that the District Court erred in instructing the jury on the issue of aiding and abetting. Although the matter of the instruction was raised on appeal, an examination of the record shows that it was not raised in the defendants' motions for new trial. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Temple, *ante* p. 442, 222 N. W. 2d 356 (1974); State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226 (1970). Assuming, but not conceding, that the error complained of existed, we cannot now consider it.

Other errors raised by the defendants have been considered and found to be without merit. However, we believe that there is one further matter which must be disposed of. It appears clear from a reading of the record with reference to the sentencing of the defendants, that the sentencing judge intended to impose upon the defendant Evelyn Kilgore a sentence that was less harsh than that which was imposed upon the defendant Richard Pope. In fact, even the defendant Richard Pope requested that this be done. As previously stated, however, defendant Pope was sentenced to a flat period of 10 years imprisonment on count I and a flat period of 5 years imprisonment on count II, with the further specific provision of the court that the sentence imposed on count II was to be consecutive to and not concurrent with the sentence imposed on count I.

On the other hand the defendant Evelyn Kilgore received indeterminate sentences of imprisonment of 3 to 10 years on both count I and count II, with the further specific provision of the court that the sentence imposed on count II was to be concurrent with and not consecutive to the sentence imposed on count I. It appears, therefore, that under the present stat-

ute, defendant Pope will be eligible for parole before the defendant Kilgore is, and therefore the sentence given to the defendant Kilgore is in a very significant respect, more harsh than the sentence given to the defendant Pope. See, §§ 83-1,110(1), 83-1,110(2), and 83-1,105, R. S. Supp., 1972; § 28-4,125, R. S. Supp., 1973. See, also, State v. Hedglin, *ante* p, 545, 222 N. W. 2d 829 (1974). The defendant Pope was sentenced to consecutive terms of 10 years and 5 years, but for each sentence the minimum sentence under section 83-1,105(2), R. S. Supp., 1972, would be 1 year. Under section 83-1,110(2), R. S. Supp., 1972, those terms would be added together, with the result that Pope would be eligible for parole after serving 2 years of his sentences. On the other hand defendant Kilgore, who was sentenced to two concurrent terms of from 3 to 10 years, would not be eligible for parole until 3 years have passed under section 83-1,110(1), R. S. Supp., 1972. Therefore although it appears that the sentencing judge intended to impose upon defendant Kilgore a sentence less harsh than that imposed upon Pope, the actual effect of the sentences was to make Pope eligible for parole in 2 years, while Kilgore will have to wait for 3 years before she will be eligible for parole. Therefore, upon a review of the record, we have determined that we should, under the authority contained in section 29-2308, R. R. S. 1943, modify the sentences of the defendant Evelyn Kilgore to impose upon her concurrent indeterminate sentences of imprisonment of from 2 to 10 years. In all other particulars, the judgments of the District Court are affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., concurs in the result only.

McCOWN, J., dissenting.

The majority opinion reaches the conclusion that objections to the introduction of evidence at a criminal trial, on the grounds that the evidence was obtained

by an unreasonable search and seizure, may be properly overruled, although there is insufficient foundation in the record of the trial to establish the admissibility of the evidence. The justification is that a motion to suppress the evidence upon the same grounds was overruled at a pretrial hearing. The holding assumes that a record was made of the pretrial hearing although that fact does not appear. The majority opinion also places upon the defendant the burden of making the pretrial record a part of the record of the trial.

In State v. Smith, 184 Neb. 363, 167 N. W. 2d 568, this court held that the overruling of a motion to suppress under section 29-822, R. R. S. 1943, does not preclude objections to the introduction of evidence at the trial on the ground that it was obtained by an unreasonable search, nor does the overruling of such a pretrial motion to suppress constitute a waiver of the right to object to the introduction of the evidence at the trial. The problem then becomes one of determining who has the burden of establishing from the record of the trial either that the evidence was or was not obtained by an unreasonable search and seizure. It must be remembered too that the search here was a warrantless search, and that unless some of the evidence from the pretrial hearing on the motion to suppress is made a part of the record at trial, there was apparently a presumptively unreasonable search, if we go on the record alone. It must be noted too that the trial was conducted by a different judge than the one who conducted the pretrial hearing on the motion to suppress. It would have been a very simple matter for the State to have moved the trial court to take judicial notice of the evidence taken at the pretrial suppression hearing or make the evidence a part of the trial record if such evidence was reported. If it was not reported, there could be all sorts of difficulty in

laying the necessary foundation to establish that the warrantless search here was reasonable.

Courts have reached all sorts of results in cases like this. It is obvious that an appellate court is placed in an extremely difficult position when it must determine from the record of a trial whether or not an objection to the introduction of evidence was properly overruled when the foundation for the ruling does not appear in the evidence of the trial, and was not made a part of the evidence by anyone. Some courts have solved the issue as the majority opinion does, by presuming in the absence of a record that the issue was properly decided at the suppression hearing. See State v. Kelly, 99 Ariz. 136, 407 P. 2d 95. Other courts have ordered the record on their own motion. See, People v. Dunn, 50 Mich. App. 529, 213 N. W. 2d 832; State v. Fetters, 510 P. 2d 1 (Mont., 1973); State v. Michaels, 60 Wash. 2d 638, 374 P. 2d 989. Federal courts have reached varying results on the issue but have tended to take action on their own motion to secure the record of the pretrial hearing and make it a part of the record on appeal. For example, in Gatewood v. United States, 209 F. 2d 789 (1953), the court recognized the principle adopted by the majority opinion in this case that the party appealing must make sure the transcript is complete on an appeal. On its own motion the court sought the record on the ground that the pretrial hearing on the search and seizure issue was of vital significance to the appeal and was actually a part of the trial. In Turk v. United States, 429 F. 2d 1327 (8th Cir., 1970), the court stated that in the interest of justice the court, on its own motion, could order the record in order to review the issue of probable cause for the search. See, also, Washington v. United States, 401 F. 2d 915.

The Nebraska statutory scheme was not intended to reduce or increase the amount of foundation evidence

necessary to support the admission of evidence at a criminal trial over an objection on the ground that it was obtained by an unreasonable search and seizure. It was instead designed to expedite determination of such issues before trial and prevent surprise and delay at the time of trial. Although the burden rests on the prosecution to prove the defendant guilty beyond a reasonable doubt, and to prove that guilt by evidence properly admitted, the majority opinion here holds that the admission of evidence may be determined on the basis of something outside the trial record, and never admitted in evidence at trial. It also holds that if the defendant wants the ruling on an objection to admission of evidence at trial reviewed, he must not only bring up the full trial record, but he also must see to it that the evidence at a pretrial suppression hearing is included as a part of the bill of exceptions of the trial. In these cases the defendants requested "a complete Bill of Exceptions in the above-entitled cause including the trial, same to contain all evidence offered and received, for the purpose of a review of the conviction and sentence in said cause by the Supreme Court of the State of Nebraska." The reporter has certified that the bill of exceptions is "correct and complete" in accordance with the praecipe and our rules.

There ought to be a far more practical answer to the problems of appellate review of rulings made at a pretrial hearing on a motion to suppress. Wherever it becomes necessary, the court ought to obtain the record on its own motion in the interests of justice.

The majority opinion also holds that the separate charges against the two defendants here were properly consolidated for the purpose of trial, and that the joint trial fails to establish any possible prejudice. Section 29-2002(2), R. R. S. 1943, provides in part: "Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to

have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Subsection (3) of that section authorizes joint trials if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information, or complaint.

Here the defendant Pope was charged with two counts of possession of a controlled substance with intent to deliver. The acts and the crime with which he was charged occurred in a house at 2534 North 16th Street, Omaha, Nebraska, and he was the only one present. The defendant Kilgore was also charged with possession of controlled substances with intent to deliver. The acts and the crime with which she was charged occurred in an automobile near 28th and Bristol Streets in Omaha, Nebraska, and at an earlier time than the Pope crime. Kilgore was the only person in the automobile. There is no proof in the trial record that the two defendants in the two separate crimes are husband and wife, and in each case the individual defendant was the only person at the scene of the arrest and was in personal possession of the illegal substances. No constructive possession is involved. There was no charge or allegation that either of the two defendants was a principal or aider or abettor in the offenses charged against the other defendant, and the jury was specifically instructed that it must separately consider the guilt of each defendant and that evidence relating to one should not be considered against the other.

The Nebraska statute involving joinder is substantially similar to Rule 8(b) of the Federal Rules of Criminal Procedure. Two or more defendants may be jointly charged in the same indictment if both defendants participated in the same act or transaction constituting the offense or offenses charged. In interpreting the federal rule, courts have repeatedly held that

the trial court must first establish that the crimes for which the defendants are charged arose out of the same act or transaction. See, Ingram v. United States, 272 F. 2d 567; Bridgman v. United States, 183 F. 2d 750. See, also, Dove v. Superior Court, 39 Cal. App. 3d 960, 114 Cal. Rptr. 889. In that case, as in this one, illicit substances were involved. One sale was made on November 5th by the wife. A second sale was made by the husband on November 15th, both to the same undercover agent and both from the same residence. The State contended that a joint trial was permissible because the sales were made from the same location and the defendants were living together. The court held that joint trials were improper, stating: "The potential for prejudice to each defendant in this case lies in the very elements on which the People rely: that defendants are married and living together and that the sales were made from the same residence. The vice inherent in joining defendants in this situation lies in the danger of a conviction based on evidence relevant only to the charge against the co-defendant."

In the cases now before this court, presumably because of the absence of the evidence at the pretrial hearing, there is no proper proof that the separate defendants were married and living together in the residence. The separate crimes with which each of these two separate defendants was charged occurred at different times and in different places. The acts or transactions were not even in the same house or the same vehicle. The majority opinion here seems to assume that the two separate crimes here are the same act or transaction, simply because they are the same kind of a crime. The majority opinion states: "There is evidence in the record to indicate a common scheme or plan on the part of these two defendants to distribute drugs illegally." But the defendants here are not charged with distributing drugs illegally. They

are each charged with the separate crime of possession of controlled substances with intent to deliver, each at a separate location and each in personal possession. The statute requires that severance for separate trial be granted in such cases. The potential for prejudice is apparent and the evidence to establish the two separate crimes of the two separate defendants was utterly different. The motion for severance was clearly proper and should have been granted.

DONALD VANDENBERG, ADMINISTRATOR OF THE ESTATE OF THOMAS VANDENBERG, DECEASED, APPELLEE, V. IRVIN LANGAN ET AL., APPELLANTS.
224 N. W. 2d 366

Filed December 26, 1974. No. 39481.

1. **Motor Vehicles: Words and Phrases.** The term "compensation," as used in section 39-6,191, R. R. S. 1943, is not limited to payment for transportation in cash or its equivalent.
2. **Motor Vehicles.** If a passenger's carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.

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

Jewell, Otte, Gatz & Collins and Baker, Tessendorf & Milbourn, for appellants.

John P. Miller of Miller & Rowen and M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, for appellee.

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

BRODKEY, J.

This appeal involves an action brought by Donald

Vandenberg, father, and administrator of the estate of Thomas Vandenberg, deceased, against the defendants, Irvin Langan, and his employee, Steve Greisen, for the wrongful death of Thomas Vandenberg when he fell or was thrown from a flatbed hayrack being pulled by a tractor owned by the defendant Langan and operated by the defendant Greisen. The court decided, as a matter of law, that the defendants were negligent, holding the decedent to be other than a guest at the time of the accident, and directed liability against them. The court submitted only the question of the amount of the damages to the jury, which returned a verdict in the amount of $36,797.80. Judgment was entered upon the verdict. Defendants filed motions for a judgment notwithstanding the verdict and also for a new trial, both of which motions were overruled and defendants thereafter appealed to this court. We affirm.

The facts of this case are that at the time of the accident, and for many years prior thereto, the defendant Langan was engaged in the business of custom baling for farmers in the Platte Center, Nebraska, area. In connection with that business he owned certain equipment, including tractors, trailers, balers, and several flatbeds and hayracks. On the day of the accident, the defendant Greisen, a 16-year-old youth, was employed by Langan to operate the tractor pulling the baler and wagons, and at the time of the accident was, as directed by Langan, transporting the tractor, baler, two wagons, the decedent, and two other boys to a job site, which was a field of hay owned by a farmer named Gerald Krings. Langan had done custom baling for Krings for a number of years prior thereto, specifically during the years 1968, 1969, and 1970. About 2 days prior to the accident in question, which occurred on July 28, 1971, Krings contacted Langan and again hired him to do custom baling for him. At the same time he requested Langan to obtain additional help for him to assist in

loading the bales of hay on the hayracks, as he had done in some, but not all, of the previous years.

Krings testified that it was Langan's usual custom and practice in previous years to arrange for and bring the help when requested, but he did not know who the helpers would be on this occasion or who was going to bring them out to his farm on the day in question. Krings paid Langan by the bale and paid the boys separately for their labor at the rate of about $2 per hour. On the day of the baling Krings talked to Mrs. Langan and asked her to get the extra help but stated if they couldn't get the help they should just drop the bales on the ground. Langan ordinarily took the boys out to the job site on either the wagons or a truck but he testified there was no set way for the boys to get out to the field and they could furnish their own transportation if they so desired. Langan had a certain crew of boys which worked for the farmers generally, and who worked for Langan in the same manner the year before and during the year in question. This crew included the decedent. It was Langan's custom that he would always notify the boys if they were going out to work and on the day in question he did notify Rick Cook, Dick Jasper, and the decedent, according to his usual custom in that regard.

At Langan's direction, the three boys and Greisen, met at the Langan place at the designated time and helped hook up the equipment in a tandem fashion. When they left the Langan place, the three boys were riding on the front of the first flatbed trailer with decedent on the right, Rick Cook in the middle, and Dick Jasper on the left. Greisen was driving the tractor. According to the evidence there were two possible routes to reach their destination; one was to stay on a county road all the way which would necessitate driving down a long hill, and the other route necessitated driving three-quarters of a mile on U. S. Highway No. 81. Greisen chose to take the county road as Langan had

told him to stay off the highway as much as possible. The county road chosen by Greisen went straight east up a very high hill which road eventually turned south down to the level road. At the crest of the hill, Greisen shifted the tractor into road gear, the fastest gear, until he came into a curve in the road to the south. The curve was banked and tilted toward the west at the point where the road proceeded down hill to the south. He continued in the fastest gear.

After starting down hill in road gear he opened the tractor up so that it was going as fast as it could go down hill, and then took the tractor out of gear. He testified that he took the tractor out of gear so that it would go faster down hill. He also stated that he knew when he took the tractor out of gear there was no way he could get the tractor back in gear until he came to the bottom of the hill and that he would not be able to apply the brakes hard enough to stop. As he came down the hill he could feel vibration coming from the tractor, baler, and racks. The racks were whiplashing from side to side taking up most of the road. He started applying the brakes, and heard someone yell. When he looked around he saw the decedent lying on the ground in about the middle of the road. He also testified that after he took the tractor out of gear coming down the hill, he never looked back to check to see how the boys on the wagon were doing, but stated that he had no concern about his speed or the safety of his passengers prior to the time someone had yelled at him and that he had no trouble getting the tractor stopped.

As a result of the accident Thomas Vandenberg sustained head injuries from which he ultimately died, without ever regaining consciousness. He was 16 years of age at the time of the accident.

We first address ourselves to the question of the propriety of the trial court directing liability under the facts of this case, rather than submitting that issue to the jury. It appears that the principal issue in this case

involves the applicability of the Nebraska guest statute and requires a determination of whether the decedent in riding on the hayrack at the time in question occupied the status of a "guest" under that statute, as claimed by defendants, or was other than a "guest," which is the contention of the plaintiff.

Section 39-6,191, R. R. S. 1943, formerly section 39-740, R. R. S. 1943, is the Nebraska guest statute referred to, and provides as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser." Under the above statute, if the decedent occupied the status of a "guest" as defined therein, the defendants would not be liable to the plaintiff for their ordinary negligence, if any, but would be liable only for "gross negligence" on their part or for operating a motor vehicle under the influence of intoxicating liquor, which is not an issue in this case.

We have held that the term "compensation," as used in the foregoing statute, is not limited to payment for transportation in cash or its equivalent. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451 (1943). In the foregoing case this court also laid down the rule to be applied in determining whether a passenger in an automobile is or is not a "guest" under our statute and stated: "* * * if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the own-

er or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest."

Subsequently, in the case of Bailey v. Pennington, 274 F. 2d 328 (1960), the Eighth Circuit Court of Appeals, in interpreting the Nebraska guest statute, stated: " 'Where the trip is primarily for a business purpose rather than a social purpose, it is sufficient to show that the driver was to derive a substantial benefit from the transportation, and such substantial benefit may be found if the transportation was for the mutual economic benefit of all concerned. (Citations omitted.)' " See, also, Carman v. Harrison, 362 F. 2d 694 (8th Cir., 1966).

Defendants contend that there was no benefit to them for providing the work crew and hayracks, and in transporting the work crew to the scene of their labors; and contend that this was done merely as an accomodation to the farmers. They also argue that the presence of the boys to stack the bales was not, in any way, beneficial to them, as their presence made the work go slower. Langan also testified that in the past he had done baling for his customer Krings, and had occasionally put bales on the ground, and that Krings always came again to seek his help, inferring thereby that there was no benefit to him in providing such accommodations for this customer. There is no evidence as to what his practice had been with respect to his other customers for whom he did custom baling.

Notwithstanding the claims of the defendants, as above set out, we believe the record in this case clearly shows a joint business purpose and a joint economic benefit to all concerned, and that they received *tangible and substantial* benefits therefrom. An interesting case in this regard is the case of Sproule v. Nelson, 81 So. 2d 478, 76 A. L. R. 2d 1066 (Fla., 1955). In that case Sproule was an employee of Standard Oil Company, and Nelson was a mechanic in the employ of National Air Lines. In December of 1952 while engaged in filling

the tanks of an airplane, Sproule being the driver of a Standard Oil Company gasoline truck, and Nelson directing the operation, the truck was backed up too far and caught Nelson between the wing of the airplane and the gasoline truck, from which he suffered severe injuries. He brought action against Sproule and his employer Standard Oil Company and recovered a judgment against them, from which an appeal was prosecuted to the Supreme Court. One of the grounds assigned for reversal was that Nelson was a guest passenger on the truck and was barred from recovery under the Florida guest statute which required the proof of gross negligence. The court held that the guest statute did not apply stating: "The evidence shows that the transportation in question was for the mutual advantage of the plaintiff and appellant and that riding the truck was customary practice when fueling the wings of an airplane."

We also feel that the trip in this case was primarily for a business purpose and not for social reasons. In this case we must consider the total relationship of the parties and the total method of dealing between them. The evidence is undisputed that Langan was a custom baler, and had been for years, selling his services not only to Krings, but to many farmers in the Platte Center area. That being so, he was clearly dependent upon the goodwill and satisfaction of his farm customers generally, not only Krings. The fact that he had, as part of his business equipment, a number of hayracks, generally available to all his customers, and also, on request of such customers, had provided boys to work in the fields and assist in the haying operations, and, according to the testimony, generally called the same crew, clearly indicates that he considered such business practices desirable and valuable to him in his business for the purpose of satisfying the retaining customers generally and promoting "goodwill" for his business. Goodwill may have a real and substantial value in the sale

of a going business, to which most accountants and businessmen will readily testify. All the arrangements on the day in question were made by Langan and were directly connected with the operation of his custom baling business, and he carried out and continued a practice he himself had instituted over the years in the operation of his business. Also, as pointed out by plaintiff in his brief, the hooking up of the tractor and baler and hayracks by the boys, as well as the traveling to the field, were all for the attainment of a business purpose with benefits going to Langan and to the boys in the sense that each was to make money out of the transaction. We conclude, therefore, that under the facts of this case there was sufficient consideration flowing to the defendants to take this case out of the guest statute, and to make the defendants herein liable to the plaintiff for the results of ordinary negligence on their part. The defendants received tangible and substantial benefits from the arrangement.

Reasonable minds could reach only one conclusion from the evidence in this case as to the negligence of the defendants herein, and the trial court was eminently correct in directing on the issue of their liability, rather than submitting such issue to the jury. In fact, it might well be argued, as plaintiff does, that even if the standard of "gross negligence" were applied under the guest statute, the evidence would be sufficient to have directed on that issue also. In view of what we have stated above, however, there is no necessity for our deciding that point at this time, and we do not do so.

In connection with the claim of the defendants that the issue of contributory negligence on the part of the decedent should have been submitted to the jury, we have read the entire record in this case and find no evidence whatsoever of anything even approximating contributory negligence on the part of decedent. In the absence of such evidence, it would have been highly improper for the trial court to have submitted that issue.

It is also the contention of the defendants that the amount of the verdict, $36,797.80, is excessive in this action for damages involving the death of a 16-year-old boy. They point out that the specials involved herein were in the amount of $4,147.80 and that the balance of the damages in the amount of $32,650 must necessarily come under the heading of and flow from "loss of society, comfort, and companionship," as set out in Selders v. Armentrout, 190 Neb. 275, 207 N. W. 2d 686 (1973). We do not agree. The record in this case reveals that the decedent was a very unusual youth, with great potential for a bright and promising future, both athletically and scholastically. The evidence established that he would, indeed, have been a source of great comfort and companionship to his parents, and that the loss of his society was very real. That matter was submitted to the jury under proper instructions and we are not inclined to disturb its verdict.

There are, however, two other matters on which we should comment. During the trial of this case Mr. John Miller, one of counsel for plaintiff herein, suddenly became ill, and it was necessary to call an ambulance and take him from the courthouse by stretcher to the hospital. The jury was excused for a period of 3½ hours and on his return a motion for mistrial was made by counsel for the defendants on the basis that the incident could only have prejudicial effect on the jury so far as the defendants were concerned, in that it would aggravate the sympathy, passion, and prejudice of the jury. Defendants' counsel make it clear in their brief that they have no intention to indicate or infer that Mr. Miller was guilty of any chicanery or misconduct. We agree and point out that on numerous occasions both before and during the trial, and after the incident in question, the jury was repeatedly cautioned not to let sympathy influence its verdict. Mr. Miller, himself, during final argument, urged the jury not to do so and to

ignore the incident. We find no validity in this contention on the part of the defendants.

Defendants also complain of the conduct of M. J. Bruckner, also counsel for the plaintiff, and the uncle of the deceased, with respect to his argument to the jury in summation as follows: "I selected John Miller out of a group of a number of excellent trial lawyers because I knew him well, I have known him since law school, and he is a sensitive feeling individual, and unfortunately I cannot say that about all trial lawyers that I know. He has probably as much appreciation for life as any lawyer I know, I have known him that long. And I know, and I knew then, when I recommended him to my sister and to my brother-in-law, that he would really put himself into this, and he has; and in my opinion has done a masterful job of bringing the evidence before you in this case, which is our primary responsibility." And later in the same argument: "And I marvel again. John Miller, as I indicated to you, is a sensitive fellow and he is a good lawyer, and I think you noticed that. But he is a reasonable guy, and that's the other reason that I had him here. And I asked John, I said, 'John, you evaluate this case because I knew Tommy too well.' " Defendants argue that by virtue of the above remarks, Mr. Bruckner requested the jury to take Mr. Miller's statement of the value of the case, as if Mr. Miller's suggestion were the evidence of an expert. While we do not approve of the argument above recited, we believe that in this case it was without prejudice, particularly in view of the cautionary remarks given by both the attorneys and the court to the jury to eliminate passion and prejudice from its decision, and also in view of the fact that the actual verdict of the jury was substantially less than the amount of $50,000 suggested by Mr. Miller in his argument to the jury.

We have examined the other errors assigned by counsel and find them to be without merit. We conclude

therefore that the judgment in this case should be, and hereby is, affirmed.

AFFIRMED.

H. D. FAGER OIL CO., INC., APPELLANT, V. KAER P. VANICE, 3RD, DOING BUSINESS AS VANICE CAR WASH, APPELLEE.
224 N. W. 2d 372

Filed December 26, 1974. No. 39514.

1. **Judgments: Trial.** The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
2. **Appeal and Error: Evidence.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. ———: ———. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Bauer, Galter & Geier, for appellant.

J. Taylor Greer of Woods, Aitken, Smith & Greer, for appellee.

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

NEWTON, J.

This is an action to recover under an oral contract for petroleum products sold and delivered. The defendant claimed certain credits were due him including one for overcharges on gasoline. This credit was allowed by the District Court and is the only subject of the appeal. We affirm the judgment of the District Court.

In substance, plaintiff's assignment of error chal-

lenges the sufficiency of the evidence to sustain the allowance of the credit mentioned. The owner of the plaintiff concern and defendant were former business partners engaged in the sale of petroleum products purchased from the Champlin Petroleum Company. Defendant sold his interest in this concern to his partner but continued to operate the Vanice Car Wash which purchased gasoline from the plaintiff. Defendant's evidence was to the effect that the gasoline was to be delivered to him at ¾ths or .75 of a cent per gallon above cost to plaintiff on a monthly billing basis but, unknown to him, he was charged 1.55 cents per gallon above cost for several months and finally learned of the overcharge from representatives of the Champlin Petroleum Company. Plaintiff insisted the agreement was that it should receive 1.55 cents per gallon above cost if credit on a monthly basis was extended. The evidence was directly contradictory.

Plaintiff relies on the proposition that the interpretation given a contract by the parties themselves while engaged in its performance is one of the best indications of the true terms of the contract. See, Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699; Simon v. Omaha P. P. Dist., 189 Neb. 183, 202 N. W. 2d 157. This is a well-recognized rule but it imports an understanding by both parties of the basic or underlying factors involved. Here defendant's evidence indicates that he was completely unaware of the overcharges being made while the contract was in force and did not knowingly accede to them.

It would serve no purpose to detail the evidence submitted in the somewhat lengthy record before us. As noted, the evidence was directly contradictory and it was sufficient to sustain a verdict for either party. Under such circumstances we are obliged to heed the following rules: "The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. * * *

"It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. * * *

"In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it." Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211.

The judgment of the District Court is affirmed.

AFFIRMED.

DAVID J. ATKINS, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA ET AL., APPELLEES.
224 N. W. 2d 535

Filed December 26, 1974. No. 39531.

1. **Public Officers and Employees: Actions.** The question of entitlement to an office can only be challenged in a direct proceeding brought for that purpose, and cannot be made an issue collateral to another proceeding.
2. **Constitutional Law: Notice.** Procedural due process is satisfied where appellant was given notice and an opportunity to be heard.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Rollin R. Bailey of Davis, Bailey, Polsky, Huff & Denney, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellees.

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

CLINTON, J.

Appellant seeks in this action to enjoin the Department of Motor Vehicles and its director, John L. Sulli-

van, from enforcing an order revoking his driver's license for failure to submit to a test of alcohol content requested by police officers pursuant to Nebraska's implied consent law. The District Court denied appellant the requested relief. We affirm.

On September 8, 1973, appellant was stopped by officers of the Lincoln police department and arrested for operating a motor vehicle while intoxicated. Appellant refused to take either a blood, breath, or urine test as provided by section 39-669.08, R. R. S. 1943. The Director of the Department of Motor Vehicles sent notice to appellant that a hearing would be held on November 14, 1973, to determine the reasonableness of his refusal. Upon request of the appellant's counsel, the matter was continued. On December 3, 1973, notice was sent to appellant indicating that his hearing had been rescheduled and would be held on December 17, 1973. In both notices of hearing the place of hearing was designated as the office of the Director of the Department of Motor Vehicles.

This December 17 hearing was not held in the Director's office as designated in the notice. Rather, upon their arrival at the Director's office, appellant and his counsel were directed to another room in the State Capitol used that day for hearings. The appellant and his attorney attended the hearing, but participated only to the extent of objecting to the authority of the hearing examiner, Mr. Duane Nelson, and to the notice served upon appellant. Following this hearing the Director of the Department of Motor Vehicles entered the order of revocation, the enforcement of which is now sought to be enjoined.

In this court, the appellant assigns and argues two reasons why he is entitled to the requested equitable relief. First: It is urged that the enforcement of the revocation order must be enjoined because the hearing examiner presiding at the show cause hearing was not properly appointed. Second: Appellant argues that the

notice of hearing was defective in that the place of hearing was changed from that designated in the notice.

We are not able to consider appellant's first contention. Undoubtedly appellant correctly states that one purporting to be authorized hearing examiner must be effectively appointed by the Director of the Department of Motor Vehicles. However, even if we did agree that the oral appointment of Mr. Nelson did not suffice for purposes of constituting him a hearing examiner, notions of orderly procedure developed in this jurisdiction preclude us from granting appellant's requested relief. The rule in Nebraska is that a question of title to an office can only be challenged in a direct proceeding brought for that purpose, and cannot, as appellant urges, be made an issue collateral to another proceeding. State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72; Von Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800; Haskell v. Dutton, 65 Neb. 274, 91 N. W. 395.

As we cannot consider appellant's first contention, the sole question is whether the notice of hearing was, in this case, so defective as to warrant an injunction against the enforcement of the revocation order.

Section 39-669.16, R. R. S. 1943, provides in part that: "Upon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him as to the reasonableness of the refusal to submit to the test." It is clear from this language that the notice to appellant met the statutory standard of notice. The issue is, then, whether appellant's right to procedural due process was violated by the fact that the notice of hearing specified the Director's office as the place of hearing, the hearing actually being held in a different room of the same building.

The testimony at the District Court indicates that the standard practice in the Department of Motor Vehicles is to specify the Director's office as the place of hearing. If that office is not to be used on the hearing day, notification is given to the licencee when he appears at

the Director's office. In this case, where the appellant was merely directed to another room located in the same building at which he was to appear, the procedure followed was reasonable. This court has stated that procedural due process requires notice and an opportunity to be heard. Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656. Appellant was given notice of the date of the hearing 2 weeks prior to its occurrence. To have his case heard, appellant merely had to walk to another room in the building where he appeared for his hearing. This does not amount to a denial of due process.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK L. SMITH, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. ALVIN E. DYE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. GARY ALLEN BOVEE, APPELLANT.

224 N. W. 2d 537

Filed December 26, 1974. Nos. 39560, 39567, 39568.

1. **Criminal Law: Rape.** A victim of forcible rape is only required to make reasonable resistance in good faith under all the circumstances, and such that nonconsent and actual opposition are genuine and real.
2. **Trial.** The general conduct of the trial rests within the sound discretion of the trial court.
3. **Trial: Evidence.** A request to produce evidence that is irrelevant is properly refused.

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

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellants.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

BOSLAUGH, J.

The defendants in these cases were charged separately with forcible rape and kidnapping. Since the crimes arose out of one transaction the cases were consolidated for trial on the motion of the county attorney. The jury returned separate verdicts of guilty as to each defendant on both counts. The defendants have appealed and the cases have been consolidated for briefing and argument in this court. The assignments of error relate to the sufficiency of the evidence and the rulings on motions for a mistrial.

The record shows the defendants were driving north on 30th Street in Omaha, Nebraska, in an automobile operated by Larry Harmer at about 4 p.m., on August 28, 1973, when they saw the prosecuting witness, Carol, leave a drugstore and walk west on Huntington Avenue. Harmer turned the car around and drove up to where Carol was walking. On the pretext of asking for directions the defendants stopped Carol and engaged her in conversation. Two of the defendants grabbed Carol and forced her into the back seat of the automobile. When she tried to resist, Bovee held her from behind while Dye struck her about the face and head. When Dye struck her, Carol attempted to dig her fingernails into his neck.

After Carol was in the automobile, Harmer made a right turn and drove north out of Omaha at a speed in excess of the limit, passing several stop signs without stopping. The automobile was noticed at this time by a witness who reported the license number to the police. This witness stated the person riding in the center of the back seat seemed to be "scrunched down."

Harmer drove to a wooded area north of Omaha and turned off onto a jeep or motorcycle trail. Carol was ordered to remove her clothes and each defendant and

Harmer then had sexual intercourse with her one or more times. The defendants finally left the area late in the afternoon. Carol walked back to the road and found a house where she stated to the people there she had been raped and asked to use the telephone. She called her parents who took her directly to a hospital where she was examined and treated. The police were notified and an investigation was commenced.

The defendants contend the evidence of the State was not sufficient to show the rape was forcible and against the will of the prosecutrix because of the absence of resistance. The defendants' evidence was that Carol was a willing participant. The jury found otherwise and the issue here is whether the evidence was sufficient to support a finding of forcible rape.

A victim of forcible rape is only required to make reasonable resistance in good faith under all the circumstances, and such that nonconsent and actual opposition are genuine and real. State v. Campbell, 190 Neb. 22, 206 N. W. 2d 53. A woman is not required to subject herself to threatened serious bodily harm or death by resisting to the utmost of her physical ability so long as she has strength to do so. Where resistance would obviously be useless, futile, or foolhardy the utmost physical resistance is not required as proof of opposition and lack of consent.

The evidence in this case was such that the jury could find the prosecuting witness was abducted by four young men and forced to have intercourse with them. When she refused to enter the car voluntarily and resisted the efforts of two of them to force her into the car, she was held by one and struck by the other. She was struck on the jaw, mouth, and temple. At the hospital an X-ray examination was made of her jaw. The doctor found a contusion on the right side of her face which was visibly swollen, quite tender, and moderately discolored. The doctor testified this contusion was the re-

sult of a substantial blow. She also had a small laceration on the lateral aspect of her right upper lip.

The defendants emphasize the absence of evidence of threats or the use of weapons after the abduction had occurred. The answer to this argument lies in the fact the defendants had already demonstrated the force they were willing to use to overcome any resistance on the part of the prosecutrix. She was hopelessly outnumbered and had no real opportunity to escape after she had been forced into the car. The evidence was sufficient to present a question for the jury on the issue of reasonable resistance under all the facts and circumstances.

During cross-examination of the prosecuting witness by counsel for Dye and Bovee, reference was made to her testimony at the preliminary hearing. Upon objection by the State, the trial court stated that the only proper use of the transcript of the testimony was to read the questions and answers to the witness. Later, after further reference to the testimony at the preliminary hearing during redirect and recross-examination, the trial court stated: "In the first place, if you're going to keep on referring to the preliminary hearing, I'm going to put the whole thing in the evidence." The defendants argue this comment reflected on defense counsel and a mistrial should have been granted.

The general conduct of the trial rests largely in the sound discretion of the trial court. This includes the examination of witnesses and the use of transcripts from other proceedings for the purpose of impeachment. See Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. It was within the discretion of the trial court to limit the examination of the prosecutrix on this one phase of the case. We find no prejudice to the defendants in the comment of the trial court.

During the trial the defendants requested the State be ordered to produce the outer clothing worn by the

prosecuting witness at the time of the event. The items in question consisted of a tee shirt or short sleeved sweat shirt and cut-off jeans. Upon objection by the State that the clothing was irrelevant the request was refused.

The items of clothing as evidence were not relevant in any way. At best they would have been cumulative. There was no prejudice to the defendants because they were allowed to examine the prosecuting witness as to her clothing and to testify concerning it.

There being no error, the judgment of the District Court in each case is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. HUBERT YALE LINN, APPELLEE.
224 N. W. 2d 539

Filed December 26, 1974. No. 39569.

1. **Criminal Law: Attorneys at Law: Judgments.** Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered.
2. **New Trial: Motions, Rules, and Orders.** An order sustaining a motion for a new trial is not an order by which the cause is terminated and finally disposed of.
3. **Statutes: Attorneys at Law.** The authority to bring error proceedings under section 29-2315.01, R. R. S. 1943, is not extended to city attorneys nor to prosecutions under city ordinances.

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

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellant.

Charles O. Forrest of Kneifl, Kneifl & Byrne, for appellee.

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

NEWTON, J.

This is an error proceeding brought by a special deputy county attorney of Douglas County. The defendant was originally convicted of violations of the ordinances of the city of Omaha. A new trial was granted and the error proceeding was brought to test the correctness of the order granting a new trial. We affirm.

This proceeding must be dismissed for two reasons. First, a final order has not been entered. "Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered. * * *

"An order sustaining a motion for a new trial is not an order by which the cause is terminated and finally disposed of." State v. Taylor, 179 Neb. 42, 136 N. W. 2d 179.

In the second place, the only provision for appeal by the State in a criminal case is found in sections 29-2315.01 et seq., R. R. S. 1943. The authority to take error proceedings is limited to the county attorney. It is not extended to city attorneys nor to prosecutions involving the violation of city ordinances. A county attorney has no authority to prosecute city ordinance violations. See § 23-1201, R. R. S. 1943. His authority to bring error proceedings is limited to those cases in which he has been given the power to prosecute violations of the laws of the State of Nebraska. The appointment of a city attorney as a special deputy county attorney does not change the situation.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. JOHN TETEN, APPELLANT.
224 N. W. 2d 541

Filed December 26, 1974. No. 39604.

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

John F. Steinheider of Hoch & Steinheider, for appellant.

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

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

NEWTON, J.

Following a trial to the court on a charge of unlawful possession and delivery of a controlled substance, to-wit: L.S.D., defendant was found guilty and sentenced to serve 1 to 3 years in the Nebraska Penal and Correctional Complex. On appeal he asserts the sentence is excessive.

It has long been the rule that a sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. See State v. Harig, *ante* p. 49, 218 N. W. 2d 884. The defendant was 22 years of age and had 2½ years of college training. This was his first felony conviction. His prior record shows a conviction for burglary as a juvenile, 10 arrests for traffic offenses involving 6 accidents and 1 license suspension, conviction as a minor in possession of alcoholic liquor, 4 arrests for possession of marijuana or other controlled substance which were dismissed, 1 conviction for issuing insufficient fund checks, and a case pending in another county on a charge of possession of marijuana. On one occasion he was known to have supplied marijuana to two 15-year-old girls and joined them in smoking it. He had also been a user of L.S.D.

His record is not one conducive to leniency and we

are unable to agree that the sentencing judge was guilty of an abuse of discretion. Perhaps it would be well to note that purveyors of drugs are actively engaged in the degradation and destruction of human life. Offenses of this nature are, as a result, more serious than those involving the theft or destruction of property, particularly when young people are the victims.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1975

STATE OF NEBRASKA, APPELLEE, V. GERSON MERRILL KARTMAN, APPELLANT.
224 N. W. 2d 753

Filed January 2, 1975. No. 39357.

1. **Criminal Law: Probation and Parole: Reports.** A written report from the probation officer is not a jurisdictional requirement in a probation revocation proceeding.
2. **Criminal Law: Probation and Parole: Indictments and Informations: Judges: Courts.** A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge.
3. **Criminal Law: Probation and Parole: Hearings: Time.** A probationer charged with a violation of probation is entitled to a preliminary hearing reasonably near the place of the alleged violation or his arrest and as promptly as convenient after his arrest.
4. **Criminal Law: Probation and Parole: Evidence.** A finding that a probationer has engaged in unlawful conduct may be based on evidence relating to another offense without regard to whether the probationer has been convicted of that offense.

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

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

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, NEWTON, and CLINTON, JJ., and FAHRNBRUCH, District Judge.

BOSLAUGH, J.

The defendant was charged with three counts of motor vehicle homicide. Upon pleas of nolo contendere he was sentenced to 2 months imprisonment on count I and placed on probation for 2 years on counts II and III. The probation period commenced October 2, 1972, at the expiration of the sentence on count I.

A motion to revoke the defendant's probation was filed on September 17, 1973. A preliminary hearing was held and a report finding probable cause was filed on September 28, 1973. After an evidentiary hearing in the District Court, at which the defendant was represented by counsel, the trial court found specifically the defendant had violated his probation in that he had engaged in unlawful conduct and would not refrain from unlawful conduct in the future. The defendant's probation was revoked and he was sentenced to imprisonment for 1 to 10 years on count II and 1 year on count III, the sentences to run concurrently.

The defendant has appealed and contends the revocation procedure in this case denied him due process of law and did not comply with sections 29-2266 and 29-2267, R. S. Supp., 1972, of the Nebraska Probation Administration Act.

Section 29-2266, R. S. Supp., 1972, provides for the filing of a written report by the probation officer whenever he has reasonable cause to believe a probationer has violated or is about to violate a condition of his probation. The procedure set out in this statute is cumulative and not exclusive and a written report from the probation officer is not a jurisdictional requisite for a probation revocation proceeding.

Section 29-2267, R. S. Supp., 1972, prescribes the procedure to be followed after a motion or information to revoke probation has been filed. It provides generally

that the probationer is entitled to a copy of the information or written notice of the grounds on which the information is based. After proper notice there is to be a hearing at which the probationer has the right to be represented by counsel, to hear and controvert the evidence against him, and to offer evidence in his defense. The statute further provides the probationer is entitled to a prompt consideration of the charge by the sentencing court, and the probation shall not be revoked or the requirements imposed on the probationer increased unless the violation of probation is established by clear and convincing evidence.

The motion to revoke probation in this case was filed in the District Court for Douglas County, Nebraska, which was the sentencing court. The statute does not require the motion be heard by the sentencing judge. A hearing before a judge of the sentencing court complies with the statute.

The defendant further contends the procedure in this case failed to comply with the requirements set out in Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484, and Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656. In the Morrissey case the Supreme Court of the United States established procedural requirements for revocation of parole. In the Gagnon case these requirements were made applicable to revocation of probation.

These cases hold that due process of law requires both a preliminary hearing and a final revocation hearing before a probation may be revoked. The preliminary hearing is informal and summary in nature and should be held reasonably near the place of "the alleged parole violation or arrest" and as promptly as convenient after the arrest. The probationer must have notice concerning the alleged violations. The hearing must be before an impartial and independent officer but not necessarily a judicial officer. The probationer is entitled to appear at the hearing and speak in his own behalf and

bring documents or witnesses who can give relevant information to the hearing officer. Persons who have given adverse information should be available for questioning unless the hearing officer determines they would be subjected to risk of harm if their identity were disclosed. At the conclusion of the hearing the officer should make a written summary of what took place at the hearing and determine whether there is probable cause to hold the probationer for a final revocation hearing.

In this case an information had been filed on July 9, 1973, alleging the defendant had violated his probation by defrauding an innkeeper and being drunk and disorderly. The defendant was arrested at that time and released on bond. At the hearing in the District Court on September 17, 1973, the State was granted leave to withdraw the information filed in July and file the motion to revoke probation. The defendant and his counsel were present at that hearing and requested a preliminary hearing on the motion.

The trial court designated the clerk of the District Court as the hearing officer and set the preliminary hearing for September 21, 1973. The defendant's bond was continued.

The preliminary hearing commenced September 21, 1973, and was continued until September 28, 1973. The report finding probable cause was filed September 28, 1973. From our examination of the record we find no prejudice to the defendant in any of the proceedings relating to the preliminary hearing.

The principal ground alleged in the motion to revoke probation related to the defendant's arrest in Tulsa, Oklahoma, on March 24, 1973, for driving a motor vehicle while intoxicated. The arresting officers from Oklahoma were present at the revocation hearing in the District Court on October 18, 1973, and testified in detail concerning the arrest. The defendant was found alone in the driver's seat of an automobile that had left

the road and struck a gas meter and a fire hydrant. The defendant was obviously intoxicated and was arrested at the scene of the accident. The evidence was clearly sufficient to support the finding the defendant had engaged in unlawful conduct and his probation should be revoked even though the charge in Oklahoma was pending at the time of the revocation hearing in District Court. Where a criminal prosecution has been started based upon the probationer's conduct, the probation court need not wait conclusion of those proceedings in order to revoke probation. If the court is satisfied that the law has been violated a conviction is not a prerequisite. United States v. Markovich, 348 F. 2d 238.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST WILMORE, APPELLANT.
224 N. W. 2d 756

Filed January 2, 1975. No. 39453.

Trial: Witnesses: Evidence. In examining a witness concerning prior inconsistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. To the extent that Cropsey v. Averill, 8 Neb. 151, conflicts with the above rule, it is overruled.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

Frank B. Morrison, Sr., 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, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

BRODKEY, J.

The appellant herein was charged with the possession

of a controlled substance with the intent to distribute. Trial resulted in a jury verdict finding the appellant guilty as charged. During the trial, appellant's counsel had attempted to impeach a key witness for the prosecution by posing questions to him in reference to certain testimony given by that same witness at the preliminary hearing. Subsequently, the trial judge instructed the jury to disregard the defense counsel's reference to previous testimony on the ground that no transcript of that testimony had been introduced into evidence. The appellant asserts that the trial court erred in giving such an instruction. We agree and consequently reverse.

Ernest Wilmore, the appellant, was brought to trial before a jury on the charge of possession of a controlled substance with the intent to distribute: To wit, amphetamines. The key witness for the prosecution at the trial of Wilmore was one Robert Runkles, who had been serving with the Omaha police department as an undercover narcotics officer. On direct examination, Runkles testified that he first met Wilmore at the end of February or the beginning of March of 1973 at a bar located in Omaha. Runkles stated that no conversation concerning drugs occurred between him and Wilmore at that first meeting. Runkles indicated that he met with Wilmore at the same location on from two to four other occasions. According to Runkles' testimony, his first conversation with Wilmore relating to drugs occurred on March 10 or 12, 1973, at which time Runkles indicated to Wilmore that he was interested in purchasing amphetamines. Runkles said he could not recall who initiated that conversation relating to drugs. Runkles testified he did not purchase amphetamines from Wilmore at that time, but that he met Wilmore at the bar again on March 14, 1973, at approximately 2:30 p.m., on which occasion he purchased amphetamines from Wilmore.

On cross-examination, Runkles denied that all his conversations with Wilmore had concerned drugs. He

again asserted that he had not brought up the subject of drugs on the occasion of his first meeting with Wilmore. He also reasserted on cross-examination that he had only made one solicitation to purchase drugs from Wilmore prior to the actual purchase of the amphetamines on March 14, 1973.

It was at approximately this point in the cross-examination that defense counsel began to question Runkles with reference to his testimony at the preliminary hearing of the case. Defense counsel was careful to preface this portion of the cross-examination by establishing that Runkles had in fact testified at the preliminary hearing on July 25, 1973, at City Hall Annex, 11th and Dodge Streets, Omaha, Nebraska, before the Honorable A. Q. Wolf. Counsel for the defense asked Runkles whether he had admitted at the preliminary hearing that *all* his conversations with Wilmore had dealt with narcotics. Counsel also asked Runkles whether he had admitted that he had brought up the subject of narcotics at the first meeting. In response, Runkles indicated that he could not recall making such answers at the preliminary hearing. Runkles was asked whether he had admitted in his testimony at the preliminary hearing that Wilmore had produced the amphetamines pursuant to solicitations by Runkles at *several* prior meetings. Runkles answered, "Yes." Runkles was asked whether he had admitted that he had also asked Wilmore to please get him some amphetamines or that he had also asked Wilmore whether he knew where Runkles could get some amphetamines. Runkles answered, "Yes." Runkles was asked whether he had testified that he had initiated the drug-related conversation with Wilmore. Runkles answered, "Yes." It also appears in the record that during the cross-examination of Runkles, defense counsel asked permission of the trial court to exhibit the preliminary hearing bill of exceptions to the witness, but was refused.

No objections were interposed by the prosecution as to either the form or the substance of these particular questions. However, the District Judge, on his own motion, gave the following instruction: "You are instructed that you shall totally disregard any statements or reference made by counsel to testimony at a preliminary hearing since no transcript of such hearing has been introduced in evidence * * *." On appeal, Wilmore has assigned as error the action of the District Court in giving such instruction.

The State, in supporting the action of the trial judge in giving that instruction, relies exclusively upon the case of Cropsey v. Averill, 8 Neb. 151 (1879). The significant language in that case is found at page 157, where the following language appears: "Another of the assigned errors is, that on the cross-examination of the witness Hartley, counsel was permitted, against objection, to read from a deposition previously given by the witness, and then to ask him whether he had so testified, without first submitting the deposition to him for inspection. The correct rule of practice in such cases seems to be that where a *letter or a deposition signed by the witness* is used to contradict him, it must be regularly proved and read as part of the evidence by the cross-examining counsel. After it has been thus proved and read, the witness may be cross-examined as to any supposed discrepancies between his testimony in court and his deposition." (Emphasis supplied.) Our interpretation of this language of the court is that before a witness may be cross-examined relative to contradictory statements appearing in "a letter or a deposition signed by the witness," proper foundation must be laid for the admission of such letter or deposition into evidence. Such foundation would, we suppose, consist of calling the attention of the witness to the letter or deposition, identifying the time and place of its execution and to whom it was ad-

dressed, and the establishing of its genuineness. See, Thompson v. Wertz, 41 Neb. 31, 59 N. W. 518 (1894); Draper v. Taylor, 58 Neb. 787, 79 N. W. 709 (1899). Thereupon, under the rule announced in Cropsey v. Averill, *supra,* it would be incumbent upon the cross-examiner to actually read the letter or deposition in question into the record. Then, and only then, could the cross-examiner ask his questions of the witness relative to any discrepancies between the evidence thus read and the in-court testimony of the witness. Thus, in this appeal the State reasons that since defense counsel did not meticulously follow this procedure in his cross-examination of the witness Runkles, the trial court quite properly determined, on the authority of Cropsey v. Averill, *supra,* that all references made to the previous testimony of Runkles were inadmissible and that, therefore, the jury should be instructed to disregard such references. The appellant, on the other hand, would have us conclude that the actual submitting of the transcript of Runkles' previous testimony into evidence was not a precondition to the questioning of Runkles relative to the contents of that testimony.

It is true as a general proposition that, as concerns the use of prior inconsistent *oral* statements for the purpose of impeachment upon cross-examination, it is not necessary that extrinsic evidence of such statements be introduced into evidence before the witness may be interrogated relative to the contents of such statements. See, Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86 (1890); Peery v. State, 165 Neb. 752, 87 N. W. 2d 378 (1958). The rule enunciated in Cropsey v. Averill, *supra,* may be regarded as an exception to this general proposition. It is further true that Nebraska authorities clearly establish there is no general requirement that extrinsic evidence of *previous testimony* be introduced before a witness may be cross-examined regarding the content of such testimony.

In this respect, attention is first directed to the case of Hanscom v. Burmood, 35 Neb. 504, 53 N. W. 371 (1892). In that case, a plaintiff's witness, Eberhart Kurz, testified he had made an examination of certain premises and had been unable to find any tracks made by calves thereon. Subsequently, the defendant offered to prove through another witness that Kurz had testified "on the trial of the cause in the justice court" that he had in fact seen the calves' tracks at the time he made the examination of the premises. That offer was objected to by the defendant and the trial court sustained the objection. The ruling of the trial court was affirmed by this court, which held that proper foundation had not been laid for the introduction of the extrinsic evidence of the previous testimony of Kurz. Of particular significance is the language appearing therein at page 506, 53 N. W. at 372, wherein the court, remarking that proper foundation had not been laid, pointed out that: "The witness Kurz was not asked, when on the witness stand, whether he had testified upon the former trial that he saw the calves' tracks in the corn field." From the tenor of that language, we believe it is fair to conclude that the court in Hanscom v. Burmood, *supra,* regarded it as at least proper to question a witness in reference to the content of his previous testimony without first having introduced such testimony into evidence.

Another case pertinent to the matter with which we are now concerned is Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466 (1955). In that case, the plaintiff produced as a witness an official court reporter who had taken the testimony of two of the defendants' witnesses when they testified under oath at a prior hearing. On appeal, the defendants complained about the admission of that impeaching evidence. In deciding the case, this court set forth the rule that: " 'In order to lay a sufficient foundation

for the introduction of evidence to contradict *the statement of a witness, as to a statement alleged or denied by him,* it is indispensable that the witness's attention be called to the declaration alleged or denied to have been made, and that the time and place, when and where, and that the person to whom such statement should have been made be cited. * * *' " Bartek v. Glasers Provisions Co., Inc., 160 Neb. at 800, 71 N. W. 2d at 471, citing Wood River Bank v. Kelley, *supra,* and Hanscom v. Burmood, *supra.* Obviously, this rule assumes that the witness sought to be impeached will already have answered questions relative to his previous testimony, admitting or denying the contents thereof, long before the extrinsic evidence of that testimony is sought to be introduced. In that respect, therefore, the rule necessarily assumes it would be proper to question a witness with reference to the content of his previous testimony without first having introduced extrinsic evidence of that testimony.

If our conclusion in that regard is correct, then there remains only the question of whether an exception to the general rule exists in cases where the extrinsic evidence of previous testimony is in written form. In other words, we are faced with the question of whether the exception to the general rule applied to prior statements appearing in letters and depositions, as stated in Cropsey v. Averill, *supra,* also applies to previous *testimony* by a witness. It should be noted in this regard that the basic purpose of the rule of Cropsey v. Averill, *supra,* is to cause the *disclosure* of the writing containing the prior statement of the witness involved. In that respect, it is clear that the rule appearing in Cropsey v. Averill, *supra,* is a manifestation of the rule of disclosure formulated in The Queen's Case, 2 Brod. & Bing. 284, 129 Eng. Rep. 976, 11 Eng. Rul. C. 183 at p. 185 (1820), wherein it was held that a cross-examiner may not, in the statement of a ques-

tion to a witness, represent the contents of a letter or ask the witness whether he wrote a letter to any person with such contents, without having first shown the witness the letter and asked the witness whether he wrote that letter. Although the rule appearing in The Queen's Case, since abrogated by Parliament in 1854, is, by the terms of that case, limited to the contents of letters, this court in Cropsey v. Averill, *supra,* elected to extend that rule to apply also to cases involving a *deposition* signed by the witness. We do not believe, however, that the rule of disclosure may properly be extended in this jurisdiction to apply also to situations involving previously recorded testimony.

It is clear that even where there is some form of written record or memorandum of previous testimony, counsel may, at his option, prove the contents thereof by means of the testimony of one who was a witness to that previous testimony. Young v. Kinney, 85 Neb. 131, 122 N. W. 679 (1909). Thus, the rather strained "best evidence" rationale of The Queen's Case can have no application here. It is also clear that where the contents of previous testimony is to be proven by means of oral extrinsic evidence, there is no requirement that such evidence be introduced *before* a witness may be cross-examined as to the contents of that previous testimony. Hanscom v. Burmood, *supra;* Bartek v. Glasers Provisions Co., Inc., *supra.* This being so, we believe it would be highly inconsistent to hold that where one seeks to prove the contents of previous testimony by means of a written transcript, he is required to introduce that transcript into evidence before he may cross-examine a witness as to those contents, but, on the contrary, he may avoid that requirement, together with its considerable inconvenience and disadvantage, merely by electing to rely upon oral extrinsic evidence to make such proof. We therefore hold that in examining a witness concerning prior in-

consistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. This is clearly in conformity with modern thinking upon the problem. For example, Rule 613 of the Proposed Nebraska Rules of Evidence (1973), entitled Prior Statements of Witnesses, reads as follows:

"(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

"(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d) (2)." Similarily Rule 6-13 of the Proposed Federal Rules of Evidence, 46 F.R.D. 161, makes the same provision. See, also, Symposium - The Proposed Nebraska Rules of Evidence, 53 Neb. L. Rev. 331, at 414; McCormick on Evidence (2d Ed.), pp. 55 to 57. So far as Cropsey v. Averill, *supra,* is in conflict with the rule we have adopted, it is hereby overruled.

The questions asked upon the cross-examination of the witness Runkles relative to his previous testimony were entirely proper, regardless of whether or not extrinsic evidence of that testimony had been introduced into evidence before those questions were asked. Under the circumstances, for the trial court to have in effect instructed the jury to disregard evidence impeaching the State's star witness was reversible error.

Appellant also contends that the District Court committed reversible error in refusing appellant's request

for an instruction to the jury presenting the defense of entrapment. We have reviewed the entire record in this case and do not find any evidence justifying the submission of such instruction. As a matter of fact, appellant consistently maintained throughout the trial, and based his defense upon the fact, that he had made no sale whatsoever to Runkles. Furthermore he makes it clear in his testimony that he was not trapped into anything. We quote verbatim from the record: "Q. Now, what we're saying now is not that you were entrapped into selling any drugs to anybody? A. That's right. Q. Nobody trapped you into anything? A. That's right." We also point out that the record clearly shows that the motion by the defendant for an instruction on the defense of entrapment was not specifically raised or referred to in the motion for new trial, and further there was no written request for an instruction concerning the defense of entrapment.

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

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result.

LELAND K. KOVARIK, APPELLEE, V. COUNTY OF BANNER, APPELLANT.
224 N. W. 2d 761

Filed January 2, 1975. No. 39469.

1. **Courts: Jurisdiction: Powers.** The courts of this state have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction.
2. **Courts: Powers: Attorneys at Law.** The county courts have the inherent power to appoint defense counsel to represent indigents charged with any offense for which they may be imprisoned.
3. **Courts: Attorneys at Law: Fees: Counties.** When a county

court appoints defense counsel to represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pursuant to that appointment.

4. **Constitutional Law.** Where state and local purposes are commingled in a governmental function, the crucial issue in regard to Article VIII, section 1A, of the Constitution of Nebraska, turns upon a determination of whether the controlling and predominant purposes are state purposes or local purposes.
5. **Constitutional Law: Attorneys at Law: Fees: Counties.** It is not in violation of Article VIII, section 1A, of the Constitution of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime.

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

Robert G. Simmons, Jr., for appellant.

Leland K. Kovarik, pro se.

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

BRODKEY, J.

This case involves the right of the plaintiff, an attorney, to recover attorney's fees and expenses from County of Banner, Nebraska, arising from his activities as appointed defense counsel for an indigent defendant charged with the commission of misdemeanors to which he subsequently entered a plea of guilty. Plaintiff thereafter filed a claim for his services and expenses with the county board, and upon the disallowance thereof, appealed to District Court. The District Court ruled against the county and entered judgment in favor of the plaintiff. We affirm.

The plaintiff herein, Leland Kovarik, was appointed by the county court of Banner County to represent the indigent defendant on the aforementioned charges. Upon the conclusion of the criminal proceedings, it was

determined by the county court that the plaintiff was entitled to attorney's fees and expenses in the amount of $121.63. The plaintiff thereupon filed a claim for that amount with the county board of Banner County, but the claim was disallowed by the board. Pursuant to section 23-135, R. R. S. 1943, the plaintiff appealed the denial of his claim to the District Court. The county answered the plaintiff's petition on appeal, asserting: (1) That the county court was without power to appoint counsel for indigent misdemeanor defendants; (2) that there is no statutory authority purporting to impose obligation upon the county to pay the fees and expenses of appointed counsel for indigent misdemeanor defendants; and (3) that to require the county to pay the fees and expenses of appointed counsel for indigent misdemeanor defendants is in violation of Article VIII, section 1A, of the Constitution of Nebraska. The District Court ruled on each of these points against the county, and entered a judgment in favor of the plaintiff for $121.63. Motion for new trial, filed by the county, was overruled and the county now brings appeal to this court.

At the outset, we concede there is no express statutory authority in this state for the appointment of counsel to represent indigent misdemeanor defendants, although there is provision made in our statutes for the appointment of counsel to represent felony defendants in counties not having public defenders. § 29-1804.06, R. S. Supp., 1972. However, we believe that the courts of this state have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction, and that when we are concerned with a matter so fundamental as the indigent's right to appointed counsel in criminal matters, no express provision granting such authority is required. This is particularly true in light of recent pronouncements of the Supreme Court of the United States with reference to the right of a criminal defendant to be rep-

resented by counsel. In 1963 the Supreme Court in the landmark case of Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, in interpreting the Sixth Amendment to the Constitution of the United States providing "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense," held that the refusal of a state trial court to appoint counsel for one prosecuted for a felony violated the Sixth Amendment's guarantee of counsel made obligatory upon the states by the Fourteenth Amendment to the Constitution of the United States. In so doing it overruled the earlier case of Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, holding that the appointment of counsel was not necessary in all cases. The ruling in Gideon v. Wainwright, *supra*, was by its terms applicable only to felony defendants, and was not construed as applicable to misdemeanor and petty offense defendants until 1972, when the Supreme Court decided the case of Argersinger v. Hamlin, 407 U. S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530. In that case the court enunciated the rule that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. Since Argersinger v. Hamlin, *supra*, it is generally recognized and conceded that the appointment of counsel to represent an indigent defendant, even in misdemeanor and petty offense cases, is mandatory under the Constitution of the United States where imprisonment is imposed, although there is a suggestion in that case of an exception when the judge knows before the trial of a misdemeanor that no imprisonment may be imposed, even though local law permits it.

As was indicated by the order of the District Court in this case, it was in observation and compliance with the requirements of the law, as set out in cases decided by the Supreme Court of the United States, that the plain-

tiff herein was appointed to serve as defense counsel to represent the indigent misdemeanant involved in this case. The administration of justice required that it be done; and although the county court had no statutory authority to make such appointment, we believe that it had the inherent power to make such an appointment. See, Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N. E. 2d 405 (1940); State ex rel. Gentry v. Becker, 351 Mo. 769, 174 S. W. 2d 181 (1943); 20 Am. Jur. 2d, Courts, § 79, p. 440.

The more important question to be determined is who, if anyone, is liable to the plaintiff herein for payment for his services. It may be stated as a general rule that it is the duty of a county to pay the expenses of the local administration of justice within the county, and it has been said that this duty may arise as well from the general system of county organization as from express statutes defining the duties of counties on this particular subject. 20 C. J. S., Counties, § 210, p. 1058. We concede that authorities differ respecting the liability of a county, in the absence of an express statutory provision therefore, for the fees and expenses of attorneys appointed to defend a poor person. 20 C. J. S., Counties, § 213 (b) 2, p. 1065; 7 C. J. S., Attorney and Client, § 172a, p. 1033; 36 L. R. A. N. S. 277; Annotation, 21 A. L. R. 3d 819. We have reviewed the cases and authorities and have concluded that the better rule is that the burden must rest with the county.

The county makes much of the language in the Gideon and Betts cases that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state," and argues from this language that the Supreme Court has clearly ruled that the providing of counsel for indigent defendants is a state function, and therefore the counties have no duty or obligation to pay for such counsel in that regard. We do not so construe that language, and believe it is clear that the Supreme Court was merely differentiating between the sovereignty of

the United States and the sovereignty of the states. Although the state may have the primary obligation of administering justice and of establishing the various courts for that purpose, such obligation would in no way restrict the power of the state from delegating that responsibility and expense to other political subdivisions therein, such as counties. As will be hereinafter demonstrated, the fact is that the State of Nebraska has in fact done that on many occasions.

In State v. Rush, 46 N. J. 399, 217 A. 2d 441, 21 A. L. R. 3d 804 (1966), the court stated: "In this connection we merely note, without exploring the subject at all, the question whether the judiciary has the inherent power to order payment in the absence of statute. See, 14 Am. Jur., Courts, § 171, p. 371; 20 Am. Jur. 2d, Courts, § 79, p. 440; Leahey v. Farrell, 362 Pa. 52, 66 A. 2d 577 (Sup. Ct. 1949). We need not explore that matter since we find ample evidence of a legislative will that the cost of criminal prosecutions shall be paid by county government and there is no reason to say the costs we are now considering are of another nature.

"That the county must meet the costs of criminal prosecutions is clear. The county is a subdivision of the State, constituted to perform certain functions of State government, Bergen County v. Port of New York Authority, 32 N. J. 303, 312 (1960), and among them is the prosecution of criminal causes. It is generally held that the county is liable for the expenses involved, either by virtue of express statutory provision or by necessary implication from the statutory scheme. 20 C. J. S. Counties § 210, pp. 1058-59; cf. Godfrey v. McGann, 27 N. J. 28 (1962)."

In Luke v. County of Los Angeles, 269 Cal. App. 2d 495, 74 Cal. Rptr. 771 (1969), the court stated: "No longer will it serve for a court to select a lawyer-bystander in the courtroom, since with the best of professional intentions the latter may only be qualified to furnish perfunctory and transitory representation, per-

haps in a field of law in which he has little personal interest or current familiarity. * * * We think the days are past when a lawyer could be expected to do this solely as a public service. If society is to demand representation by counsel in an expanding variety of proceedings and to insist on a high level of competency in the performance of such representation, then counsel should be paid. Is it reasonable today to attach to a statute which provides for court-appointed counsel in a custodial proceeding an interpretation that appointed counsel will render his services for nothing?

"We think not. The similarity of civil custodial proceedings to criminal proceedings and the comparable need of the subject for effective representation in both instances makes us reject the proposition that the Legislature intended to provide court-appointed counsel in two types of proceedings but compensate counsel at public expense in only one. We think the better reasoning infers that the Legislature intended court-appointed counsel to be compensated in all custodial proceedings of a serious nature, including narcotic commitment proceedings."

In this case we believe that plaintiff in defending the indigent conferred through his services a benefit upon the public, and that in accordance with the general rule that when one party renders services that are of benefit to another there is an implied obligation on the part of the recipient to pay the reasonable value of the services rendered. The cost involved is not a burden which should be made to rest unequally upon the individual, merely because he is an attorney. We conclude therefore that where a county court appoints an attorney to represent an indigent charged with a crime, that appointment carries with it an implied promise that such attorney will be paid for his services by the public. County of Dane v. Smith, 13 Wis. 654 (1861). See, also, cases cited in 21 A. L. R. 3d 819, 832. Furthermore, since the proceedings that compel such an

appointment are commonly instituted by a *county* official (§ 23-1201, R. R. S. 1943), in order to prosecute for a crime committed within the *county* (§ 29-1301, R. R. S. 1943), we believe it is quite proper that the obligation to pay for the services rendered by appointed counsel fall particularly upon the county. We hold, therefore, that where a county court appoints defense counsel to represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pursuant to that appointment.

We find the county's contention regarding the unconstitutionality of the imposition of such an obligation upon the county to be interesting, but without merit. Basically, the county asserts that to require the counties to pay the attorney's fees and expenses of court-appointed counsel is in violation of Article VIII, section 1A, of the Constitution of Nebraska, which provides: "The state shall be prohibited from levying a property tax for state purposes." Thus, the county argues that the providing of defense counsel for indigents is a state purpose for which county funds, supplied through property taxation, may not be expended. We do not agree.

This court has commented before upon the conceptual difficulty of separating "state purposes" from "local purposes." See Craig v. Board of Equalization, 183 Neb. 779, 164 N. W. 2d 445 (1969). It would seem to us that in many, if not most, cases a governmental function may be accurately described as having both state and local purposes. It is with this sort of problem in mind that this court has held that where state and local purposes are commingled in a governmental function, the crucial issue in regard to Article VIII, section 1A, Constitution, turns upon a determination of whether the controlling and predominant purposes are state purposes or local purposes. State ex rel. Western Nebraska Tech-

nical Com. Col. Area v. Tallon, *ante* p. 201, 219 N. W. 2d 454 (1974). We also note in passing that under the facts of the foregoing case the state required the county to levy a property tax to support the technical college, which is not true in the instant case. We properly held under the facts of that case that a "state purpose" rather than a "local purpose" was involved. We also wish to point out that counties are not supported solely by property taxes. There are other sources of revenue available to the counties other than property taxes, such, for example, as inheritance taxes. In fact, it is clear from a reading of sections 77-2032 and 77-2033, R. R. S. 1943, that inheritance taxes may be credited by the county board to the county general fund, to be used "for the relief of worthy, incapacitated or *indigent* persons * * *." (Emphasis supplied.) There is no requirement whatsoever that any county levy a property tax to pay the fees for appointed counsel.

We believe that in spite of the fact a criminal prosecution is required by statute to be brought in the name of the state, the actual prosecution of criminal charges has been delegated by the state to the counties. It is true, of course, that countless people, not only in the county, but also in the state and country, and perhaps in the entire world, may benefit from the just prosecution of the criminal accused. However, the mere chance that the collective benefits may be universal does not alter the fact there is a definite and substantial benefit accruing to the counties, and the procedures for criminal prosecutions have been established by law at the county level. By virtue of our laws of venue, the prosecution is taken to vindicate, as it were, a crime occurring within the county. See § 29-1301, R. R. S. 1943. It is perhaps for that reason that historically and traditionally the counties have been given the responsibility of paying for the expenses of criminal prosecution. In adopting the Duis amendment to Article VIII, section 1A, Constitution, there is no reason to be-

lieve the people intended to disturb the historical method of financing criminal prosecutions. For example, under section 29-2709, R. R. S. 1943, the counties are obligated to pay "any cost bills that are not collectible in cases of misdemeanor, peace warrant and juvenile causes." The cost of keeping and maintaining prisoners prior to conviction has been charged to the counties pursuant to sections 29-1001 and 29-1004, R. R. S. 1943, and the counties are obligated, under section 29-1005, R. R. S. 1943, to pay such costs. It is a county officer, namely the county attorney, who has the duty, under section 23-1201, R. R. S. 1943, to prosecute criminal charges. Even where there is a change of venue, it is the duty, under section 23-1201, R. R. S. 1943, of the county attorney of the county where the crime was committed to carry out prosecution, and he is empowered, under section 33-108, R. R. S. 1943, to charge the county for his reasonable traveling and hotel expenses, in addition to his regular salary, while so engaged. Furthermore, when there is a change of venue the county where the crime was committed is responsible to pay "all costs, fees, charges and expenses made or incurred in the trial of, or in keeping, guarding and maintaining the accused," under section 29-1302, R. R. S. 1943.

If we were to agree with the county and hold that it is unconstitutional to charge the counties for the expenses of appointed defense counsel, then logically we would call into question the constitutionality of all these other statutes which charge to the counties the expenses of criminal prosecutions. We cannot be drawn into such an absurd result. The statutory scheme, outlined above, is clearly indicative of the fact that criminal prosecution has always been regarded as being primarily a function of the counties. We must conclude, therefore, that the court appointment of defense counsel for an indigent charged with crime has a purpose which is predominantly local in nature and that it is not in violation of Article VIII, section 1A, of the Constitution

of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime.

All contentions of the county having been determined against it, the judgment of the District Court must be and is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLANT, V. RAYMOND M. BERRY ET AL., APPELLEES.
224 N. W. 2d 767

Filed January 2, 1975. No. 39472.

Criminal Law: Appeal and Error. The right to appeal in criminal cases can be exercised only by the party to whom it is given; and generally only a person aggrieved or injured by a judgment may take an appeal from it.

Appeal from the District Court for Banner County: JOHN H. KUNS, Judge. Appeal dismissed.

Robert G. Simmons, Jr., for appellant.

C. F. Fitzke, pro se.

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

BRODKEY, J.

This case was consolidated for argument before this court with the case of Kovarik v. County of Banner, No. 39469, as both cases involve similar questions of law. Neither of the appellees filed briefs in these actions, and an argument before this court was conducted by the appellant, County of Banner, on its briefs in the respective cases. We have concluded that we should write separate opinions in these cases for reasons which will hereinafter be made apparent.

In this case defendants Raymond M. Berry and Alfonso Reyes Alvarez, charged with the commission of felonies, made application for court-appointed counsel. In support of those applications, affidavits of financial status were filed by the defendants. Counsel was appointed to represent them pursuant to section 29-1804.06, R. S. Supp., 1972. Trial of the matter resulted in an acquittal of both defendants. Thereupon, defense counsel made application, pursuant to section 29-1804.12, R. S. Supp., 1972, for the allowance of reasonable attorney's fees and expenses. Objections to that application were filed on behalf of the county. Those objections asserted, among other things, that section 29-1804.12, R. S. Supp., 1972, was unconstitutional. A hearing on those objections was held by the District Court and the matter taken under advisement. Subsequently, the District Court issued an order finding section 29-1804.12, R. S. Supp., 1972, to be constitutional, fixing a reasonable value of the attorney's services at $375, and finding the amount of expenses to be $17.18. A notice of intention to appeal from that order was filed by the county and that appeal has been prosecuted to this court, raising again the issues of the constitutionality of section 29-1804.12, R. S. Supp., 1972. In particular, the county asserts that section to be in violation of Article III, section 14 and/or Article VIII, section 1A, of the Constitution of Nebraska.

We appreciate the importance of the issues raised by the county, but are of the opinion that those issues are not now properly before the court in this case. We have therefore concluded that this appeal must be dismissed.

It is clear that the county was not a party to the proceedings in the court below. Those proceedings were criminal proceedings, instituted and carried out in order to determine the guilt or innocence of the accused parties. This appeal by the county was taken in that criminal case.

It is a general rule that the right to appeal in criminal cases can be exercised only by the party to whom it is given; and generally only a person aggrieved or injured by a judgment may take an appeal from it. 24 C. J. S., Criminal Law, § 1658, p. 1027; 4 Am. Jur. 2d, Appeal & Error, § 267, p. 761. The subject of review of judgments in criminal cases is covered by Chapter 29, article 23, Reissue Revised Statutes of Nebraska, 1943, and Supplements thereto, including also section 25-1912, R. R. S. 1943, which contains certain provisions as to the procedure to be employed to perfect an appeal in both civil and criminal actions. It is clear from a review of the Nebraska statutes above-cited that only one convicted of an offense has a right to appeal to this court in a criminal matter, with the possible exception that under certain circumstances the county attorney is given a right to appeal for matters occurring during the trial. There is no statutory authority contained therein for an appeal by a county from an order of the court in connection with a criminal case awarding attorney's fees to an attorney for an indigent defendant, even though a statute of this state requires the county to pay such fees. The proper way to raise such an issue on appeal would be as was done by appellant in the companion case of Kovarik v. County of Banner, No. 39469, previously referred to. In that case the attorney filed a claim with the county board for such fees and expenses which claim was disallowed. He thereafter perfected his appeal to District Court, which, after a hearing, ordered the county to pay the attorney for his services in the matter. An appeal was taken to this court from that order.

Section 29-1804.12, R. S. Supp., 1972, provides as follows: "Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him for all expenses reasonably necessary to permit him to effectively and competently represent his client and for fees for serv-

ices performed pursuant to his appointment. The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court." Our interpretation of the foregoing statute is that under it, the court, in effect, makes findings as to the reasonable expenses and fees of appointed counsel, which, according to the statute, the county board is obligated to pay. However, we do not construe that statute as empowering the District Court to enter a formal judgment against the county at that time for the amount of fees and expenses found to be owing. Section 25-1301, R. R. S. 1943, states: "A judgment is the final determination of the rights of the *parties* in an action." (Emphasis supplied.) See, also, Keller v. State, 184 Neb. 853, 172 N. W. 2d 782 (1969). Since the county was not a party to the criminal action against the defendants in this case, it goes without saying that the court could not enter a legal judgment against the county, and that the procedure suggested above is the correct procedure to be followed.

While we have found no Nebraska cases squarely on point, we note that our neighboring State of Iowa had a similar problem before it in the case of State v. Schmidt, 259 Iowa 972, 145 N. W. 2d 631 (1966). In that case the Supreme Court of Iowa held that the attorney for the defendant in a criminal prosecution was not a party of record and had no right of appeal from an order setting his attorney's fee. We quote from that opinion: "On March 23, 1966, defendant's attorney, Paul D. Lunde, filed a 16-page verified application for counsel fees to February 9, 1966, including services rendered in Schmidt v. Uhlenhopp, 258 Iowa 771, 140 N. W. 2d 118. He claimed $4812.50 as fees plus $141.03 expenses.

"Section 775.5, Code 1962, as amended by chapter 449, Laws of the Sixty-first General Assembly, provides an attorney appointed by the court to defend any person charged with a crime shall be entitled to reasonable

compensation to be decided in each case by the court. It also authorizes allowance of a sum or sums as the court may determine are necessary for investigation in the interests of justice and costs necessary for a transcript and printing in event of appeal.

"Defense counsel's claim was submitted on his application as filed. On April 21, 1966, the trial court entered a written ruling on the application finding a reasonable attorney fee to be $950 and ordered the county auditor of Story County to pay Mr. Lunde that amount plus $141.03 as necessary expenses.

"Defendant's counsel has attempted in this case to appeal from that allowance and order. Neither he nor Story County are parties herein. His claim the trial court erred in the amount allowed does not go to an affirmance or reversal of defendant's conviction. The order was not adverse to defendant. It is an attempt to appeal by the attorney who is not a party herein. This cannot be done. Garberson v. Garberson, 241 Iowa 713, 714, 42 N. W. 2d 391, 392 and citations; State v. Lundstedt, 246 Iowa 355, 67 N. W. 2d 450. Defense counsel's contention is not properly before us." See, also, State v. Lundstedt, 246 Iowa 355, 67 N. W. 2d 450 (1954); State v. Fair, 35 Wash. 127, 76 P. 731 (1904).

We conclude, therefore, that under the circumstances of this case the county may not be regarded as being a party entitled to bring an appeal to this court pursuant to section 25-1912, R. R. S. 1943; and, therefore, this appeal must be dismissed.

APPEAL DISMISSED.

WALTER J. MEYER ET AL., APPELLEES AND CROSS-APPELLANTS, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH RAYMOND W. FOREMAN ET AL., APPELLEES AND CROSS-APPELLEES.

224 N. W. 2d 770

Filed January 2, 1975. No. 39492.

1. **Employer and Employee: Parent and Child.** Usually any labor supplied by a father to a son is presumed to be gratuitous.
2. **Employer and Employee: Parent and Child: Contracts.** The presumption of gratuity with respect to the services of a parent is a rebuttable one. It may be overcome by proof of an express contract regarding compensation or of such facts and circumstances as show an understanding of the parties that payment was to be made. In the absence of such proof, recovery will be denied.
3. **Master and Servant.** The relationship of master and servant is a contractual relationship.
4. **Contracts: Parties.** The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
5. **Master and Servant: Evidence.** In determining whether an individual is a servant as distinguished from an independent contractor, the basic test is whether or not his physical conduct in the performance of the service is controlled or subject to the right of control. A pertinent question in this respect is whether under the arrangement the workman only possesses the same independence that employees in general enjoy.
6. ———: ———. The facts of each particular case must be considered in determining whether a master and servant relationship exists.
7. **Employer and Employee.** The usual exchange of work arrangement does not as a matter of law constitute employment so as to create an employee and employer relationship.

Appeal from the District Court for Seward County: JOHN D. ZEILINGER, Judge. Reversed and dismissed.

Ray C. Simmons, for appellant.

Barlow, Watson & Johnson, for appellees Meyer et al.

Mattson, Ricketts, Davies, Stewart & Calkins and

Knudsen, Berkheimer, Endacott & Beam, for appellees Foreman et al.

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

SPENCER, J.

Appellant, State Farm Mutual Automobile Insurance Company, appeals from a declaratory judgment finding that appellee Walter J. Meyer was an employee of his son, appellee Warren Meyer, State Farm's insured, under a work arrangement agreement. We reverse.

The accident which gave rise to this litigation arose during the operation of a farm tractor on a highway in Seward County, Nebraska. The issue presented is whether or not at the time of that accident Walter J. Meyer was an employee of his son Warren Meyer within the terms of the following provision of a State Farm policy: "Insured — means * * * (5) under coverage AF, any employee of an insured with respect to agricultural vehicles and implements while engaged in his employment by an insured."

The father and son, along with two neighbors, Eicher and Schmidt, had been involved for several years in what has been characterized as a "work exchange" program in which each of the parties aided with particular tasks on the farms of each of the others. Warren was putting up hay on his own land with the assistance of his father and two neighbors. Warren supplied a tractor, rake, and baler. Eicher brought a tractor and started raking the hay. Warren followed with his baler. When Walter and Schmidt arrived, they were informed that another tractor and trailer were required in addition to the trailer in the field. At Warren's suggestion Walter and Schmidt left in Schmidt's car to get Walter's tractor and Schmidt's trailer. After attaching the trailer to the tractor, Schmidt returned to the hay field in his car and

Walter started back pulling the trailer with the tractor.

On the trip to Warren's hay field, and before he reached it, Walter was involved in an accident in which Raymond W. Foreman was injured. Foreman brought an action against Walter. Walter and Warren each carried liability policies of $25,000 with State Farm. Coverage under Walter's policy was admitted. This action was brought to determine coverage for the father, Walter, under Warren's policy.

Warren testified that when the three others came over to his farm, he decided what equipment the other three would bring and when they would start baling hay. He also decided where to put the hay. It was the practice that whoever owned the hay to be cut would be the person to give the orders, and it was the understanding among the parties that the owner of the land gave the directions.

Schmidt testified that the four of them never discussed the particular legal relation between them in exchanging labor operations. They never discussed whether they were employers or employees. They just helped each other out and didn't discuss anything along those lines. They were neighbors and they had to get along and needed each other's help. It was a neighborly and Christianly thing to do, and that was at least part of the basis of their exchange of work among themselves. When he worked on the farms of the other three in these exchange of labor operations, he did not consider himself their employee, and when they worked on his farm he did not consider himself their employer. When he went over and helped Warren with his haying operation he expected Warren to come back later and help him with his. That was the agreement. He traded his services for Warren's services.

The parties to this appeal agree that this case presents one of first impression in Nebraska. Appellant asserts it is a case of first impression nationally. Appellees,

however, claim that similar facts have been found to support a finding of an employer-employee relationship on two occasions in Iowa: Ganszhorn v. Reep (1943), 234 Iowa 495, 12 N. W. 2d 154, and Erickson v. Erickson (1959), 250 Iowa 491, 94 N. W. 2d 728.

Ganzhorn v. Reep, *supra,* involved an action between two neighboring farmers for injuries resulting from an automobile accident. Defendant had called plaintiff and asked him for assistance in fixing a broken pump. After working for a time, defendant determined it was necessary to go to town for additional equipment. Defendant asked plaintiff to ride with him since nothing more could be done until he returned. On the ride to town the accident occurred. The record indicates that for several years plaintiff and defendant had exchanged work with each other. No money ever changed hands and no accounting of time took place. The trial court submitted the question of master-servant relationship to the jury and the jury returned a verdict for the plaintiff, which was affirmed.

In Erickson v. Erickson, *supra,* the plaintiff and defendant were brothers. They had exchanged work over the years, had kept accounts of time spent, and made cash payments to settle any imbalance. Plaintiff had been called to do chores for defendant while he was away. In performing those chores plaintiff was injured while working with certain machinery owned by defendant. The trial court, sitting without a jury, found an employer-employee relationship existed. The judgment for the plaintiff was affirmed.

In Patty v. State Farm Mut. Auto. Ins. Co. (Tenn., 1955), 228 F. 2d 363, the United States Court of Appeals for the Sixth Circuit held the practice of swapping work does not as a matter of law constitute employment. A judgment for the insurer was reversed to determine whether the agreement of the insured to pay for new parts for the mower was by way of com-

pensation to the plaintiff, or to make the mower fit for operation.

St. Aubyn v. Thogmartin (1970), 206 Kan. 62, 476 P. 2d 248, involved the definition of "employee" within an employee-exclusionary clause of an insurance policy. The driver of a newspaper delivery truck brought a third-party action against the insurer for a declaratory judgment, alleging that the insurer was obligated to defend him and pay within policy limits any judgment obtained against him by a newsboy who was injured in a collision while throwing newspapers from the truck. The Kansas Supreme Court determined that the driver, who was an old friend of the truck owner, had volunteered to drive the truck for the owner without any agreement for compensation, while the owner went on a hunting trip. The court held the subsequent payment of $5 was a gratuity and sustained a finding that the driver was not an employee within the exclusionary clause of the owner's policy.

In Bean v. Gibbens (1954), 175 Kan. 639, 265 P. 2d 1023, a neighbor boy was killed while guiding insured's truck which was being towed into town. Nothing was said about pay, and no pay was offered. The Kansas Supreme Court held the boy was not an employee within a clause of a liability policy excluding coverage of employees of the insured.

Kentucky Farm Bureau Mut. Ins. Co. v. Snell (Ky. App., 1958), 319 S. W. 2d 462, involved a member of a group of neighbors who voluntarily helped each other in harvesting their tobacco crops, keeping track of the hours worked, and agreeing to make up any difference in amount of work performed by payment of an agreed amount. The trial court submitted to the jury the question of control of the neighbor while working. The jury found against the plaintiff. The Kentucky Court of Appeals affirmed, holding the injured man was not

an employee of the neighbor owning the truck upon which the accident occurred.

Usually any labor supplied by a father to a son is presumed to be gratuitous. See cases collected on this point in Annotation, 7 A. L. R. 2d at p. 88. The presumption of gratuity, however, with respect to the services of a parent is a rebuttable one. It may be overcome by proof of an express contract regarding compensation or of such facts and circumstances as show an understanding of the parties that payment was to be made. In the absence of such proof, recovery will be denied. Houser v. Houser (1965), 178 Neb. 401, 133 N. W. 2d 618.

Warren could not recall any cash payments with any of the other three parties when the four exchanged labor. If somebody felt he was on the short end at the close of the year, there would be a settlement of some kind. This was usually balanced, however, by supplying more labor and machinery. The exchange of work was apparently taken for granted, as the record does not reveal any specific promises regarding it.

Warren testified that he and his father, in addition to the trading of labor with the other two men in haying operations, traded other labor and equipment between themselves. Much of their equipment was owned jointly. They exchanged considerable labor and equipment at harvest time and generally quite a bit at ground preparation time. Warren was farming about 400 acres, his father about 160. Warren testified he thought their work averaged out because he did the fertilizing for his father and also did his baling and his planting.

It is undisputed the father was to get some benefit out of the hay that was being harvested from the son's field. The father had no native hay. At the time of the accident he was doing some feeding. The hay being harvested from the son's field was to be taken to

the father's barn for storage even though the son had a barn on his own farm. When the son was asked whether there was any reason his father had not used Schmidt's tractor, he answered: "'Well, there was really no reason to use his (Schmidt's) tractor, he was getting, or going to get no benefit out of the, out of that particular hay.'" The son conceded that although he owned the hay his father was benefited by it in that "It was there if he needed it." He testified his father did use some of the hay. Another reason the son gave for using his father's tractor was that he and his father always exchanged help and machinery.

The relationship of master and servant is a contractual relationship. Barton v. Hobbs (1967), 181 Neb. 763, 151 N. W. 2d 331. We there held: "The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties." Ordinarily, such a contract requires a consideration. See 53 Am. Jur. 2d, Master and Servant, § 18, p. 95. The exchange of work could meet this requirement for the other two parties involved. An exchange of work arrangement between a father and son, however, poses a different question because of the presumption that such services are generally considered to be gratuitous.

In the case of the ordinary master and servant arrangement, we have announced the following rule: "The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, * * *." Kessler v. Bates & Rogers Constr. Co. (1951), 155 Neb. 40, 50 N. W. 2d 553.

In determining whether an individual is a servant as distinguished from an independent contractor, the basic test is whether or not his physical conduct in the performance of the service is controlled or subject to the right of control. A pertinent question in this

respect is whether under the arrangement the workman only possesses the same independence that employees in general enjoy. See Sandrock v. Taylor (1970), 185 Neb. 106, 174 N. W. 2d 186.

The facts of each particular case must be considered in determining whether a master and servant relationship exists. Premised upon the test as to whether the participants in the work exchange agreement only possessed the same independence that employees in general enjoy, we would determine them to be independent contractors. It is evident from the record they had more independence than employees in general. While the owner of the premises told the other participants what he wanted done, he did not tell them how they had to do it. They did it their own way without instruction or control from him.

Appellees premise their action herein on their claim that the son controlled the haying operation so that the father and the other two men were employees. The son decided when he thought his hay was dry enough to be cut and baled; what equipment was needed and to be used in the haying operation; what work was to be done, and who was to do it; and where the hay was to be taken. Appellant, however, points out that these matters simply control the result of the work and that such control does not change the workmen from independent contractors to employees. Appellant argues the when, what, who, or where was not controlling the manner of the work. Appellant suggests this is illustrated by the answer to the following question asked Mr. Schmidt: "And you told these fellows how to do it?" to which he gave the answer: "They know how to do it. I told them what I wanted done and so forth."

In this case there was no agreement de facto or otherwise for close supervision of the work. The men were all farmers with expert knowledge of the work at hand, and proceeded accordingly. The work was of a semi-

skilled nature. Some of the tools and equipment were supplied by the alleged servants. They received no pay, only helped at short intervals and without regular hours, in a specific area, in connection with the regular farming business of Warren. The record does not indicate that the farmers exchanging labor regarded themselves as servants or employees. Actually, the record indicates otherwise, as indicated by the testimony of Schmidt set out heretofore.

A pertinent question, if we regard the present circumstances as establishing a master and servant relationship, is when did it actually commence? Can it be said that its inception occurred when the four men involved met for coffee in the morning and decided to put up the hay that afternoon? Or, when Walter, Eicher, and Schmidt left their own farms enroute to Warren's; or upon arrival; or upon commencing work? It would have to be conceded that the latter is the only possibility. As to Walter, he had never commenced work, but instead left the field at once to get his tractor. It was his own tractor, over which he had exclusive control, which he was operating at the time of the accident. The accident occurred before he reached the place where the tractor was to be used. In this respect, the case before us is definitely different from the situations found in the two Iowa cases relied upon by appellees. In Ganzhorn v. Reep, *supra,* the injured party was riding in the defendant's automobile enroute to the place where he was to assist the defendant. In Erickson v. Erickson, *supra,* the injured party was working on defendant's farm with defendant's machinery.

Appellees concede that while Schmidt was driving his car to take Walter to get his tractor he was not under Warren's control. They further concede that while the father was operating the tractor from his farm to the Schmidt farm to get the Schmidt trailer,

and while he was bringing the tractor and the trailer to the hay field, he was not under the son's control. They contend, however, that the father was doing what the son asked him to do, and in doing so, he was under Warren's direction.

Warren and his father exchanged help and machinery in addition to the four-member exchange with Eicher and Schmidt before the date of the accident. Warren did not charge his father for the work that he did for him. He and his father were not partners but did own machinery together and often worked together. The machinery which they used together was bought by both of them, with the cost of the combine shared about equally. However, the father supplied more money on the disc than Warren. As of the date of the accident, Warren's father would have supplied slightly more of the financing than Warren.

Exchange of work arrangements are common in this state. Also, it is not unusual for neighbors to do the work of a farmer who is temporarily ill or disabled, with the implied understanding by all concerned that the sick farmer will return the favor if and when he is able. In the latter situation, however, someone other than the farmer organizes the group and suggests the manner in which the work will be done and by whom the equipment will be furnished. In the usual work exchange arrangements, it is the owner of the premises where the work is to be done who decides when the work should be done and what equipment will be needed. Other than apportioning the work among those involved, there is none of the usual control exercised by an employer over an employee. We are convinced that in none of these situations do the parties involved think of themselves in terms of being masters and servants or employers and employees. As Schmidt testified, he did not so consider himself but he did expect Warren to perform like services for him when the need arose.

It is an exchange of work between equals. In exchanging work, farmers are not selling their time but are simply assisting a neighbor to get a job done with the expectation that the neighbor will return the favor.

If we are to sustain the judgment herein, we must give a much broader construction to the terms "master" and "servant," and "employer" and "employee" than we have done heretofore. To affirm the judgment would require us to hold that the word "employee" is to be interpreted as inclusive of any and every person who may happen at the time of the accident to be rendering some service to the insured, whether that service be occasional, incidental, casual, gratuitous, or the mere expression of a neighborly act. This we refuse to do. The usual exchange of work arrangement does not as a matter of law constitute employment so as to create an employee and employer relationship. Stripped to its essential element, we hold the fact that Walter was bringing his own tractor to his son's farm at the son's request did not make him an employee of the son at the time of the accident which occurred before he reached the son's farm.

The judgment herein is reversed, and the petition is dismissed.

REVERSED AND DISMISSED.

CLINTON, J., dissenting.

CORRINE M. SULLIVAN, APPELLANT, V. WILLIAM F. SULLIVAN, APPELLEE.
224 N. W. 2d 542

Filed January 2, 1975. No. 39541.

1. **Divorce: Alimony.** The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances.
2. **Divorce: Attorneys at Law: Fees.** The award of attorney's

fees and the taxing of costs in an action for the dissolution of marriage is discretionary.

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

Warren C. Schrempp and Thomas G. McQuade of Schrempp, Bruckner & Dinsmore, for appellant.

Michael J. Dugan of Costello & Dugan, for appellee.

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

BOSLAUGH, J.

This is an action for the dissolution of a marriage. The trial court dissolved the marriage; awarded child support and custody of Susan, the minor child of the parties, to the petitioner; and made a division of the property. Each party was ordered to pay his own costs and attorney's fees.

The petitioner has appealed and contends the trial court should have awarded alimony and a greater share of the property to her, should have allowed her an attorney's fee, and should have taxed all costs to the respondent.

The parties were married in 1947. They have four children, three of whom were of age at the time of the trial. Susan became 19 on September 9, 1974. The petitioner is 47 years old and apparently in good health except for a hearing problem. She has not been employed and has no special skills or training. The respondent is 53 years of age and employed as a bookkeeper by Latham Enterprises, a subsidiary of Zimmerman Feed Yards. His gross earnings are $705 per month.

The trial court awarded the following property to the petitioner: The residence of the parties valued at $50,000 and subject to a mortgage of $17,500; furniture valued at $4,000; a 1972 Ford automobile; 245 shares of

Jolenco stock and all other money and stocks in her name amounting to approximately $42,800; personal effects and personal property in her possession; and one-half of an escrow account.

The respondent was awarded a 1971 Chevrolet automobile; all shares of Meadow Oaks and Latham Enterprises, Inc., common stock and 5 shares of Jolenco common stock in his name; his insurance policies, personal effects, and personal property in his possession; and one-half of the escrow account. The trial court also canceled three promissory notes signed by the respondent and payable to the petitioner totalling $12,350.

The petitioner's principal contention is that the property division made by the trial court did not restore to her the value of property which she received by inheritance or gift during the marriage. This consisted of a one-fourth interest in 80 acres of land and approximately $30,000 from the sale of land that had belonged to her father. The Jolenco Corporation was organized to develop the 80-acre tract. The petitioner received dividends of approximately $74,000 from the sale of that land. The $42,800 in money and stocks in her name represents the amount remaining from the $104,000. The balance was used for taxes, a vacation in Hawaii, the Ford automobile, college expenses of the children, construction of the home, loans to the respondent, and household and living expenses.

During the marriage the respondent received gifts and bequests amounting to $17,500 which were used for living expenses. Both the Meadow Oaks stock and the Latham Enterprises stock are subject to mortgages. The Meadow Oaks project is a land development venture of uncertain value. The Latham Enterprises stock pays no dividends. The respondent has borrowed substantially the entire cash value of his insurance policies.

The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances.

The property division made by the trial court here was an award to the petitioner of substantially all the property that was of value. The respondent had but a modest income and there was no reasonable basis for an award of alimony in addition to the property assigned to the petitioner.

In regard to attorney's fees and costs the trial court is empowered to "decree costs against either party." § 42-367, R. R. S. 1943. The award of attorney's fees and the taxing of costs is discretionary. In view of the division of property made in this case, the trial court was justified in ordering each party to pay his own costs and attorney's fees.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD D. NOKES, APPELLANT.
224 N. W. 2d 776

Filed January 2, 1975. No. 39548.

1. **Criminal Law: Guilty Plea.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. **Criminal Law: Homicide: Words and Phrases.** The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
3. **Criminal Law: Guilty Plea: Waiver.** A valid and voluntary plea of guilty establishes the defendant's guilt of the offenses charged and embodies a waiver of all defenses to the charge, whether procedural, statutory, or constitutional.
4. **Criminal Law: Sentences.** It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.

Appeal from the District Court for Red Willow County:

JACK H. HENDRIX, WILLIAM F. COLWELL, and HERBERT A. RONIN, Judges. Affirmed.

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

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

McCOWN, J.

The defendant, Harold D. Nokes, pleaded guilty to one count of first degree murder for the killing of Wilma Hoyt, and one count of second degree murder for the killing of Edwin Hoyt. A three-judge panel imposed a sentence of life imprisonment on the charge of first degree murder. The presiding District Judge imposed a sentence of life imprisonment on the second degree murder count, and directed the sentences to run consecutively. This appeal followed.

The relevant facts of the killings are taken from a statement made by the defendant on January 4, 1974, in the presence of a court reporter; the special prosecutor; the defendant's counsel; and the sheriff of Frontier County. The statement is designated as exhibit A and included in the bill of exceptions.

Edwin and Wilma Hoyt disappeared from their farm home near Culbertson, Nebraska, on September 23, 1973. After a couple of days, their daughter, Kay Hein, suspected foul play and gave the police some information which set off the extensive investigation that followed. The defendant, Harold D. Nokes, was among those investigated.

The defendant, Harold D. Nokes, was 45 years of age. He was employed by the State Department of Roads as an area foreman in McCook, Nebraska. He and his wife, Ena, had been married for some 27 years and had lived for 20 years in their home at 903 East G Street in McCook. Harold and Ena Nokes had been mutual

friends of Mrs. Kay Hein and her husband, Dwayne, for several years.

At sometime in 1969 or 1970, Harold Nokes and Kay Hein became involved in a sexual relationship. In 1971, Mrs. Hein divorced her husband. Mrs. Hein then continued sexual relationships with the Nokeses until April or May of 1973. In April of 1973, Mrs. Hein attempted suicide and the defendant called her parents, Mr. and Mrs. Hoyt, and reported the incident to them. In May of 1973, Mrs. Hein broke off her relationship with the defendant. In June of 1973, Mr. Hoyt accused the defendant of attempting to blackmail Mrs. Hein and repeated the accusations on other occasions thereafter.

On Sunday, September 23, 1974, Harold Nokes and his wife left McCook at approximately 8 p.m., and decided to drive to the Hoyt's home near Culbertson to get the "misunderstandings straightened out." The defendant took a revolver along which he had purchased that summer, and put it in his belt under his coat. The defendant and Mrs. Nokes arrived at the Hoyt residence at about 8:30 p.m. After the four individuals had discussed the matter for a period of time, which is unclear in the record, the defendant suggested that the four of them go to the Nokes' house in McCook and have Mrs. Hein join them there. Mr. and Mrs. Hoyt agreed, and the defendant suggested that the Hoyts ride with him to McCook, and Mrs. Nokes followed in the Hoyt car.

When they arrived at the Nokes' residence in McCook, Mr. Hoyt had become angry and was talking loudly, and the defendant suggested that they all go to the basement so that the neighbors would not hear them. The four went to the basement. The defendant and Mr. Hoyt went into the wash room and the two women remained in the family room. The door between the two areas was open throughout the events. In the wash room, Mr. Hoyt said that he had had enough and he removed his glasses, drew his fist back, and came toward the defendant. The defendant took his gun out of his

belt when Mr. Hoyt was about 3 feet from him, fired one shot into Mr. Hoyt, and killed him.

Mrs. Hoyt came toward the defendant, started screaming, and said: "Why didn't you kill Kay," and then started up the basement stairs. The defendant stated that he "couldn't let her get away," and when she was about two steps up the stairs, he shot her in the back and she fell dead at the foot of the stairs.

Harold and Ena Nokes discussed the situation and decided to dispose of the bodies. The defendant dismembered the bodies with a butcher knife, and his wife helped wrap the pieces and put them in a freezer. She also took the Hoyt car to a hospital lot and left it. The activities consumed most of the night, and both Mr. and Mrs. Nokes went directly to work the next morning. During the day the defendant returned to his house and picked up the clothes he had been wearing and the clothes the Hoyts had worn and took them out and burned them. That evening, around sundown, the defendant and his wife loaded the body parts into the trunk of their car and into a boat which they pulled behind the car. They then drove to Harry Strunk Reservoir, also known as Cambridge Lake, put the body parts into the boat; put the boat into the water; boated out into the lake; unwrapped each body part; and threw it into the lake. They returned to shore, built a fire, and burned the wrappings. The following Saturday the defendant returned to the lake and found 7 or 8 pieces of bodies floating along the edge of the lake. He placed them in against the rocks along the dam and put another rock on top of them. The defendant never returned to the lake thereafter.

Harold D. Nokes was arrested on December 20, 1973. The reported statement was given on January 4, 1974. On January 10, 1974, the defendant waived the right to preliminary hearing and entered his plea of guilty to both counts of murder, after a full and complete arraignment. On March 22, 1974, after full presentence

reports, the three-judge panel imposed a life sentence on the first degree murder count; and the presiding District Judge imposed a consecutive life sentence on the second degree murder count.

The defendant's first general area of complaint is directed at the voluntariness of the defendant's guilty plea and the alleged lack of any factual basis to establish premeditation on the first degree murder count. It is somewhat difficult to comprehend the basis of these contentions. The arraignment was extensive and thorough. The agreement and understanding under which the statement of January 4, 1974, was obtained was fully and thoroughly explained to the defendant and to the court. The defendant does not even intimate that the statement of January 4 was illegal, improper, or even involuntary. Essentially, the argument seems to rest on the contention that the statement of January 4 fails to establish a factual basis of premeditation as to the first degree murder count.

In State v. Hall, 188 Neb. 130, 195 N. W. 2d 201, we held that the standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162. Not only was the plea here a clearly voluntary and intelligent choice among alternative courses of action, there was also ample evidence to establish that the murder of Mrs. Hoyt was premeditated. The defendant's own admission establishes the necessary foundation. He said: "But as soon as I shot him, well, she started running for the stairs, and all I could think of, I couldn't let her get away and she was past me and I shot her."

While the time may have been short, it is nevertheless clear in this state that time is not the crucial element in establishing premeditation. Almost three-quarters of a century ago, this court said: "It is earnestly insisted that time is required for premeditation and delibera-

tion. While this is true, the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed * * *." Savary v. State, 62 Neb. 166, 87 N. W. 34. There can be no doubt that on the basis of the defendant's statement alone, there was a factual basis for the plea of guilty to first degree murder. If there were any real doubt as to the voluntariness of the defendant's statement, merely a cursory glance at the statement itself would dispell any doubt. On at least two occasions the defendant expressed a desire to get everything taken care of as quickly as possible and to have it over with. The guilty plea here represents the defendant's own free voluntary and intelligent choice among the alternative courses of action open to him.

The next major group of assignments of error centers around the contention that the defendant was denied the effective assistance of counsel. The contention embraces charges of incompetence for failing to file motions to suppress evidence resulting from an illegal search and seizure; from illegal and improper electronic surveillance of his home; as well as failure to file motions to suppress some of defendant's statements given prior to the January 4 statement. The allegations of incompetence are concluded by the allegation that "his trial counsel allowed him to plead guilty." Carried to its logical extreme, that contention would mean that every defense counsel would be required to try every criminal case and make every possible defense, regardless of the strength of the evidence against the defendant and in disregard of the defendant's own desires; and to ignore the beneficial alternatives to trial afforded by a guilty plea. Obviously no court has ever adopted such a position.

It must be noted also that the misconduct charged here involved failure to file motions to suppress various

items of evidence which might have been admissible at trial. But this case was not tried, nor did any of the evidence at which the objections are directed enter into the defendant's conviction. The plea of guilty rendered all those other allegations completely irrelevant. This state, along with virtually every other state, has consistently held that a plea of guilty embodies a waiver of all defenses to the charge, whether procedural, statutory, or constitutional. See, State v. Mason, 187 Neb. 675, 193 N. W. 2d 576; Annotation, 20 A. L. R. 3d 724. The basis for that proposition was stated in Tollett v. Henderson, 411 U. S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235, as follows: "We thus reaffirm the principle recognized in the Brady trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

In Hughes v. United States, 371 F. 2d 694 (8th Cir., 1967), that court held that a voluntary plea of guilty admitted all the essential elements of the offense charged and waived all nonjurisdictional defects and defenses and said: "The plea of guilty established his guilt of the offenses charged. No proof of defendant's guilt by use of the seized evidence or any other evidence was required."

It has never been true that the competence of counsel in a criminal case can be proved only by an actual demonstration of his professional abilities in the legal arena of a trial courtroom. The knowledge, experience, judgment, and advice of counsel are more important than his dexterity in legal maneuvers, or the determination with which he wields the weapons of his profession in a jury trial. Here Harold D. Nokes' trial counsel performed at least as well as a lawyer with ordinary train-

ing and skill in the criminal law in his area, and conscientiously protected the interests of his client within the test standards set out in State v. Leadinghorse, *ante* p. 485, 222 N. W. 2d 573.

The final contention of the defendant is that the consecutive life sentences are excessive and an abuse of judicial discretion. It may well be that consecutive life sentences reflect a public policy of retribution and punishment to the maximum extent. There is no valid reason here why such a public policy should not be vindicated and the penalty of life imprisonment executed to its full extent. See State v. Pope, 190 Neb. 689, 211 N. W. 2d 923. Under the circumstances involved in the crimes here it cannot be said that the trial court abused its discretion in directing that the sentences be served consecutively. See State v. Rodman, *ante* p. 403, 222 N. W. 2d 109.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAN GROOMS, ALSO KNOWN AS DANIEL N. GROOMS, APPELLANT.
224 N. W. 2d 781

Filed January 2, 1975. No. 39555.

1. **Criminal Law: Evidence.** 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. **Trial: Evidence: Proof.** Secondary evidence of the contents of a written instrument may be introduced where proof is made that the writing has been lost or destroyed, or is otherwise unavailable.

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

Charles Plantz, for appellant.

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

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

SPENCER, J.

Appellant, Daniel N. Grooms, was convicted on two counts of uttering a forged instrument. We condense appellant's assignments of error to four: (1) Insufficiency of the evidence; (2) admission of photographic copies of the forged instruments; (3) admission of statements made by appellant to his grandmother; and (4) the refusal to declare a mistrial. We affirm.

On or about May 24, 1973, appellant, the grandson of Frank Grooms, presented a $500 check payable to himself to the Gordon State Bank. The check was purportedly drawn by Frank Grooms on his account at that bank. On or about July 7, 1973, appellant presented another check payable to himself, purportedly drawn by Frank Grooms. This check was for $800. Frank Grooms was subsequently reimbursed by the bank for the $1,300 represented by the two checks, on a claim that the checks were forgeries. This prosecution followed.

Frank Grooms was 93 years old and practically blind. He had banked at the Gordon State Bank for many years. He still occasionally signed checks on his account, although he couldn't fill them out. His wife also had authority to sign checks on the account, but when she did she signed her own name.

In August of 1973, Mrs. Grooms discovered two charges against the account, one for $500, the other for $800. There were no checks included for those amounts. She and her husband were not living at their mailing address during the period in question, and their statements were delivered to them by their son and grandson. Appellant delivered at least some of the statements to

Mrs. Grooms. On some of them she remembered the envelopes had been opened and resealed shut.

Mr. and Mrs. Grooms contacted the bank about the charges and learned that checks for those amounts, purportedly signed by Frank Grooms payable to appellant, had been charged to the account. Both Frank Grooms and his wife testified they did not owe appellant anything. They had not bought anything from him for either $500 or $800. Frank Grooms denied having written appellant any check in those amounts or that he gave anyone else authority to do so. He further testified he never gave appellant permission to sign his name to checks. During 1973, he did not sign a check for appellant or give one to appellant to fill out.

The Gordon State Bank followed a regular procedure relating to checks drawn on accounts in that bank. After a check was cashed, it was processed through a proof machine and a computer machine, microfilmed, and then stored in the vault with the customer's statement. Approximately every 30 days the statement, with the checks, was mailed to the customer. The bank did not keep the original canceled checks longer than 30 days. The only record it had of the checks was the microfilm which was stored in its vault. When the questioned checks were not found the bank procured enlargements of the microfilms it had made. These were introduced into evidence over objection.

Frank Grooms, because of his poor eyesight, was unable to examine the questioned signatures. Mrs. Frank Grooms, appellant's grandmother, testified that Frank did not make out checks. He merely signed them. She usually made out checks for him. She did not make out either the $500 or the $800 check payable to Dan Grooms. For the last 5 years somebody else had filled in the portion of the check above Mr. Grooms' signature. Whoever did that had to indicate to him where to sign the check. She is the one who keeps the records and audits the bank statements. When she checked the May, June,

and July statements, she found the $500 and the $800 charges, but there were no checks in the statements for those amounts. On cross-examination she testified positively that the signature on the $500 check was not Frank Grooms' signature.

Mrs. Grooms further testified she talked to appellant after the preliminary hearing about the trial that was coming up. She asked him if anybody else was in on the deal, and appellant said there wasn't.

Robert Kehr, an officer of the Gordon State Bank, talked to appellant about the checks in August 1973. His testimony is as follows: "I told him that he was really in trouble because of writing these checks on his grandfather. And he told me that he had talked to his grandfather that morning and that he had made a settlement with him on these."

Frank Tolstedt, the executive vice president of the Gordon State Bank, testified the appellant called him in October about the checks. He testified as follows: "A He told me that he was calling in reference to the checks - with reference to the checks that we were - in other words, that we had to pay for. In other words, the checks that we paid Mr. Frank Grooms back on. * * * Q Well, just none other. What did he say? The best you can remember. The substance of it. A Well, he said that he would like to take care of the checks. Q And what did you say to him? A I said it was too late."

Appellant did not testify. Ben Garcia, an examiner of questioned documents, was the only witness called by him. Garcia was of the opinion that Frank Grooms and not appellant wrote "Frank Grooms" on the two questioned checks. He testified that appellant did write his own name as payee on the $800 check. He conceded that a signature could be traced and that he would not be able to detect it on a photostatic copy. His attention was called to the fact that both of the questioned signatures appear to have been made with

something broader than a ballpoint pen. Without the original it was not possible to testify as to the nature of the pen.

"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. Hiatt (1973), 190 Neb. 315, 207 N. W. 2d 678.

The evidence is conflicting on the issue of forgery. The State's evidence is to the effect that the checks were not signed by Frank Grooms or anyone authorized by him. Frank Grooms specifically denied that he had signed the checks for appellant. Appellant's expert testified he thought the checks were signed by Frank Grooms and not the appellant. He did concede that appellant had written his name as payee on one of the checks. On cross-examination the expert admitted that signatures could possibly be traced and he would not be able to detect that on a photostatic copy. The expert was at a disadvantage in that he was working with photocopies of the questioned documents, not the originals. The blowups of the photocopies would indicate that the writing on the questioned checks was heavier and broader than that on the comparison documents. The question of forgery was one for the jury. It was not required to accept the opinion of the expert witness, as it obviously did not.

While appellant was not required to testify, if the checks were genuine or if there was some reasonable explanation for them, it would appear that some attempt would have been made in the cross-examination of Frank Grooms and Mrs. Grooms to bring out this explanation. Appellant presented the checks to the bank and received payment on them. There is not even a hint of an explanation in this record as to why the 93-year-old grandfather gave appellant, if such was the fact, $1,300.

No attempt was made to explain the statements made to the grandmother and the other witnesses. While appellant did not admit the forgery in the statements, the inference is clearly present that there was something wrong with the checks. Certainly, his conversations with the three witnesses are inconsistent with any theory of innocence. The jury could reasonably have believed that if the checks had been legitimate or he were not involved he would have made some protestation of innocence on at least one of the occasions.

The evidence was sufficient to permit the jury to find the checks involved were not signed by Frank Grooms or by anyone with authority to sign for him. From an examination of the photocopies of the two checks, we cannot say that the jury was wrong in this respect. There is no hint in the evidence that anyone other than appellant was involved. Actually, in response to a direct question appellant told his grandmother no one else was involved. Appellant's expert testified that appellant's name as payee on the $800 check was written by appellant. A jury question was presented. There is no merit to appellant's first assignment of error.

Appellant complains that the original forged instruments were not introduced but that photographic copies were admitted in evidence. The evidence was sufficient to show the unavailability of the original instruments. They were missing from Frank Grooms' bank statement. There was evidence in the record from which the jury could infer that possibly the appellant himself had abstracted them. The statements had been in his home; he had delivered statements to his grandparents; and the envelopes had been opened and resealed before they were delivered. While the evidence is purely circumstantial, it was sufficient to account for the unavailability of the original instruments. Secondary evidence of the contents of a written instrument may be introduced where proof is made that the writing has been lost or destroyed, or is otherwise unavailable. See

Clough v. North Central Gas Co. (1948), 150 Neb. 418, 34 N. W. 2d 862.

Appellant complains of the introduction of his grandmother's testimony that she asked him if there was anyone else in on the deal and he replied that there was not. He asserts it is prejudicial because what she meant by asking the question is not clear; what the deal was is not specified; and what appellant meant by his answer is not clear. In context, it is reasonably clear what the conversation was about. It took place after the preliminary hearing and at a time when appellant and his grandmother were talking about the trial coming up for forging checks on his grandfather's account. She obviously assumed he was guilty and wanted to know if anyone else was involved.

The trial court instructed the jury herein: "Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say."

The statement made by the grandmother was in effect an accusation of guilt. While the appellant did not specifically admit the commission of the crime, he made a statement utterly inconsistent with innocence. It was clearly relevant and admissible.

Appellant does not argue or seek to sustain his argument on the refusal of the trial court to declare a mistrial. Under our rules, it will not be considered.

The judgment is affirmed.

AFFIRMED.

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Accomplices.

Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error. State v. Temple ---------- 442

Accounting.

1. An action for an accounting between partners is equitable in nature and is reviewed de novo in this court. Barthuly v. Barthuly ---------- 610
2. The right of a partner to an accounting accrues at the time of dissolution in the absence of an agreement to the contrary. An agreement between partners that an accounting will be made when accounts receivable are collected prevents the accrual of the right to an accounting at the time of dissolution. Barthuly v. Barthuly ---------- 610
3. Generally in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Barthuly v. Barthuly ---------- 610
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Actions.

1. Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. Schmidt v. Henke ---------- 408
2. The purpose of section 25-301, R. R. S. 1943, is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause, as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy. Schmidt v. Henke ---------- 408
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cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Schmidt v. Henke ---------- 408

4. The question of entitlement to an office can only be challenged in a direct proceeding brought for that purpose, and cannot be made an issue collateral to another proceeding. Atkins v. Department of Motor Vehicles ---------- 791

Administrative Law.

1. Orders of the Department of Public Welfare made pursuant to the provisions of section 68-1016, R. R. S. 1943, may be reviewed by petition in error under section 25-1901 et seq., R. R. S. 1943, as well as by appeal under section 84-917, R. R. S. 1943. Downer v. Ihms ---------- 594

2. Venue in either case lies in the county of residence of the applicant or recipient affected by the final order under section 68-1016, R. R. S. 1943. Downer v. Ihms ---------- 594

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Adoption.

1. An appeal to the District Court in an adoption proceeding is tried de novo on the record. § 24-541, R. S. Supp., 1972. Riggert v. King ---------- 607

2. In an appeal to the District Court in an adoption proceeding, it is the duty of the appellant to see that a record of the evidence in the county court is properly presented in the District Court. Riggert v. King ---------- 607

Adverse Possession.

1. When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under section 34-301, R. R. S. 1943. Shirk v. Schmunk ---------- 25

2. A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership for the full

period required by the statute. § 25-202, R. R. S. 1943. Shirk v. Schmunk ---------- 25
Campbell v. Buckler ---------- 336

3. When a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Shirk v. Schmunk ---------- 25
4. In order to establish title by adverse possession, the possession is sufficient if the land is used continuously for purposes for which it may in its nature be adapted. Shirk v. Schmunk ---------- 25
5. In order to establish title by adverse possession, the possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold the land as the owner of it. It must have been under a claim of ownership. Shirk v. Schmunk ---------- 25
6. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. State v. Kilberg ---- 661

Affidavits.

1. In general there must be a substantial, although not a technical, correspondence between the petition and the affidavit in replevin. Cromwell v. Ward ---------- 178
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3. Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed. State v. Torrence -- 213
4. Affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a

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Aiders and Abettors.

To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. State v. Wilson ---------- 435

Alcoholic Liquors.

1. A requirement that one convicted of driving while intoxicated attend and complete an "Alcohol Abuse Course" established under sections 39-669.31 and 39-669.32, R. R. S. 1943 (Reissue of 1974), is a valid condition of probation under section 29-2262(2) (e) and (m), R. S. Supp., 1972. State v. Muggins - 415
2. A condition of probation that one convicted of driving while intoxicated pay the fee for an Alcohol Abuse Course is presumptively valid as reasonably related to the rehabilitation of the offender, and will not be disturbed on appeal, absent a showing in the record that the fee charged is unreasonable in amount or unduly onerous to probationer. State v. Muggins ---------- 415

Aliens.

Under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, nonresident aliens may not inherit an interest or title to lands in the State of Nebraska, but the heirs or persons who would have been entitled to such lands shall be paid compensation by the State of Nebraska to the extent of the full value thereof in the manner provided in section 76-408, R. R. S. 1943. Shames v. State ---------- 614

Alimony.

1. The payment of money by a divorced husband directly to his ex-wife is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and a divorced husband

is a person having a direct legal interest in the result of proceedings to revive judgment as to unpaid installments of child support vested in the deceased ex-wife. Harrison v. Grizzard ---------- 243

2. The District Court has inherent power and retains a continuing jurisdiction to determine the amounts due and to enforce the judgments for alimony and child support. Roach v. Roach ---------- 268
3. Upon the dissolution of a marriage, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Barnes v. Barnes _ 295
4. The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. Schwaninger v. Schwaninger ---------- 681
5. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Schwaninger v. Schwaninger ---------- 681
6. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. Schwaninger v. Schwaninger ------ 681
7. The fixing of alimony rests in each case within the sound discretion of the trial court. Young v. Young 735
8. Alimony awards are not subject to solution by mathematical formula. Young v. Young ---------- 735
9. The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. Sullivan v. Sullivan ---------- 841

Animals.

1. The old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an

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2. Where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes. Ruskamp v. Hog Builders, Inc. ---------- 168

Appeal and Error.

1. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Shirk v. Schmunk ---------- 25
Campbell v. Buckler ---------- 336

2. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Shirk v. Schmunk ---------- 25
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3. In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other. Nestle v. Welsh ---------- 71

4. The provision of section 25-1144, R. R. S. 1943, requiring a written motion for new trial specifying the ground thereof, is mandatory in order to review errors of law occurring at the trial of a law action or the sufficiency of the evidence. Parker v. Christensen ---------- 117

5. The standard of judicial review of a trial court's

order granting a new trial is whether or not the trial court abused its discretion. Johnson v. Enfield 191

6. This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor. Johnson v. Enfield ---------- 191

7. The action of the board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Friesen v. Clark ---------- 227

8. When a motion for a new trial is seasonably filed and pending, the cause remains in the District Court so long as the motion is undisposed of and there can be no final judgment until its disposition. Versch v. Tichota ---------- 251

9. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. Versch v. Tichota ---------- 251

10. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Herman Brothers, Inc. v. Hennis Freight Lines, Inc. ---------- 258

11. Generally, the Supreme Court's jurisdiction over appeals is based on final judgments or orders. Burroughs Corp. v. James E. Simon Constr. Co. ------ 272

12. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272

13. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. State v. Knowles ---------- 281

14. For a question of constitutionality to be considered

in this court, is must be previously raised in the trial court. If it is not raised in the trial court it may not be considered in this court. State v. Knowles ---------- 281

15. In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try the case de novo and to reach independent conclusions on the issues presented by the appeal without reference to the conclusion or judgment reached in the District Court. Barnes v. Barnes ---------- 295

16. Where recovery was not a mere matter of computation, and depends upon the intangible and subjective elements of pain and suffering and future disability, it will not be interfered with unless it is so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the incident. Anson v. Fletcher 317

17. The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska Public Service Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

18. An order of the Nebraska Public Service Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

19. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Buss ---------- 407

20. An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case. State v. Warner ---------- 438
State v. Jonsson ---------- 730

21. A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced. State v. Temple ---------- 442

22. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed

out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Temple -- 442
23. 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. Marion v. American Smelting & Refining Co. 457
24. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Marion v. American Smelting & Refining Co. ---------- 457
25. Even though the issue of child custody is triable de novo in this court, the judgment of the trial court is entitled to great weight in determining the best interests of the children. Braeman v. Braeman ---- 510
26. In this court a cross-appeal by an appellee can be taken only against an appellant unless otherwise provided by statute. Hansen v. Hasenkamp ------ 530
27. Orders of the Department of Public Welfare made pursuant to the provisions of section 68-1016, R. R. S. 1943, may be reviewed by petition in error under section 25-1901 et seq., R. R. S. 1943, as well as by appeal under section 84-917, R. R. S. 1943. Downer v. Ihms ---------- 594
28. The provision of the statutes requiring the plaintiff in error to file with his petition an authenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory. Downer v. Ihms ---- 594
29. An appeal to the District Court in an adoption proceeding is tried de novo on the record. § 24-541, R. S. Supp., 1972. Riggert v. King ---------- 607
30. Error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous. Riggert v. King ---------- 607
31. In an appeal to the District Court in an adoption proceeding, it is the duty of the appellant to see that a record of the evidence in the county court is properly presented in the District Court. Riggert v. King ---------- 607
32. In the absence of a record of the evidence in the

lower court, it is presumed the evidence sustained the findings of the court. Riggert v. King ------- 607

33. In the absence of a record of the evidence which was received in the county court, and in the absence of a showing as to what additional evidence should have been received in the District Court and why it was reasonably necessary, it was not an abuse of discretion for the District Court to refuse to receive additional evidence in a trial de novo on the record. Riggert v. King ---------- 607

34. Whether the trial court's decision on a motion for a new trial was to grant a new trial or to deny one, the questions on appeal are whether error or errors appear in the record; whether they were called to the attention of the trial court; and whether they constitute prejudicial error to the party complaining. McMillan Co. v. Nebraska E. G. & T. Coop., Inc. --- 744

35. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. State v. Pope ---- 755

36. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789

37. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789

38. The right to appeal in criminal cases can be exercised only by the party to whom it is given; and generally only a person aggrieved or injured by a judgment may take an appeal from it. State v. Berry ---------- 826

Arrest.

1. "Arrest" within the meaning of 18 U. S. C. A., § 3182, means an arrest caused by the executive authority of the asylum state, after formal demand in compliance with the statute has been made by the governor of the state from which the prisoner fled. Prettyman v. Karnopp ---------- 451

2. Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to

be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time, but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest. Prettyman v. Karnopp ---- 451

Assault and Battery.

1. The crime of assault and battery is a lesser included offense within a charge of robbery with force and violence. State v. Jacobs ---------- 246
2. In a prosecution for an assault by threatening another in a menacing manner, the State is not required as an element of the crime to prove specific intent. State v. Brauner ---------- 602
3. The pointing of an unloaded weapon at another is an assault, if the person aimed at does not know but that it is loaded, and has no reason to believe that it is not. State v. Brauner ---------- 602

Attorney and Client.

A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Klatt ---------- 219

Attorneys at Law.

1. A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney. Barnes v. Barnes ---------- 295
2. Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel. State v. Haynes ---------- 445
3. To meet the test of effectiveness, trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client. State v. Leadinghorse ---------- 485
4. Court-appointed counsel for an indigent is entitled to all expenses reasonably necessary to permit him

to effectively and competently represent his client, and reasonable fees for services performed pursuant to his appointment. State v. Belding ---------- 555

5. A defendant's personal absence from inquiries into jurors' impartiality at in-chambers meetings is not prejudicial where defense counsel is present. State v. Nevels ---------- 668

6. Where, upon direct appeal to this court from a finding of guilty in a criminal prosecution, a constitutional claim of ineffectiveness of counsel is made, we will not consider the issue where the determination of its merits may depend upon the existence of facts not shown in the record. State v. Hert ---------- 751

7. Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered. State v. Linn ---------- 798

8. The authority to bring error proceedings under section 29-2315.01, R. R. S. 1943, is not extended to city attorneys nor to prosecutions under city ordinances. State v. Linn ---------- 798

9. The county courts have the inherent power to appoint defense counsel to represent indigents charged with any offense for which they may be imprisoned. Kovarik v. County of Banner ---------- 816

10. When a county court appoints defense counsel to represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pursuant to that appointment. Kovarik v. County of Banner -- 816

11. It is not in violation of Article VIII, section 1A, of the Constitution of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime. Kovarik v. County of Banner - 816

12. The award of attorney's fees and the taxing of costs in an action for the dissolution of marriage is discretionary. Sullivan v. Sullivan ---------- 841

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The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Harig ---------- 49

Boundaries.

1. Section 34-301, R. R. S. 1943, authorizes actions in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute. Shirk v. Schmunk ---------- 25
2. When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under section 34-301, R. R. S. 1943. Shirk v. Schmunk ---------- 25
3. When a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Shirk v. Schmunk ------ 25

Business Records.

1. Under section 25-12,109, R. S. Supp., 1972, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission. State v. Watson ---------- 44
2. The purpose of the statute, section 25-12,109, R. S. Supp., 1972, was to permit the admission in evidence of systematically entered records made in the usual course of business, without the necessity of identifying, locating, and producing as witnesses the individuals who made the original entries in the records. State v. Watson ---------- 44
3. No particular mode or form of record is required under section 25-12,109, R. S. Supp., 1972, and a record prepared by electronic equipment and stored on tape, if it complies with the requirements of the statute, is as admissible as a book account or record recording the same information and calculations. State v. Watson ---------- 44
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room and the statute should not be construed narrowly to destroy its usefulness. State v. Watson -- 44

Carriers.

1. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
2. It is the policy of the Legislature to regulate transportation by motor carriers in intrastate commerce in such manner as to preserve the inherent advantages of, and foster sound economic conditions in, transportation by motor carriers, in the public interest; and to promote economical and efficient service and reasonable charges, without unjust discrimination, or unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
3. A certificate of public convenience and necessity may be issued only when required by the present or future public convenience and necessity. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
4. The burden is upon the applicant to show that the proposed service is required by public convenience and necessity. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
5. The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska Public Service Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
6. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing

carriers contrary to the public interest. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

Colleges and Universities.

1. Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a State may impose on a student a reasonable durational residency requirement that can be met in student status. Bauer v. Board of Regents of University of Nebraska ---------- 87
2. We find L.B. 1171 in violation of Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska. State ex rel. Rogers v. Swanson ---------- 125
3. We find L.B. 1171 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States. State ex rel. Rogers v. Swanson ---------- 125
4. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201
5. Where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Nebraska Technical Community College Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201

Comity.

A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Dallmann v. Mehrer -- 543

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The common law rule of governmental immunity has not been completely abrogated in Nebraska. Hall v. Abel Inv. Co. ---------- 256

Confessions.

1. Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights. State v. Torrence ---------- 213
2. Where voluntary statements or confessions are not offered or received in evidence, testimony by a police officer that the defendant had been advised of his constitutional rights and refused to waive them is improper. State v. Jacobs ---------- 246
3. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Temple ---------- 442
4. A finding that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Temple -- 442
5. Volunteered statements of any kind are not barred by the Fifth Amendment to the Constitution of the United States. State v. Gundlach ---------- 692

Consideration.

1. A consideration for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other but the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request. Adair v. Adair ---------- 571
2. An accommodation maker is a debtor within the meaning of section 9-504(3), U. C. C. Bank of Gering v. Glover ---------- 575

Conspiracy.

To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. State v. Wilson ---------- 435

Constitutional Law.

1. Article I, section 11, of the Constitution of Nebraska, requires that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense thereto and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. State v. Harig ---------- 49
2. Under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Harig ---------- 49
3. Sections 77-202.25 to 77-202.33, R. S. Supp., 1972, do not constitute an appropriation of state funds and are not violative of Article II, section 1, Article III, section 22, or Article III, section 25, Constitution of the State of Nebraska. Stahmer v. State - 63
4. It is the duty of this court to give the statute an interpretation which meets constitutional requirements if it can reasonably be done. Stahmer v. State ---------- 63
5. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. Stahmer v. State ---------- 63
6. The partial exemption from taxation of the classes of property specified in section 77-202.25, R. S. Supp., 1972, are not unreasonable, constitutionally objectionable as discriminatory, or violative of Article III, section 18, Article VIII, sections 1, 2, or 4, Constitution of the State of Nebraska. Stahmer v. State ---------- 63
7. Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a State may impose on a student a reasonable durational residency requirement that can be met in student status. Bauer v. Board of Regents of University of Nebraska ---------- 87
8. Whether a business is charged with such a public

interest as to warrant its regulation is a legislative question in which the court ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. Such regulations must be reasonable considering the nature of the business and not such as would prevent the carrying on of the business. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---------- 89

9. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---------- 89

10. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

11. We hold that the Dairy Industry Trade Practices Act, as amended, insofar as it purports to fix a minimum basic cost, discriminates against efficient producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anticompetitive influences in the industry, contrary to the purposes stated by the Legislature. We therefore conclude the act is an unnecessary and unwarranted interference with individual liberty. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

12. An act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act. State ex rel. Rogers v. Swanson ---- 125

13. The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by

virtue of its provisions. State ex rel. Rogers v. Swanson ---------- 125
14. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. State ex rel. Rogers v. Swanson ---------- 125
Gaffney v. State Department of Education ------ 358
15. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Rogers v. Swanson ---------- 125
16. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. State ex rel. Rogers v. Swanson ---------- 125
17. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each. State ex rel. Rogers v. Swanson ---------- 125
18. The guarantee of the Establishment Clause of the First Amendment to the Constitution of the United States is protected against state infringement by the Fourteenth Amendment to the Constitution of the United States. State ex rel. Rogers v. Swanson 125
19. We find L.B. 1171 in violation of Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska. State ex rel. Rogers v. Swanson --- 125
20. We find L.B. 1171 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States. State ex rel. Rogers v. Swanson ---------- 125
21. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohib-

iting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201

22. Where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Nebraska Technical Community College Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201

23. For a question of constitutionality to be considered in this court, it must be previously raised in the trial court. If it is not raised in the trial court it may not be considered in this court. State v. Knowles ---------- 281
State v. Hert ---------- 751

24. The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Hale v. Taylor ---------- 298

25. A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception. State v. Patterson ---------- 308
State v. Pope ---------- 755

26. A statute which changes the substantive rights and obligations of the parties to an otherwise valid contract violates the constitutional prohibition against impairment of obligation of contracts. United States Brewers' Assn., Inc. v. State ---------- 328

27. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of a police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the

property rights of the individual. United States Brewers' Assn., Inc. v. State ---------- 328
28. L.B. 234, Laws 1971, as amended by L.B. 66, Laws 1972, held unconstitutional. United States Brewers' Assn., Inc. v. State ---------- 328
29. Article VII, section 11, of the Constitution of Nebraska, provides in part: Neither the state Legislature nor any county, city, or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358
30. By its terms, Article VII, section 11, declares and requires that any educational institution which receives any aid by way of public appropriation must be exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358
31. Constitutional and statutory provisions are not open to construction as a matter of course. Gaffney v. State Department of Education ---------- 358
32. By its terms, the criteria announced in Article VII, section 11, of the Constitution of Nebraska, do not permit an examination of the distinction between secular or sectarian purposes, nor do they permit an examination of a scheme to determine the elusive distinction between primary or incidental benefit, nor an examination into the areas of surveillance, entanglement, and political divisiveness. Gaffney v. State Department of Education ---------- 358
33. The fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school from public funds. Gaffney v. State Department of Education ------ 358
34. Textbook loans to students or parents of students are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. Gaffney v. State Department of Education ------ 358
35. The channeling of free textbook loans to students or their parents as distinguished from a grant to the school is immaterial. Such a device is a patent

attempt to sanction by indirection that which the Constitution forbids. Gaffney v. State Department of Education ---------- 358
36. L.B. 659 is in violation of Article VII, section 11, of the Constitution of Nebraska. Gaffney v. State Department of Education ---------- 358
37. The admission of evidence of a tainted showup does not without more violate due process. State v. Sanchell ---------- 380
38. In order to find a due process violation, the court must determine if the independent basis of the identification when viewed in the totality of the circumstances defeats a substantial likelihood of irreparable misidentification. State v. Sanchell -- 380
39. The sodomy statute, section 28-919, R. R. S. 1943, is not unconstitutional as being vague and indefinite, or as invading the right of privacy. State v. Temple ---------- 442
40. Section 28-1011.15, R. S. Supp., 1972, is constitutional. State v. Haynes ---------- 445
41. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. State v. Haynes ---------- 445
42. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection. State v. Haynes ---------- 445
43. The constitutional test for determining the validity of a plea of guilty is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Lewis ---------- 518
44. The constitutional right of confrontation does not apply to criminal contempt proceedings. State v. Rhodes ---------- 557
45. A proceeding to punish for contempt of court does not require the presence of the defendant in order to satisfy the requirement of due process, if there have been suitable notice and adequate opportunity to appear and be heard. State v. Rhodes ---------- 557
46. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the

same action question its constitutionality. Zoimen v. Landsman ---------- 561

47. It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Zoimen v. Landsman ---------- 561

48. The Fourth Amendment to the Constitution of the United States was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. State v. Gundlach ---------- 692

49. Volunteered statements of any kind are not barred by the Fifth Amendment to the Constitution of the United States. State v. Gundlach ---------- 692

50. Procedural due process is satisfied where appellant was given notice and an opportunity to be heard. Atkins v. Department of Motor Vehicles -------- 791

51. Where state and local purposes are commingled in a governmental function, the crucial issue in regard to Article VIII, section 1A, of the Constitution of Nebraska, turns upon a determination of whether the controlling and predominant purposes are state purposes or local purposes. Kovarik v. County of Banner ---------- 816

52. It is not in violation of Article VIII, section 1A, of the Constitution of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime. Kovarik v. County of Banner ---------- 816

Contempt.

1. A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence. State v. Rhodes - 557

2. The constitutional right of confrontation does not apply to criminal contempt proceedings. State v. Rhodes ---------- 557

3. A proceeding to punish for contempt of court does not require the presence of the defendant in order to satisfy the requirement of due process, if there

have been suitable notice and adequate opportunity to appear and be heard. State v. Rhodes 557

Continuances.

1. The matter of the granting of a continuance in a criminal case is particularly within the province and the discretionary judgment of the trial court. State v. Harig 49
2. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. State v. Haynes 445

Contracts.

1. The defense of illegality of a contract cannot as a rule be invoked by a third party. Armstrong v. Armstrong 11
2. The defense of equitable estoppel may be claimed by a party or privy but not by a stranger. Armstrong v. Armstrong 11
3. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. Ross v. Ross 186
4. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Ross v. Ross 186
5. A statute which changes the substantive rights and obligations of the parties to an otherwise valid contract violates the constitutional prohibition against

impairment of obligation of contracts. United States Brewers' Assn., Inc. v. State ---------- 328

6. In an action by a taxpayer to have declared void upon the grounds of public policy or prohibiting statute a contract for the purchase of real estate by a school district from an officer thereof, there can be no recovery of the purchase price in a case where the real estate is unchanged by improvements thereon and can therefore be readily returned unless the school district offers, or by being made a party can be compelled, to reconvey the title and deliver possession. Davy v. School Dist. of Columbus ---------- 468

7. Section 79-1254, R. R. S. 1943, in its present form does not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring a determination that reasonable and just cause exists for termination of such employment. Schultz v. School Dist. of Dorchester ---------- 492

8. When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. Adair v. Adair ---------- 571

9. A consideration for an agreement requires that there be a benefit on one side, or a detriment suffered or a service done on the other but the benefit rendered need not be to the party contracting but may be to any one else at his procurement or request. Adair v. Adair ---------- 571

10. A contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where there is a breach of contract by the owner or the other party, and the breach of contract results in delay in the work of the contractor and the delay in the work causes damage to him, he has a right of recovery in the absence of a "no-damage clause" or other provisions to the contrary in the contract and even though the contract contains a provision for the extension of time. Siefford v. Housing Authority ---------- 643

11. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract. Siefford v. Housing Authority - 643

12. Damages for breach of contract which are suscep-

tible of definite proof are recoverable only to the extent that the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Siefford v. Housing Authority ---------- 643

13. Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. Hollister v. Government Emp. Ins. Co. ---------- 687

14. Medical and hospital services charged to an insured and for which he is legally liable are "incurred" within the meaning of an insurance policy agreeing to pay only expenses actually incurred, notwithstanding the payment of such expense by another party. Hollister v. Government Emp. Ins. Co. ---- 687

15. An insurance policy providing for the payment of medical and hospital expense incurred "for" or "on behalf of" an insured renders the insurer liable for payment of the expense whether or not the insured incurred the expense if it was incurred by another party for him. Hollister v. Government Emp. Ins. Co. ---------- 687

16. Generally, in the absence of an agreement to the contrary, upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place without liability to account for the good will of the firm. Thorin v. Kurkowski ----- 701

17. In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it. Rutherford v. Chief Industries, Inc. 715

18. The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction. Rutherford v. Chief Industries, Inc. ---------- 715

19. The presumption of gratuity with respect to the services of a parent is a rebuttable one. It may be overcome by proof of an express contract regarding compensation or of such facts and circum-

stances as show an understanding of the parties that payment was to be made. In the absence of such proof, recovery will be denied. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

20. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

Controlled Substances.

1. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Ambrose ---------- 285

2. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. State v. Turner -- 397

3. 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. State v. Torrence ---------- 720

4. To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. State v. Torrence ---------- 720

Cotenancy and Joint Ownership.

Where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the property, and neither has the right to the immediate and exclusive possession of the property as against the other. Cromwell v. Ward ---------- 178

Counties.

1. When a county court appoints defense counsel to represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pursuant to that appointment. Kovarik v. County of Banner ---------- 816
2. It is not in violation of Article VIII, section 1A, of the Constitution of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime. Kovarik v. County of Banner 816

Courts.

1. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. Stahmer v. State ---------- 63
2. While it is appropriate for the trial court to thank the jurors at the conclusion of a trial for their public service, such comments ordinarily should not include praise or criticism of their verdict. State v. Eskew ---------- 76
3. Generally, the Supreme Court's jurisdiction over appeals is based on final judgments or orders. Burroughs Corp. v. James E. Simon Constr. Co. ----- 272
4. The Summary Judgment Act, by its terms grants to the District Court the power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and contemplates and requires a trial and final order or judgment upon the material facts that are actually and in good faith controverted. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272
5. Ordinarily the duly authenticated record of a county court imports absolute verity. State v. Morford -- 412
6. The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Morford ---------- 412
7. A trial judge cannot effectively discharge the roles of both judge and defense counsel and one pro-

ceeding pro se is bound by his own acts and conduct. State v. Morford ---------- 412

8. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed within the limits fixed by statute and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Holzapfel ---------- 672

9. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable to a formal criminal trial. State v. Holzapfel ---------- 672

10. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holzapfel ------ 672

11. The power of the District Court to modify or vacate a decree of marriage dissolution under the provisions of section 42-372, R. R. S. 1943, within 6 months of the entry of the decree does not exist after an appeal has been made to this court and the appellant has suffered an involuntary dismissal here. Dewey v. Dewey ---------- 676

12. A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge. State v. Kartman ---------- 803

13. The courts of this state have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction. Kovarik v. County of Banner ---------- 816

14. The county courts have the inherent power to appoint defense counsel to represent indigents charged with any offense for which they may be imprisoned. Kovarik v. County of Banner ---------- 816

15. When a county court appoints defense counsel to represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pur-

suant to that appointment. Kovarik v. County of Banner ---------- 816

Criminal Law.

1. Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation. State v. Jackson ---------- 39
   State v. Zobel ---------- 480
2. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Harig ---------- 49
3. After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Harig ---------- 49
4. The essential allegations which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms not less than 1 year each. State v. Harig ---------- 49
5. Article I, section 11, of the Constitution of Nebraska, requires that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense thereto and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. State v. Harig ---------- 49
6. An accused is entitled to be represented by counsel at all "critical stages" of criminal proceedings against him, including the occasion upon which he is sentenced. State v. Harig ---------- 49
7. Under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause

the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Harig ---------- 49

8. Where a defendant is simultaneously convicted of more than one felony charged on the same information, and the Habitual Criminal Act is applicable, such defendant may be sentenced separately for each underlying conviction, each sentence being enhanced under the Habitual Criminal Act. State v. Harig ---------- 49

9. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harig ---------- 49
State v. Cannady ---------- 404
State v. Gundlach ---------- 692

10. The matter of the granting of a continuance in a criminal case is particularly within the province and the discretionary judgment of the trial court. State v. Harig ---------- 49

11. The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Harig ---------- 49

12. In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. State v. Casper -- 120
State v. Wilson ---------- 435

13. A witness may be examined concerning prior inconsistent statements to show his testimony has operated as a surprise, to test his recollection, refresh his memory, induce him to change his testimony, or show the circumstances which induced the party to call him. State v. Casper ---------- 120

14. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Merrick -- 157
State v. Wiitala ---------- 727

15. A court may properly sentence a convicted criminal to consecutive terms in the Penal and Correctional Complex for separate offenses. State v. Merrick - 157

16. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Wade ---------- 159

17. Section 39-727, R. S. Supp., 1972, defines but one

offense, namely the operation of a motor vehicle while (1) under the influence of alcoholic liquor, (2) being under the influence of any drug, or (3) having ten hundredths of one percent or more by weight of alcohol in the body fluid. State v. Weidner 161

18. There is no requirement in our law that trial judges discuss parole possibilities with defendants. State v. Graham ---------- 196

19. Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196

20. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196

21. An affidavit for a search warrant which is based in part upon information supplied by an unidentified informant is sufficient if the affidavit contains a factual basis upon which the reliability of the informant can be determined. State v. Torrence ---- 213

22. Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed. State v. Torrence -- 213

23. Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights. State v. Torrence ---------- 213

24. It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Torrence ---------- 213

25. A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Klatt -- 219

26. The crime of assault and battery is a lesser included offense within a charge of robbery with force and violence. State v. Jacobs ---------- 246

27. When the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as

to which the evidence is sufficient to support a verdict. State v. Jacobs ---------- 246

28. The refusal to instruct upon a lesser included offense after request by the defense is reversible error. State v. Jacobs ---------- 246

29. Where voluntary statements or confessions are not offered or received in evidence, testimony by a police officer that the defendant had been advised of his constitutional rights and refused to waive them is improper. State v. Jacobs ---------- 246

30. Section 29-2025, R. R. S. 1943, provides that upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense. State v. Ambrose ---------- 285

31. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Ambrose ---------- 285

32. Where a defendant, who testifies as a witness, offers evidence of his reputation for truth and veracity, the State may offer contradicting evidence. Such contradicting evidence must be confined to the reputation of the defendant for truth and veracity in the community where he lives or works. State v. Craig ---------- 347

33. In a criminal prosecution for theft, where the determination of the facts by the jury may turn upon its acceptance or nonacceptance of the credibility of the defendant, who has testified on his own behalf, the admission into evidence over objection of the opinion of a law enforcement officer that the defendant's reputation is, "that he would take anything that he could get a hold of," is erroneous and we cannot, under such circumstances, say that it was not prejudical. State v. Craig ---------- 347

34. The admission of evidence of a tainted showup does not without more violate due process. State v. Sanchell ---------- 380

35. The purpose of excluding evidence made as a result of a tainted indentification procedure is to avoid a substantial likelihood of irreparable misidentification. State v. Sanchell ---------- 380

36. In order to find a due process violation, the court

must determine if the independent basis of the identification when viewed in the totality of the circumstances defeats a substantial likelihood of irreparable misidentification. State v. Sanchell -- 380

37. The credibility of the witnesses and the weight of the testimony are questions for the jury to decide. State v. Sanchell ---------- 380

38. A voice identification is enough to support a conviction. State v. Sanchell ---------- 380

39. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. State v. Turner ---------- 397

40. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Rodman ------- 403
State v. Nokes ---------- 844

41. 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. State v. Moss 405

42. It is a sufficient waiver of counsel if it is made intelligently and understandingly with knowledge of the right to counsel. State v. Morford ---------- 412

43. The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. State v. Fox ---------- 424

44. An essential element of a crime may be proved solely by circumstantial evidence. State v. Fox -- 424

45. To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. State v. Wilson ---------- 435

46. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence. State v. Warner ---------- 438

47. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Warner ---------- 438

48. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Temple ---------- 442

49. A finding that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Temple ---------- 442

50. Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error. State v. Temple ---------- 442

51. The sodomy statute, section 28-919, R. R. S. 1943, is not unconstitutional as being vague and indefinite, or as invading the right of privacy. State v. Temple ---------- 442

52. Defendant's status as a felon is an essential element of the crime described in section 28-1011.15, R. S. Supp., 1972, and evidence must be adduced on that status in the absence of a stipulation. State v. Haynes ---------- 445

53. Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel. State v. Haynes ------ 445

54. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. State v. Haynes ---------- 445

55. The requirement that 1 day shall elapse between service of an information and arraignment relates

to the charge which is to be tried and does not apply to a charge that the defendant is an habitual criminal. State v. Cole ---------- 466

56. A previous judgment and commitment in the same court may be proved by a certified copy of the judgment and commitment. State v. Cole -------- 466

57. To meet the test of effectiveness, trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client. State v. Leadinghorse ---- 485

58. Joinder of offenses of the same or similar character is permissible in the absence of prejudice to the defendant. State v. McDonnell ---------- 500

59. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. McDonnell -- 500

60. In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Fauth ---- 502

61. 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 it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. City of Beatrice v. Blake ---------- 503

62. Delay resulting from the fact the defendant was serving a sentence imposed by a Canadian court can not be considered in determining whether the defendant was denied the right to a speedy trial. State v. Brown ---------- 505

63. In a criminal prosecution the trial court should, before accepting a plea of guilty or nolo contendere, inform the defendant personally of the possible penalties that may be imposed. State v. Lewis ---- 518

64. Subsequent to sentence, in the absence of manifest injustice as defined in section 2.1(a) (ii) (1) (2) (3) (4), American Bar Association Standards Relating to Pleas of Guilty, the defendant should not be permitted to withdraw his plea of guilty or nolo contendere. State v. Lewis ---------- 518

65. The constitutional test for determining the validity of a plea of guilty is whether or not it represents a voluntary and intelligent choice among the alter-

native courses of action open to the defendant. State v. Lewis ---------- 518
66. The record should affirmatively disclose that the defendant entered his plea of guilty or nolo contendere intelligently and voluntarily. State v. Lewis 518
67. A sentence imposed within the statutory limits will not be disturbed on appeal without a showing of an abuse of discretion by the sentencing court. State v. Orner ---------- 523
68. Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence, and the ruling will not be overturned on appeal except for a clear abuse of discretion. State v. Langer ---- 525
69. Under section 83-1,105(2), R. S. Supp., 1972, where the trial court imposes a sentence for a definite term of years on a defendant, the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law. State v. Hedglin ---- 545
70. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Combs -------- 551
71. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Combs ---------- 551
72. A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Combs ---- 551
73. Court-appointed counsel for an indigent is entitled to all expenses reasonably necessary to permit him to effectively and competently represent his client, and reasonable fees for services performed pursuant to his appointment. State v. Belding ---------- 555

74. In a homicide prosecution, where self-defense is in issue, proof that the deceased was a person of fierce and violent disposition must ordinarily be made by evidence of the general reputation of the deceased and not by evidence of specific acts on his part. State v. Ralls ---------- 621
75. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Ralls ---------- 621
76. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment. State v. Laravie ---------- 625
77. If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken. State v. Campbell ------ 629
78. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense. State v. Campbell ---------- 629
79. When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. State v. Redwine ---------- 638
80. A person convicted of a felony and sentenced to imprisonment in a city or county jail is not eligible to receive work release privileges under section 47-401, R. R. S. 1943. State v. Redwine -------- 638
81. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion. State v. Frans ---------- 641
82. In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Nevels ---------- 668

83. A defendant's personal absence from inquiries into jurors' impartiality at in-chambers meetings is not prejudicial where defense counsel is present. State v. Nevels ---------- 668

84. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed within the limits fixed by statute and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Holzapfel ---------- 672

85. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable to a formal criminal trial. State v. Holzapfel ---------- 672

86. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holzapfel _ 672

87. Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them. State v. Gundlach ---------- 692

88. Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which one may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. State v. Gundlach ---------- 692

89. One of the basic principles in determining the appropriate sentence is the possibility of rehabilitation. Before one can be successfully rehabilitated, he must cooperate, and a lack of cooperation prior to sentencing could be a strong indication that the lesser restrictions of probation may not be sufficient to effect a purposeful rehabilitation. State v. Gundlach ---------- 692

90. An allegation that an act was done maliciously but without any pleading of the ultimate facts from which malice may be inferred is a mere legal conclusion and is insufficient to raise an issue of fact

so as to withstand a general demurrer. Koch v. Grimminger ---------- 706

91. 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. State v. Torrence ---------- 720

92. To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. State v. Torrence ---------- 720

93. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Torrence ---------- 720

94. A trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Torrence -- 720

95. Chapter 29, article 21, R. R. S. 1943, covering motions for new trial and arrest of judgment, details remedies dealing with criminal procedure after a verdict of guilty is entered in a criminal action. State v. Torrence ---------- 720

96. The court is not and should not be bound by the recommendation of a probation officer made in a presentence investigation report. State v. Wiitala -- 727

97. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence and does not include an appeal in or from a collateral or related proceeding. State v. Jonsson ---------- 730

98. Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to speedy trial provided for by section 29-1208, R. S. Supp., 1972. State v. Hert ---------- 751

99. Where, upon direct appeal to this court from a finding of guilty in a criminal prosecution, a constitu-

tional claim of ineffectiveness of counsel is made, we will not consider the issue where the determination of its merits may depend upon the existence of facts not shown in the record. State v. Hert -- 751

100. It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207, R. S. Supp., 1972. However, under the provisions of section 29-1209, R. S. Supp., 1972, it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute. State v. Hert ---------- 751

101. Section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that the trial court is not precluded from correcting errors at the trial. State v. Pope -- 755

102. A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception. State v. Pope ---- 755

103. Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist. State v. Pope ---------- 755

104. The existence of probable cause must be determined by a practical, and not by any technical, standard. State v. Pope ---------- 755

105. In the absence of a showing that the defendants involved would be prejudiced by the consolidation for trial of criminal prosecutions, such consolidation is proper where it could have been alleged that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. State v. Pope - 755

106. Even where criminal prosecutions are otherwise properly consolidated for the purpose of trial, the court may grant the defendants involved therein separate trials under section 29-2002(4), R. R. S. 1943, upon a showing that prejudice will result from a joint trial. State v. Pope ---------- 755

107. The ruling of a trial court upon a motion for consolidation or severance of criminal prosecutions that were properly joinable in a single indictment, information, or complaint will not be disturbed on appeal in the absence of an abuse of discretion. State v. Pope ---------- 755
108. In determining if separate counts in an indictment constitute the same offense, the test to be applied is whether each provision requires proof of additional facts or evidence. State v. Pope ---------- 755
109. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Pope ---- 755
110. A victim of forcible rape is only required to make reasonable resistance in good faith under all the circumstances, and such that nonconsent and actual opposition are genuine and real. State v. Smith -- 794
111. Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered. State v. Linn -- 798
112. A written report from the probation officer is not a jurisdictional requirement in a probation revocation proceeding. State v. Kartman ---------- 803
113. A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge. State v. Kartman ---------- 803
114. A probationer charged with a violation of probation is entitled to a preliminary hearing reasonably near the place of the alleged violation or his arrest and as promptly as convenient after his arrest. State v. Kartman ---------- 803
115. A finding that a probationer has engaged in unlawful conduct may be based on evidence relating to another offense without regard to whether the probationer has been convicted of that offense. State v. Kartman ---------- 803
116. The right to appeal in criminal cases can be exercised only by the party to whom it is given; and generally only a person aggrieved or injured by a judgment may take an appeal from it. State v. Berry ---------- 826
117. The standard for determining the validity of a guilty

plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Nokes -- 844

118. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Nokes -- 844

119. A valid and voluntary plea of guilty establishes the defendant's guilt of the offenses charged and embodies a waiver of all defenses to the charge, whether procedural, statutory, or constitutional. State v. Nokes ---------- 844

120. 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. Grooms -- 851

Custody.

1. Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise. Fenner v. Strickland ---------- 114

2. Considerations of public policy do not, in all cases, prevent the splitting of custody of the children between the parents upon dissolution. Braeman v. Braeman ---------- 510

3. The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests. Braeman v. Braeman ---- 510

4. Even though the issue of child custody is triable de novo in this court, the judgment of the trial court is entitled to great weight in determining the best interests of the children. Braeman v. Braeman 510

5. The jurisdiction of a state to determine the status and custody of a child extends to every child within its borders. Dallmann v. Mehrer ---------- 543

6. A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Dallmann v. Mehrer 543

Customs and Usages.

To exclude or modify an implied warranty of fitness,

the exclusion must be a writing and conspicuous, except that an implied warranty can also be excluded or modified by course of dealing, or course of performance, or usage of trade. Ruskamp v. Hog Builders, Inc. ---------- 168

Damages.

1. An action for damages against a political subdivision for misrepresentation and deceit is barred by the Political Subdivisions Tort Claims Act. Hall v. Abel Inv. Co. ---------- 256
2. The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict. Selders v. Armentrout _ 291
3. Where recovery was not a mere matter of computation, and depends upon the intangible and subjective elements of pain and suffering and future disability, it will not be interfered with unless it is so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the incident. Anson v. Fletcher ---------- 317
4. A verdict and judgment will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Brewer v. Case ---------- 538
5. If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount. Hays v. County of Douglas ---------- 580
6. A contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where there is a breach of contract by the owner or the other party, and the breach of contract results in delay in the work of the contractor and the delay in the work causes

damage to him, he has a right of recovery in the absence of a "no-damage clause" or other provisions to the contrary in the contract and even though the contract contains a provision for the extension of time. Siefford v. Housing Authority ---------- 643

7. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract. Siefford v. Housing Authority - 643

8. Damages for breach of contract which are susceptible of definite proof are recoverable only to the extent that the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Siefford v. Housing Authority ---------- 643

9. Where pasture lands forming the principal acreage of a cattle ranch, upon a portion of which an easement for electric transmission lines is taken by condemnation, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken. McMillan Co. v. Nebraska E. G. & T. Coop., Inc. ---------- 744

Death.

The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict. Selders v. Armentrout - 291

Deeds.

1. The essential fact to render delivery effectual always is that the deed itself has left the control of the grantor who has reserved no right to recall it, and it has passed to the grantee. Robinson v. Thompson ---------- 428

2. It is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. Robinson v. Thompson ---------- 428

Descent and Distribution.

Under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, nonresident aliens may not inherit an interest or title to lands in the State of Nebraska, but the heirs or persons who would have been entitled to such lands shall be paid compensation by the State of Nebraska to the extent of the full value thereof in the manner provided in section 76-408, R. R. S. 1943. Shames v. State ---------- 614

Discovery.

1. At a hearing on a motion to produce filed under the provisions of section 29-1912, R. S. Supp., 1972, it is necessary for the trial court to determine by inquiry of the prosecuting attorney whether or not the prosecution has any item of the classification and kind specifically designated in the statute and in the motion to produce. State v. Eskew -------- 76
2. Whenever the court refuses to grant an order to produce pursuant to the provisions of section 29-1912, R. S. Supp., 1972, it shall render its findings in writing together with the facts upon which the findings are based. State v. Eskew ---------- 76

Divorce.

1. The payment of money by a divorced husband directly to his ex-wife is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and a divorced husband is a person having a direct legal interest in the result of proceedings to revive judgment as to unpaid installments of child support vested in the deceased ex-wife. Harrison v. Grizzard ---------- 243
2. The controlling consideration in determining custody of minor children in a divorce proceeding is the best interests and welfare of the children. Lewis v. Lewis ---------- 266
3. The findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal in the absence of a clear abuse of discretion. Lewis v. Lewis 266
4. The District Court has inherent power and retains a continuing jurisdiction to determine the amounts due and to enforce the judgments for alimony and child support. Roach v. Roach ---------- 268
5. In an appeal of an action for the dissolution of

marriage, the Supreme Court is required to try the case de novo and to reach independent conclusions on the issues presented by the appeal without reference to the conclusion or judgment reached in the District Court. Barnes v. Barnes ---------- 295

6. Upon the dissolution of a marriage, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Barnes v. Barnes - 295

7. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Gray v. Gray 392

8. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. Gray v. Gray ------ 392

9. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Gray v. Gray ---------- 392

10. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Ford v. Ford ---------- 400

11. In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion. Ford v. Ford -- 400

12. Considerations of public policy do not, in all cases, prevent the splitting of custody of the children between the parents upon dissolution. Braeman v. Braeman ---------- 510

13. The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests. Braeman v. Braeman ---- 510

14. Even though the issue of child custody is triable de novo in this court, the judgment of the trial

court is entitled to great weight in determining the best interests of the children. Braeman v. Braeman 510

15. A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Dallmann v. Mehrer -- 543

16. The power of the District Court to modify or vacate a decree of marriage dissolution under the provisions of section 42-372, R. R. S. 1943, within 6 months of the entry of the decree does not exist after an appeal has been made to this court and the appellant has suffered an involuntary dismissal here. Dewey v. Dewey ---------- 676

17. The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. Schwaninger v. Schwaninger ---------- 681

18. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Schwaninger v. Schwaninger ---------- 681

19. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. Schwaninger v. Schwaninger 681

20. The fixing of alimony rests in each case within the sound discretion of the trial court. Young v. Young ---------- 735

21. Alimony awards are not subject to solution by mathematical formula. Young v. Young ---------- 735

22. The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. Sullivan v. Sullivan ---------- 841

23. The award of attorney's fees and the taxing of costs in an action for the dissolution of marriage is discretionary. Sullivan v. Sullivan ---------- 841

Domicile.

1. Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a State may impose on a student a reasonable durational residency requirement that can be met in student status. Bauer v. Board of Regents of University of Nebraska ---------- 87
2. The jurisdiction of a state to determine the status and custody of a child extends to every child within its borders. Dallmann v. Mehrer ---------- 543

Easements.

To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. State v. Kilberg ---------- 661

Eminent Domain.

Where pasture lands forming the principal acreage of a cattle ranch, upon a portion of which an easement for electric transmission lines is taken by condemnation, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken. McMillan Co. v. Nebraska E. G. & T. Coop., Inc. ---------- 744

Employer and Employee.

1. Under section 48-118, R. R. S. 1943, a strict compliance with the provisions requiring notice to the employer is not mandatory and jurisdictional. Versch v. Tichota ---------- 251
2. The purpose of the notice requirements of section 48-118, R. R. S. 1943, is to give the employer or other party interested an opportunity to join in the action. Versch v. Tichota ---------- 251
3. Under section 48-118, R. R. S. 1943, substantial rather than literal compliance with the notice provisions is sufficient. Versch v. Tichota ---------- 251
4. Usually any labor supplied by a father to a son

is presumed to be gratuitous. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

5. The presumption of gratuity with respect to the services of a parent is a rebuttable one. It may be overcome by proof of an express contract regarding compensation or of such facts and circumstances as show an understanding of the parties that payment was to be made. In the absence of such proof, recovery will be denied. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

6. The usual exchange of work arrangement does not as a matter of law constitute employment so as to create an employee and employer relationship. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

Entrapment.

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. State v. Moss 405

Equity.

1. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Shirk v. Schmunk ---------- 25
Campbell v. Buckler ---------- 336

2. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Shirk v. Schmunk ---------- 25
Campbell v. Buckler ---------- 336

3. In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and

accepted one version of the facts rather than the other. Nestle v. Welsh ---------- 71

4. A quiet title action is equitable in character and is tried de novo on appeal. Robinson v. Thompson 428

5. Even though the issue of child custody is triable de novo in this court, the judgment of the trial court is entitled to great weight in determining the best interests of the children. Braeman v. Braeman 510

6. In a suit for foreclosure of a mortgage after sale and satisfaction of the mortgage if a surplus remains, the District Court has full power to determine the interest of all parties in the surplus, and to do complete and final justice between the parties. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

Escheat.

Under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, nonresident aliens may not inherit an interest or title to lands in the State of Nebraska, but the heirs or persons who would have been entitled to such lands shall be paid compensation by the State of Nebraska to the extent of the full value thereof in the manner provided in section 76-408, R. R. S. 1943. Shames v. State ---------- 614

Estates.

1. Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal. Reller v. Hays ---------- 354

2. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust. Reller v. Hays ---------- 354

Estoppel.

The defense of equitable estoppel may be claimed by a party or privy but not by a stranger. Armstrong v. Armstrong ---------- 11

Evidence.

1. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Shirk v. Schmunk ---------- 25
   Campbell v. Buckler ---------- 336
2. A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption. Renna v. Bishop's Cafeteria Co. ---------- 33
3. A motion for a directed verdict for the purpose of decision thereon must 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. Renna v. Bishop's Cafeteria Co. ---------- 33
4. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Renna v. Bishop's Cafeteria Co. ---------- 33
5. It is well settled that a simple receipt is only prima facie evidence of the truth of the statements recited therein, and that oral evidence is admissible for the purpose of explaining, varying, or modifying its terms. Christiansen Constr. Co. v. A. J. Hiller Enterprises, Inc. ---------- 37
6. Under section 25-12,109, R. S. Supp., 1972, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular

course of business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission. State v. Watson ---------- 44

7. The purpose of the statute, section 25-12,109, R. S. Supp., 1972, was to permit the admission in evidence of systematically entered records made in the usual course of business, without the necessity of identifying, locating, and producing as witnesses the individuals who made the original entries in the records. State v. Watson ---------- 44

8. No particular mode or form of record is required under section 25-12,109, R. S. Supp., 1972, and a record prepared by electronic equipment and stored on tape, if it complies with the requirements of the statute, is as admissible as a book account or record recording the same information and calculations. State v. Watson ---------- 44

9. The business record statute, section 25-12,109, R. S. Supp., 1972, was intended to bring the realities of business and professional practice into the courtroom and the statute should not be construed narrowly to destroy its usefulness. State v. Watson - 44

10. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Harig ---------- 49

11. After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Harig ---------- 49

12. Where a party seeks specific performance of an oral agreement to leave property, that person has the burden of proving performance of the alleged contract by clear and convincing evidence. Nestle v. Welsh ---------- 71

13. In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other. Nestle v. Welsh ---------- 71

14. If a general objection to admission of evidence is

overruled, the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose. Gateway Bank v. Department of Banking ---------- 109

15. An objection on the ground of insufficient foundation is a general objection. Where the lack of foundation is not readily apparent and is lacking in some particular respect, the specific attention of the court should be called to such lack. Gateway Bank v. Department of Banking ---------- 109

16. An offer of a composite record under the provisions of the Uniform Composite Reports as Evidence Act, sections 25-12,115 to 25-12,119, R. R. S. 1943, is prima facie sufficient if a foundation is laid under section 25-12,115, R. R. S. 1943. A failure of the party offering the evidence to comply with the provisions of section 25-12,117, R. R. S. 1943, must be called to the attention of the court by specific objection. Gateway Bank v. Department of Banking ---------- 109

17. In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. State v. Casper -- 120
State v. Wilson ---------- 435

18. A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy. State v. Reyes - 153

19. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. Ross v. Ross ---------- 186

20. Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights. State v. Torrence ---------- 213

21. It is not required that jurors be totally ignorant

of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Torrence ---------- 213

22. A freeholder's petition under section 79-403, R. R. S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. Friesen v. Clark ---------- 227

23. Where voluntary statements or confessions are not offered or received in evidence, testimony by a police officer that the defendant had been advised of his constitutional rights and refused to waive them is improper. State v. Jacobs ---------- 246

24. Circumstantial evidence alone is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can reasonably be drawn therefrom. So Soo Feed & Supply Co. v. Morgan ---------- 277

25. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than the other. So Soo Feed & Supply Co. v. Morgan ---------- 277

26. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Ambrose ---------- 285

27. A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. Anson v. Fletcher ---------- 317

28. An admission against interest is admissible when

it contravenes a position taken upon trial by the party making the admission. Anson v. Fletcher -- 317

29. It is fundamental that a trial court has broad discretion to exclude cumulative evidence. Anson v. Fletcher ---------- 317

30. Where a defendant, who testifies as a witness, offers evidence of his reputation for truth and veracity, the State may offer contradicting evidence. Such contradicting evidence must be confined to the reputation of the defendant for truth and veracity in the community where he lives or works. State v. Craig ---------- 347

31. In a criminal prosecution for theft, where the determination of the facts by the jury may turn upon its acceptance or nonacceptance of the credibility of the defendant, who has testified on his own behalf, the admission into evidence over objection of the opinion of a law enforcement officer that the defendant's reputation is, "that he would take anything that he could get a hold of," is erroneous and we cannot, under such circumstances, say that it was not prejudicial. State v. Craig ------ 347

32. The admission of evidence of a tainted showup does not without more violate due process. State v. Sanchell ---------- 380

33. The purpose of excluding evidence made as a result of a tainted identification procedure is to avoid a substantial likelihood of irreparable misidentification. State v. Sanchell ---------- 380

34. In order to find a due process violation, the court must determine if the independent basis of the identification when viewed in the totality of the circumstances defeats a substantial likelihood of irreparable misidentification. State v. Sanchell ---------- 380

35. The credibility of the witnesses and the weight of the testimony are questions for the jury to decide. State v. Sanchell ---------- 380

36. A voice identification is enough to support a conviction. State v. Sanchell ---------- 380

37. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. State v. Turner ------ 397

38. The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Morford ---------- 412
39. In order to recover under the Workmen's Compensation Act, the evidence must show the plaintiff's disability was the result of accident arising out of and in the course of the employment. Mauser v. Douglas & Lomason Co. ---------- 421
40. An essential element of a crime may be proved solely by circumstantial evidence. State v. Fox -- 424
41. Polygraph tests are not admissible in evidence. State v. Temple ---------- 442
42. A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced. State v. Temple -- 442
43. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Temple ---------- 442
44. A finding that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Temple 442
45. Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error. State v. Temple ---------- 442
46. Defendant's status as a felon is an essential element of the crime described in section 28-1011.15, R. S. Supp., 1972, and evidence must be adduced on that status in the absence of a stipulation. State v. Haynes ---------- 445
47. 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. Marion v. American Smelting & Refining Co. ---------- 457
Chester v. Douglas County ---------- 666
48. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Marion v. American Smelting & Refining Co. ---------- 457

49. Reasonable certainty and reasonable probability mean exactly the same thing when used in medical testimony. Marion v. American Smelting & Refining Co. ---------- 457
50. When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. Loomis v. Estate of Davenport ---------- 461
51. Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced. Loomis v. Estate of Davenport ---------- 461
52. A previous judgment and commitment in the same court may be proved by a certified copy of the judgment and commitment. State v. Cole ---------- 466
53. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion. State v. Zobel -- 480
54. 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 it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. City of Beatrice v. Blake ---------- 503
55. Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence, and the ruling will not be overturned on appeal except for a clear abuse of discretion. State v. Langer ---------- 525
56. Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence

and where there is a conflict in the evidence, such issues must be submitted to the jury. Hansen v. Hasenkamp ---------- 530

57. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry. The use of motion pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge. Hansen v. Hasenkamp ---------- 530

58. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Combs ---- 551

59. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Combs ---------- 551

60. In an appeal to the District Court in an adoption proceeding, it is the duty of the appellant to see that a record of the evidence in the county court is properly presented in the District Court. Riggert v. King ---------- 607

61. In the absence of a record of the evidence in the lower court, it is presumed the evidence sustained the findings of the court. Riggert v. King ------ 607

62. In the absence of a record of the evidence which was received in the county court, and in the absence of a showing as to what additional evidence should have been received in the District Court and why it was reasonably necessary, it was not an abuse of discretion for the District Court to refuse to receive additional evidence in a trial de novo on the record. Riggert v. King ---------- 607

63. In a homicide prosecution, where self-defense is in issue, proof that the deceased was a person of fierce and violent disposition must ordinarily be made by evidence of the general reputation of the deceased and not by evidence of specific acts on his part. State v. Ralls ---------- 621

64. In the absence of a showing of diligence, it is not an abuse of discretion to refuse a continuance for

the purpose of obtaining additional evidence. Heffernan v. Kissack ---------- 637
65. Damages for breach of contract which are susceptible of definite proof are recoverable only to the extent that the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Siefford v. Housing Authority ---------- 643
66. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Siefford v. Housing Authority ---------- 643
67. Triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. Siefford v. Housing Authority ---------- 643
68. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Chester v. Douglas County ---------- 666
69. In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Nevels ---------- 668
70. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed within the limits fixed by statute and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Holzapfel ---------- 672
71. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable to a formal criminal trial. State v. Holzapfel ---------- 672
72. Possession of recently stolen property, if not satis-

factorily explained, is ordinarily a circumstance from which one may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. State v. Gundlach ---------- 692

73. In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it. Rutherford v. Chief Industries, Inc. 715

74. The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction. Rutherford v. Chief Industries, Inc. ---------- 715

75. 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. State v. Torrence ---------- 720

76. To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. State v. Torrence ---------- 720

77. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Torrence ---------- 720

78. A trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Torrence ---- 720

79. Section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that the trial court is not pre-

cluded from correcting errors at the trial. State v. Pope ---------- 755
80. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789
81. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789
82. A request to produce evidence that is irrelevant is properly refused. State v. Smith ---------- 794
83. A finding that a probationer has engaged in unlawful conduct may be based on evidence relating to another offense without regard to whether the probationer has been convicted of that offense. State v. Kartman ---------- 803
84. In examining a witness concerning prior inconsistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. To the extent that Cropsey v. Averill, 8 Neb. 151, conflicts with the above rule, it is overruled. State v. Wilmore ---------- 807
85. In determining whether an individual is a servant as distinguished from an independent contractor, the basic test is whether or not his physical conduct in the performance of the service is controlled or subject to the right of control. A pertinent question in this respect is whether under the arrangement the workman only possesses the same independence that employees in general enjoy. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831
86. The facts of each particular case must be considered in determining whether a master and servant relationship exists. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831
87. 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. Grooms ---------- 851
88. Secondary evidence of the contents of a written instrument may be introduced where proof is made

that the writing has been lost or destroyed, or is otherwise unavailable. State v. Grooms ---------- 851

Exemptions.

1. The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. Stahmer v. State ---------- 63
2. The partial exemption from taxation of the classes of property specified in section 77-202.25, R. S. Supp., 1972, are not unreasonable, constitutionally objectionable as discriminatory, or violative of Article III, section 18, Article VIII, sections 1, 2, or 4, Constitution of the State of Nebraska. Stahmer v. State ---------- 63

Extradition.

1. "Arrest" within the meaning of 18 U. S. C. A., § 3182, means an arrest caused by the executive authority of the asylum state, after formal demand in compliance with the statute has been made by the governor of the state from which the prisoner fled. Prettyman v. Karnopp ---------- 451
2. Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time, but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest. Prettyman v. Karnopp ---- 451

Fees.

1. A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney. Barnes v. Barnes ---------- 295
2. Court-appointed counsel for an indigent is entitled to all expenses reasonably necessary to permit him to effectively and competently represent his client, and reasonable fees for services performed pursuant to his appointment. State v. Belding ---------- 555
3. When a county court appoints defense counsel to

represent an indigent charged with any offense for which he may be imprisoned, such an appointment carries with it an obligation on the part of the county to pay the attorney so appointed reasonable attorney's fees and expenses for his services pursuant to that appointment. Kovarik v. County of Banner ---------- 816

4. It is not in violation of Article VIII, section 1A, of the Constitution of Nebraska, to require the counties to pay the reasonable attorney's fees and expenses of an attorney appointed to defend an indigent charged with crime. Kovarik v. County of Banner 816

5. The award of attorney's fees and the taxing of costs in an action for the dissolution of marriage is discretionary. Sullivan v. Sullivan ---------- 841

Foods.

A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption. Renna v. Bishop's Cafeteria Co. ---------- 33

Foreclosure.

1. Generally a lien creditor has no right to apply the surplus proceeds of a foreclosure sale to other debts or claims which he holds against the debtor and has no priority over other general creditors of the debtor in the absence of an agreement relating thereto. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

2. The holder of two liens against distinct parcels of land and for different debts but against the same debtor, cannot apply the surplus arising on the foreclosure of one of the liens to make up a deficiency on the other as against a trustee of the debtor for the benefit of creditors. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

3. A general lien on all the debtor's property is not created by a judgment or decree for the foreclosure of a lien on specific property described in the fore-

closure action. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

4. In a suit for foreclosure of a mortgage after sale and satisfaction of the mortgage if a surplus remains, the District Court has full power to determine the interest of all parties in the surplus, and to do complete and final justice between the parties. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

Forgery.

The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. State v. Fox ---------- 424

Fraud.

An action for damages against a political subdivision for misrepresentation and deceit is barred by the Political Subdivisions Tort Claims Act. Hall v. Abel Inv. Co. ---------- 256

Frauds, Statute of.

1. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. Ross v. Ross ---------- 186

2. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Ross v. Ross ---------- 186

Governmental Agencies.

The Fourth Amendment to the Constitution of the United States was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. State v. Gundlach ---------- 692

Guilty Plea.

1. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196
2. A state may, in a post conviction hearing, cure otherwise defective plea-taking transcript to show that a plea of nolo contendere or guilty was entered voluntarily and intelligently. State v. Elliott ---- 217
3. In a criminal prosecution the trial court should, before accepting a plea of guilty or nolo contendere, inform the defendant personally of the possible penalties that may be imposed. State v. Lewis ------ 518
4. Subsequent to sentence, in the absence of manifest injustice as defined in section 2.1(a) (ii) (1) (2) (3) (4), American Bar Association Standards Relating to Pleas of Guilty, the defendant should not be permitted to withdraw his plea of guilty or nolo contendere. State v. Lewis ---------- 518
5. The constitutional test for determining the validity of a plea of guilty is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Lewis ---------- 518
6. The record should affirmatively disclose that the defendant entered his plea of guilty or nolo contendere intelligently and voluntarily. State v. Lewis 518
7. The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Nokes - 844
8. A valid and voluntary plea of guilty establishes the defendant's guilt of the offenses charged and embodies a waiver of all defenses to the charge, whether procedural, statutory, or constitutional. State v. Nokes ---------- 844

Habitual Criminals.

1. The essential allegations which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms not less than 1 year each. State v. Harig ---------- 49
2. Where a defendant is simultaneously convicted of more than one felony charged on the same information, and the Habitual Criminal Act is applicable, such defendant may be sentenced separately for each underlying conviction, each sentence being enhanced under the Habitual Criminal Act. State v. Harig ---------- 49
3. Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196
4. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196
5. The requirement that 1 day shall elapse between service of an information and arraignment relates to the charge which is to be tried and does not apply to a charge that the defendant is an habitual criminal. State v. Cole ---------- 466
6. A previous judgment and commitment in the same court may be proved by a certified copy of the judgment and commitment. State v. Cole -------- 466

Hearings.

1. At a hearing on a motion to produce filed under the provisions of section 29-1912, R. S. Supp., 1972, it is necessary for the trial court to determine by inquiry of the prosecuting attorney whether or not the prosecution has any item of the classification and kind specifically designated in the statute and in the motion to produce. State v. Eskew ------- 76
2. Whenever the court refuses to grant an order to produce pursuant to the provisions of section 29-1912, R. S. Supp., 1972, it shall render its findings in

writing together with the facts upon which the findings are based. State v. Eskew ---------- 76

3. While it is appropriate for the trial court to thank the jurors at the conclusion of a trial for their public service, such comments ordinarily should not include praise or criticism of their verdict. State v. Eskew ---------- 76

4. Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196

5. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196

6. The burden is upon the applicant to show that the proposed service is required by public convenience and necessity. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

7. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

8. A probationer charged with a violation of probation is entitled to a preliminary hearing reasonably near the place of the alleged violation or his arrest and as promptly as convenient after his arrest. State v. Kartman ---------- 803

Highways.

To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. State v. Kilberg ---------- 661

Homicide.

1. In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. State v. Casper ---- 120
   State v. Wilson ---------- 435
2. In a homicide prosecution, where self-defense is in issue, proof that the deceased was a person of fierce and violent disposition must ordinarily be made by evidence of the general reputation of the deceased and not by evidence of specific acts on his part. State v. Ralls ---------- 621
3. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment. State v. Laravie ---------- 625
4. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Nokes ------ 844

Hospitals.

When a serviceman, or his dependent, is treated in a government hospital free of charge, no expense is incurred. Hollister v. Government Emp. Ins. Co. -- 687

Immunity.

1. Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption. Koch v. Grimminger 706
2. A public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and, where he acts in good faith, he is immune from suit for an erroneous or negligent determination. Koch v. Grimminger ---------- 706

Implied Consent Law.

A single request to submit to a test is sufficient under the implied consent law. Heffernan v. Kissack -- 637

Incompetent Persons.

1. If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken. State v. Campbell ------ 629
2. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense. State v. Campbell ---------- 629

Indictments and Informations.

1. The essential allegations which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms not less than 1 year each. State v. Harig ---------- 49
2. Article I, section 11, of the Constitution of Nebraska, requires that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense thereto and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. State v. Harig ---------- 49
3. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196
4. The requirement that 1 day shall elapse between service of an information and arraignment relates to the charge which is to be tried and does not apply to a charge that the defendant is an habitual criminal. State v. Cole ---------- 466
5. In the absence of a showing that the defendants involved would be prejudiced by the consolidation

for trial of criminal prosecutions, such consolidation is proper where it could have been alleged that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. State v. Pope ---- 755

6. Even where criminal prosecutions are otherwise properly consolidated for the purpose of trial, the court may grant the defendants involved therein separate trials under section 29-2002(4), R. R. S. 1943, upon a showing that prejudice will result from a joint trial. State v. Pope ---------- 755

7. The ruling of a trial court upon a motion for consolidation or severance of criminal prosecutions that were properly joinable in a single indictment, information, or complaint will not be disturbed on appeal in the absence of an abuse of discretion. State v. Pope ---------- 755

8. In determining if separate counts in an indictment constitute the same offense, the test to be applied is whether each provision requires proof of additional facts or evidence. State v. Pope ---------- 755

9. A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge. State v. Kartman ---------- 803

Infants.

1. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Fenner v. Strickland ---------- 114

2. In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children. Fenner v. Strickland ---------- 114

3. Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise. Fenner v. Strickland ---------- 114

4. The controlling consideration in determining custody of minor children in a divorce proceeding is the best interests and welfare of the children. Lewis v. Lewis ---------- 266

5. The findings of the trial court both as to an evalua-

tion of the evidence and as to the matter of custody will not be disturbed on appeal in the absence of a clear abuse of discretion. Lewis v. Lewis ---------- 266

6. The jurisdiction of a state to determine the status and custody of a child extends to every child within its borders. Dallmann v. Mehrer ---------- 543

7. A foreign divorce decree has no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Dallmann v. Mehrer - 543

Innkeepers.

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentional harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of third persons or by giving a warning adequate to enable them to avoid harm. Welsh v. Zuck ---- 1

2. A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption. Renna v. Bishop's Cafeteria Co. ---------- 33

Instructions.

1. When the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. State v. Jacobs ---------- 246

2. The refusal to instruct upon a lesser included offense after request by the defense is reversible error. State v. Jacobs ---------- 246

3. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered

by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. State v. Knowles ---------- 281
4. In considering the impact of instructions, they must be viewed as a whole. State v. Ambrose ---------- 285
5. After the cause has been submitted to the jury, a further communication by the trial judge to the jury in the absence of the parties and their counsel, which communication merely repeats or affirms an instruction already given to the jury, is not reversible error. Hansen v. Hasenkamp ---------- 530
6. All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Ralls ---------- 621
7. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. State v. Gundlach ---------- 692
8. In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it. Rutherford v. Chief Industries, Inc. 715

Insurance.

1. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Schmidt v. Henke ---------- 408
2. Medical and hospital services charged to an insured and for which he is legally liable are "incurred" within the meaning of an insurance policy agreeing to pay only expenses actually incurred, notwithstanding the payment of such expense by another party. Hollister v. Government Emp. Ins. Co. ---- 687
3. An insurance policy providing for the payment of medical and hospital expense incurred "for" or "on behalf of" an insured renders the insurer liable for payment of the expense whether or not the insured incurred the expense if it was incurred by another

party for him. Hollister v. Government Emp. Ins. Co. ---------- 687

Intent.

1. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. State v. Turner ---------- 397
2. In a prosecution for an assault by threatening another in a menacing manner, the State is not required as an element of the crime to prove specific intent. State v. Brauner ---------- 602

Interest.

1. Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal. Reller v. Hays ---------- 354
2. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust. Reller v. Hays ---------- 354
3. If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount. Hays v. County of Douglas 580

Intoxicating Liquors.

1. Section 39-727, R. S. Supp., 1972, defines but one offense, namely the operation of a motor vehicle while (1) under the influence of alcoholic liquor, (2) being under the influence of any drug, or (3) having ten hundredths of one percent or more by weight of alcohol in the body fluid. State v. Weidner 161

2. A single request to submit to a test is sufficient under the implied consent law. Heffernan v. Kissack 637
3. 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. State v. Torrence ---------- 720

Joinder.

Joinder of offenses of the same or similar character is permissible in the absence of prejudice to the defendant. State v. McDonnell ---------- 500

Judges.

A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge. State v. Kartman ---------- 803

Judgments.

1. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Wade ---------- 159
2. A judgment must be supported by the pleadings. Harrison v. Grizzard ---------- 243
3. When a motion for a new trial is seasonably filed and pending, the cause remains in the District Court so long as the motion is undisposed of and there can be no final judgment until its disposition. Versch v. Tichota ---------- 251
4. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. Versch v. Tichota ---------- 251
5. The District Court has inherent power and retains a continuing jurisdiction to determine the amounts due and to enforce the judgments for alimony and child support. Roach v. Roach ---------- 268
6. A decree awarding custody of minor children and fixing child-support payments is not subject to mod-

ification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Gray v. Gray ------ 392

7. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. Gray v. Gray --------- 392

8. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Gray v. Gray 392

9. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Buss ---------- 407

10. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Warner ---------- 438

11. A general lien on all the debtor's property is not created by a judgment or decree for the foreclosure of a lien on specific property described in the foreclosure action. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

12. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority 643

13. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789

14. Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered. State v. Linn ---------- 798

Jurisdiction.

1. Generally, the Supreme Court's jurisdiction over appeals is based on final judgments or orders. Burroughs Corp. v. James E. Simon Constr. Co. -- 272
2. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272
3. The Summary Judgment Act by its terms grants to the District Court the power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and contemplates and requires a trial and final order or judgment upon the material facts that are actually and in good faith controverted. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272
4. The power of the District Court to modify or vacate a decree of marriage dissolution under the provisions of section 42-372, R. R. S. 1943, within 6 months of the entry of the decree does not exist after an appeal has been made to this court and the appellant has suffered an involuntary dismissal here. Dewey v. Dewey ---------- 676
5. The courts of this state have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction. Kovarik v. County of Banner ---------- 816

Jury.

1. It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Torrence ---------- 213
2. A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Klatt -- 219
3. The right to challenge a juror for cause may be waived or lost by a lack of diligence. Selders v. Armentrout ---------- 291
4. Affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the

charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict. Selders v. Armentrout -- 291

Legislature.

1. Municipal corporations are creatures of the Legislature and the Legislature has plenary power over them. Lynch v. Metropolitan Utilities Dist. ------ 17
2. The state may modify or withdraw the power to hold, manage, or convey property to be used for governmental purposes; may take such property without compensation; and hold it itself or vest it in other agencies. Lynch v. Metropolitan Utilities Dist. ---------- 17
3. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. Stahmer v. State ---------- 63
4. The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. Stahmer v. State ---------- 63
5. When general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provisions do not apply. Stahmer v. State -------- 63
6. It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Stahmer v. State ---------- 63
7. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. State ex rel. Rogers v. Swanson ---------- 125
   Gaffney v. State Department of Education -------- 358
8. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Rogers v. Swanson ---------- 125
9. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the clas-

sification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. State ex rel. Rogers v. Swanson ---------- 125

10. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each. State ex rel. Rogers v. Swanson ---------- 125

Liens.

1. Generally a lien creditor has no right to apply the surplus proceeds of a foreclosure sale to other debts or claims which he holds against the debtor and has no priority over other general creditors of the debtor in the absence of an agreement relating thereto. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

2. The holder of two liens against distinct parcels of land and for different debts but against the same debtor, cannot apply the surplus arising on the foreclosure of one of the liens to make up a deficiency on the other as against a trustee of the debtor for the benefit of creditors. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

3. A general lien on all the debtor's property is not created by a judgment or decree for the foreclosure of a lien on specific property described in the foreclosure action. Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp. ---------- 588

Limitations of Actions.

A statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. The only restriction on the exercise of this power is that the Legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by

a new enactment. Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc. ---------- 431

Master and Servant.

1. The relationship of master and servant is a contractual relationship. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831
2. In determining whether an individual is a servant as distinguished from an independent contractor, the basic test is whether or not his physical conduct in the performance of the service is controlled or subject to the right of control. A pertinent question in this respect is whether under the arrangement the workman only possesses the same independence that employees in general enjoy. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831
3. The facts of each particular case must be considered in determining whether a master and servant relationship exists. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

Monopolies.

1. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---------- 89
2. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89
3. We hold that the Dairy Industry Trade Practices Act, as amended, insofar as it purports to fix a minimum basic cost, discriminates against efficient producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anticompetitive influences in the industry, contrary to the purposes stated by the Legislature. We there-

fore conclude the act is an unnecessary and unwarranted interference with individual liberty. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

Motions, Rules, and Orders.

1. The provision of section 25-1144, R. R. S. 1943, requiring a written motion for new trial specifying the ground thereof, is mandatory in order to review errors of law occurring at the trial of a law action or the sufficiency of the evidence. Parker v. Christensen ---------- 117
2. Generally, the Supreme Court's jurisdiction over appeals is based on final judgments or orders. Burroughs Corp. v. James E. Simon Constr. Co. ----- 272
3. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272
4. The Summary Judgment Act by its terms grants to the District Court the power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and contemplates and requires a trial and final order or judgment upon the material facts that are actually and in good faith controverted. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272
5. A motion for directed verdict must be treated as an admission of the truth of all competent 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. Hansen v. Hasenkamp ---------- 530
6. This court on appeal will not consider an issue involving a motion for a directed verdict where the party making the motion withdraws it before it is ruled on by the trial court. Rutherford v. Chief Industries, Inc. ---------- 715
7. Section 25-1315.02, R. R. S. 1943, outlining the procedure for a motion for judgment notwithstanding the verdict, is limited to civil proceedings. State v. Torrence ---------- 720
8. Chapter 29, article 21, R. R. S. 1943, covering motions for new trial and arrest of judgment, details

remedies dealing with criminal procedure after a verdict of guilty is entered in a criminal action. State v. Torrence ---------- 720

9. An order sustaining a motion for a new trial is not an order by which the cause is terminated and finally disposed of. State v. Linn ---------- 798

Motor Carriers.

The term "willful failure" as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. Herman Brothers, Inc. v. Hennis Freight Lines, Inc. ---------- 258

Motor Vehicles.

1. Section 39-727, R. S. Supp., 1972, defines but one offense, namely the operation of a motor vehicle while (1) under the influence of alcoholic liquor, (2) being under the influence of any drug, or (3) having ten hundredths of one percent or more by weight of alcohol in the body fluid. State v. Weidner ------ 161
2. Generally, a motorist undertaking to leave a parked position has the duty to keep a proper lookout, and not to depart from the parked position until, in the exercise of reasonable care, he may safely do so. Johnson v. Enfield ---------- 191
3. The motor vehicle guest statute, section 39-740, R. R. S. 1943, is applicable to the operation of a motor vehicle upon private property as well as upon public highways. Hale v. Taylor ---------- 298
4. The question of whether a person attempting to enter a motor vehicle is a guest within the meaning of section 39-740, R. R. S. 1943, is generally one for determination in each individual case. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. Hale v. Taylor ---------- 298
5. As a general rule it is negligence as a matter of

law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Brewer v. Case ---------- 538

6. A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation. Zoimen v. Landsman -- 561

7. The definition of gross negligence as defined by the guest statute is great and excessive and it indicates the lack of slight care in the performance of duty. Zoimen v. Landsman ---------- 561

8. The presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration in the determination of gross negligence. Zoimen v. Landsman ---------- 561

9. A single request to submit to a test is sufficient under the implied consent law. Heffernan v. Kissack 637

10. The term "compensation," as used in section 39-6,191, R. R. S. 1943, is not limited to payment for transportation in cash or its equivalent. Vandenberg v. Langan ---------- 779

11. If a passenger's carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest. Vandenberg v. Langan ---------- 779

Municipal Corporations.

1. Municipal corporations are creatures of the Legislature and the Legislature has plenary power over them. Lynch v. Metropolitan Utilities Dist. ------ 17

2. The state may modify or withdraw the power to hold, manage, or convey property to be used for governmental purposes; may take such property without compensation; and hold it itself or vest it in other agencies. Lynch v. Metropolitan Utilities Dist. ---------- 17

3. Section 14-1115, R. S. Supp., 1972, effectively removed from a metropolitan city whatever right it may have had to sell and convey the utility prop-

erty described in the statute; transferred that right to the metropolitan utilities district; and determined the manner and method of disposition of the proceeds of any such sale and conveyances. Lynch v. Metropolitan Utilities Dist. ---------- 17

4. The common law rule of governmental immunity has not been completely abrogated in Nebraska. Hall v. Abel Inv. Co. ---------- 256

5. An action for damages against a political subdivision for misrepresentation and deceit is barred by the Political Subdivisions Tort Claims Act. Hall v. Abel Inv. Co. ---------- 256

6. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Midwest Development Corp. v. City of Norfolk --- 475

7. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and so may be collaterally attacked. Midwest Development Corp. v. City of Norfolk ------- 475

8. All defects, irregularities, and inequalities in the making of assessments, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. Midwest Development Corp. v. City of Norfolk ---------- 475

9. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Midwest Development Corp. v. City of Norfolk ---------- 475

10. Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement, on the theory that the property owner has received special benefits from the improvements in excess of the benefits accrued to people generally. Midwest Development Corp. v. City of Norfolk ---------- 475

Negligence.

1. When the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwith-

standing the verdict if motions therefore are timely and appropriately made. Welsh v. Zuck ---------- 1

2. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentional harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of third persons or by giving a warning adequate to enable them to avoid harm. Welsh v. Zuck ------ 1

3. A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. Welsh v. Zuck ---------- 1

4. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause. Welsh v. Zuck -- 1

5. Generally, a motorist undertaking to leave a parked position has the duty to keep a proper lookout, and not to depart from the parked position until, in the exercise of reasonable care, he may safely do so. Johnson v. Enfield ---------- 191

6. The motor vehicle guest statute, section 39-740, R. R. S. 1943, is applicable to the operation of a motor vehicle upon private property as well as upon public highways. Hale v. Taylor ---------- 298

7. The question of whether a person attempting to enter a motor vehicle is a guest within the meaning of section 39-740, R. R. S. 1943, is generally one for determination in each individual case. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a mat-

ter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. Hale v. Taylor ---------- 298

8. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Brewer v. Case ---------- 538

9. A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation. Zoimen v. Landsman -- 561

10. The definition of gross negligence as defined by the guest statute is great and excessive and it indicates the lack of slight care in the performance of duty. Zoimen v. Landsman ---------- 561

11. If the evidence as to gross negligence is conflicting and reasonable minds could draw different conclusions, it is for the jury. But, when the evidence is resolved most favorably to the existence of gross negligence, and thus the facts are determined, the inquiry of whether or not they support a finding of gross negligence is one of law for the court. Zoimen v. Landsman ---------- 561

12. The presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration in the determination of gross negligence. Zoimen v. Landsman ---------- 561

New Trial.

1. The provision of section 25-1144, R. R. S. 1943, requiring a written motion for new trial specifying the ground thereof, is mandatory in order to review errors of law occurring at the trial of a law action or the sufficiency of the evidence. Parker v. Christensen ---------- 117

2. The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. Johnson v. Enfield 191

3. This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor. Johnson v. Enfield ---------- 191

4. When a motion for a new trial is seasonably filed and pending, the cause remains in the District Court so long as the motion is undisposed of and there can be no final judgment until its disposition. Versch v. Tichota ---------- 251
5. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. Versch v. Tichota ---------- 251
6. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. State v. Knowles ---------- 281
7. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Temple -- 442
State v. Pope ---------- 755
8. In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Fauth ----- 502
9. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Fauth ---------- 502
10. Whether the trial court's decision on a motion for a new trial was to grant a new trial or to deny one, the questions on appeal are whether error or errors appear in the record; whether they were called to the attention of the trial court; and whether they constitute prejudicial error to the party complaining. McMillan Co. v. Nebraska E. G. & T. Coop., Inc. -- 744
11. An order sustaining a motion for a new trial is not an order by which the cause is terminated and finally disposed of. State v. Linn ---------- 798

Notice.

1. Under section 48-118, R. R. S. 1943, a strict compliance with the provisions requiring notice to the employer is not mandatory and jurisdictional. Versch v. Tichota ---------- 251
2. The purpose of the notice requirements of section 48-118, R. R. S. 1943, is to give the employer or other party interested an opportunity to join in the action. Versch v. Tichota ---------- 251

3. Under section 48-118, R. R. S. 1943, substantial rather than literal compliance with the notice provisions is sufficient. Versch v. Tichota ---------- 251
4. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Bank of Gering v. Glover -- 575
5. Procedural due process is satisfied where appellant was given notice and an opportunity to be heard. Atkins v. Department of Motor Vehicles --------- 791

Officers.

In an action by a taxpayer to have declared void upon the grounds of public policy or prohibiting statute a contract for the purchase of real estate by a school district from an officer thereof, there can be no recovery of the purchase price in a case where the real estate is unchanged by improvements thereon and can therefore be readily returned unless the school district offers, or by being made a party can be compelled, to reconvey the title and deliver possession. Davy v. School Dist. of Columbus ------- 468

Parent and Child.

1. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Fenner v. Strickland ---------- 114
2. In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children. Fenner v. Strickland ---------- 114
3. The controlling consideration in determining custody of minor children in a divorce proceeding is the best interests and welfare of the children. Lewis v. Lewis ---------- 266
4. The findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal in the absence of a clear abuse of discretion. Lewis v. Lewis ------ 266
5. The District Court has inherent power and retains a continuing jurisdiction to determine the amounts due and to enforce the judgments for alimony and child support. Roach v. Roach ---------- 268
6. A decree awarding custody of minor children and

fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Gray v. Gray ---------- 392

7. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. Gray v. Gray --------- 392

8. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Gray v. Gray 392

9. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Ford v. Ford ---------- 400

10. In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion. Ford v. Ford --------- 400

11. Considerations of public policy do not, in all cases, prevent the splitting of custody of the children between the parents upon dissolution. Braeman v. Braeman ---------- 510

12. The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests. Braeman v. Braeman 510

13. The jurisdiction of a state to determine the status and custody of a child extends to every child within its borders. Dallmann v. Mehrer ---------- 543

14. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. Schwaninger v. Schwaninger - 681

15. Usually any labor supplied by a father to a son is presumed to be gratuitous. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

16. The presumption of gratuity with respect to the services of a parent is a rebuttable one. It may be overcome by proof of an express contract regarding

compensation or of such facts and circumstances as show an understanding of the parties that payment was to be made. In the absence of such proof, recovery will be denied. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

Parties.

1. A defect of parties will be waived if not raised by demurrer or answer. Cromwell v. Ward ---------- 178
2. One having custody of the property in dispute is a proper defendant in replevin. Cromwell v. Ward - 178
3. Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. Schmidt v. Henke ---------- 408
4. The purpose of section 25-301, R. R. S. 1943, is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause, as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy. Schmidt v. Henke ---------- 408
5. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor. Schmidt v. Henke ---------- 408
6. In this court a cross-appeal by an appellee can be taken only against an appellant unless otherwise provided by statute. Hansen v. Hasenkamp ------ 530
7. Medical and hospital services charged to an insured and for which he is legally liable are "incurred" within the meaning of an insurance policy agreeing to pay only expenses actually incurred, notwithstanding the payment of such expense by another party. Hollister v. Government Emp. Ins. Co. ---- 687
8. An insurance policy providing for the payment of medical and hospital expense incurred "for" or "on behalf of" an insured renders the insurer liable for payment of the expense whether or not the insured incurred the expense if it was incurred by another party for him. Hollister v. Government Emp. Ins. Co. ---------- 687
9. In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there

must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it. Rutherford v. Chief Industries, Inc. 715

10. The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction. Rutherford v. Chief Industries, Inc. ---------- 715

11. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. Meyer v. State Farm Mut. Auto. Ins. Co. ---------- 831

Partnership.

1. An action for an accounting between partners is equitable in nature and is reviewed de novo in this court. Barthuly v. Barthuly ---------- 610

2. The right of a partner to an accounting accrues at the time of dissolution in the absence of an agreement to the contrary. An agreement between partners that an accounting will be made when accounts receivable are collected prevents the accrual of the right to an accounting at the time of dissolution. Barthuly v. Barthuly ---------- 610

3. Generally in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Barthuly v. Barthuly ---------- 610

4. A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for his services. Barthuly v. Barthuly ---------- 610

5. Generally, in the absence of an agreement to the contrary, upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place without liability to account for the good will of the firm. Thorin v. Kurkowski -- 701

6. A method of valuation appropriate to the sale of a going business is not applicable where the surviving partner has the right to continue in the same business in the same locality. Thorin v. Kurkowski 701

7. In an action for an accounting following the dissolution of a partnership, the court has jurisdiction to settle all rights between the parties arising out of the partnership. Thorin v. Kurkowski -------- 701

Penalties.

1. Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal. Reller v. Hays ---------- 354
2. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust. Reller v. Hays ---------- 354

Pleadings.

1. In order to maintain an action under the Post Conviction Act the prisoner must allege facts which if proved would constitute an infringement of his constitutional rights. State v. Spidell ---------- 42
2. In general there must be a substantial, although not a technical, correspondence between the petition and the affidavit in replevin. Cromwell v. Ward ------ 178
3. A judgment must be supported by the pleadings. Harrison v. Grizzard ---------- 243
4. The provision of the statutes requiring the plaintiff in error to file with his petition an authenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory. Downer v. Ihms - 594
5. An allegation that an act was done maliciously but without any pleading of the ultimate facts from which malice may be inferred is a mere legal conclusion and is insufficient to raise an issue of fact so as to withstand a general demurrer. Koch v. Grimminger ---------- 706

Police Officers and Sheriffs.

Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them. State v. Gundlach ---------- 692

Post Conviction.

1. In order to maintain an action under the Post Conviction Act the prisoner must allege facts which if

proved would constitute an infringement of his constitutional rights. State v. Spidell ---------- 42
2. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Spidell 42
3. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for appeal or to secure further review of issues already litigated. State v. Spidell ---------- 42
4. The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied. State v. Reyes ---------- 153
5. A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy. State v. Reyes _ 153
6. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Wade ---------- 159
State v. Jonsson ---------- 730
7. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Wade ---------- 159
8. A state may, in a post conviction hearing, cure otherwise defective plea-taking transcript to show that a plea of nolo contendere or guilty was entered voluntarily and intelligently. State v. Elliott ---------- 217
9. An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case. State v. Warner ---------- 438
State v. Jonsson ---------- 730
10. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Warner ---------- 438

11. An evidentiary hearing is not always necessary in order to dismiss a post conviction motion, however, such a hearing is usually advisable to avoid protracted litigation. State v. Leadinghorse ---------- 485
12. The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied. State v. Leadinghorse ---------- 485
13. The presentence report could be relevant only to the sentence imposed upon the defendant. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Leadinghorse ----- 485
14. Joinder of offenses of the same or similar character is permissible in the absence of prejudice to the defendant. State v. McDonnell ---------- 500
15. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. McDonnell -- 500
16. Matters which have been fully litigated in a direct appeal are not a basis for post conviction relief. State v. Brown ---------- 505

Powers.

1. The courts of this state have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction. Kovarik v. County of Banner ---------- 816
2. The county courts have the inherent power to appoint defense counsel to represent indigents charged with any offense for which they may be imprisoned. Kovarik v. County of Banner ---------- 816

Presentence Reports.

1. Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation. State v. Jackson ---------- 39
State v. Zobel ---------- 480
2. The presentence report could be relevant only to the sentence imposed upon the defendant. Sentences

imposed within statutory limits furnish no basis for post conviction relief. State v. Leadinghorse ---- 485
3. The court is not and should not be bound by the recommendation of a probation officer made in a presentence investigation report. State v. Wiitala - 727

Private Roads.

The motor vehicle guest statute, section 39-740, R. R. S. 1943, is applicable to the operation of a motor vehicle upon private property as well as upon public highways. Hale v. Taylor ---------- 298

Probable Cause.

1. A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception. State v. Patterson -- 308
State v. Pope ---------- 755
2. Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates that this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist. State v. Patterson ---------- 308
State v. Pope ---------- 755
3. The existence of probable cause must be determined by a practical, and not by any technical, standard. State v. Pope ---------- 755

Probation and Parole.

1. There is no requirement in our law that trial judges discuss parole possibilities with defendants. State v. Graham ---------- 196
2. A sentencing court in prescribing probation may impose any conditions of probation that it is authorized by statute to impose. State v. Muggins ----- 415
3. This court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose. State v. Muggins ----- 415
4. A requirement that one convicted of driving while intoxicated attend and complete an "Alcohol Abuse

Course" established under sections 39-669.31 and 39-669.32, R. R. S. 1943 (Reissue of 1974), is a valid condition of probation under section 29-2262(2) (e) and (m), R. S. Supp., 1972. State v. Muggins ---- 415

5. A condition of probation that one convicted of driving while intoxicated pay the fee for an Alcohol Abuse Course is presumptively valid as reasonably related to the rehabilitation of the offender, and will not be disturbed on appeal, absent a showing in the record that the fee charged is unreasonable in amount or unduly onerous to probationer. State v. Muggins ---------- 415

6. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion. State v. Frans ---------- 641

7. One of the basic principles in determining the appropriate sentence is the possibility of rehabilitation. Before one can be successfully rehabilitated, he must cooperate, and a lack of cooperation prior to sentencing could be a strong indication that the lesser restrictions of probation may not be sufficient to effect a purposeful rehabilitation. State v. Gundlach 692

8. A written report from the probation officer is not a jurisdictional requirement in a probation revocation proceeding. State v. Kartman ---------- 803

9. A motion or information to revoke probation must be filed in the sentencing court. There is no requirement that it be heard by the sentencing judge. State v. Kartman ---------- 803

10. A probationer charged with a violation of probation is entitled to a preliminary hearing reasonably near the place of the alleged violation or his arrest and as promptly as convenient after his arrest. State v. Kartman ---------- 803

11. A finding that a probationer has engaged in unlawful conduct may be based on evidence relating to another offense without regard to whether the probationer has been convicted of that offense. State v. Kartman ---------- 803

Proof.

Secondary evidence of the contents of a written instrument may be introduced where proof is made that the writing has been lost or destroyed, or is otherwise unavailable. State v. Grooms ---------- 851

Property.

1. A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute. § 25-202, R. R. S. 1943. Shirk v. Schmunk ---------- 25
2. Where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the property, and neither has the right to the immediate and exclusive possession of the property as against the other. Cromwell v. Ward ---------- 178
3. One having custody of the property in dispute is a proper defendant in replevin. Cromwell v. Ward -- 178
4. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of a police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. United States Brewers' Assn., Inc. v. State ---------- 328
5. The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. United States Brewers' Assn., Inc. v. State ---------- 328
6. One who claims title to real estate by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute. Campbell v. Buckler ---- 336
7. Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from

which one may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. State v. Gundlach ---------- 692

Prosecuting Attorneys.

A public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and, where he acts in good faith, he is immune from suit for an erroneous or negligent determination. Koch v. Grimminger ---------- 706

Public Funds.

1. We find L.B. 1171 in violation of Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska. State ex rel. Rogers v. Swanson -- 125
2. We find L.B. 1171 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States. State ex rel. Rogers v. Swanson ---------- 125
3. Article VII, section 11, of the Constitution of Nebraska, provides in part: Neither the state Legislature nor any county, city, or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358
4. By its terms, Article VII, section 11, declares and requires that any educational institution which receives any aid by way of public appropriation must be exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358
5. The fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school from public funds. Gaffney v. State Department of Education ------- 358
6. Textbook loans to students or parents of students

are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. Gaffney v. State Department of Education ---------- 358

7. The channeling of free textbook loans to students or their parents as distinguished from a grant to the school is immaterial. Such a device is a patent attempt to sanction by indirection that which the Constitution forbids. Gaffney v. State Department of Education ---------- 358

Public Lands.

1. The state may modify or withdraw the power to hold, manage, or convey property to be used for governmental purposes; may take such property without compensation; and hold it itself or vest it in other agencies. Lynch v. Metropolitan Utilities Dist. ---------- 17

2. Section 14-1115, R. S. Supp., 1972, effectively removed from a metropolitan city whatever right it may have had to sell and convey the utility property described in the statute; transferred that right to the metropolitan utilities district; and determined the manner and method of disposition of the proceeds of any such sale and conveyances. Lynch v. Metropolitan Utilities Dist. ---------- 17

Public Officers and Employees.

1. Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption. Koch v. Grimminger 706

2. When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial. Koch v. Grimminger ---------- 706

3. A public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and, where he acts in good faith, he is immune from suit for

an erroneous or negligent determination. Koch v. Grimminger ---------- 706
4. The question of entitlement to an office can only be challenged in a direct proceeding brought for that purpose, and cannot be made an issue collateral to another proceeding. Atkins v. Department of Motor Vehicles ---------- 791

Public Service Commissions.

1. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Herman Brothers, Inc. v. Hennis Freight Lines, Inc. ---------- 258
2. The term "willful failure" as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. Herman Brothers, Inc. v. Hennis Freight Lines, Inc. ---------- 258
3. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
4. It is the policy of the Legislature to regulate transportation by motor carriers in intrastate commerce in such manner as to preserve the inherent advantages of, and foster sound economic conditions in, transportation by motor carriers, in the public interest; and to promote economical and efficient service and reasonable charges, without unjust discrimination, or unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. 343
5. A certificate of public convenience and necessity may be issued only when required by the present

or future public convenience and necessity. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
6. The burden is upon the applicant to show that the proposed service is required by public convenience and necessity. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
7. The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska Public Service Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable. Ruan Transport Corp. v. Herman Bros., Inc. 343
8. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343
9. An order of the Nebraska Public Service Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review. Ruan Transport Corp. v. Herman Bros., Inc. ------ 343

Quieting Title.

1. Section 34-301, R. R. S. 1943, authorizes actions in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute. Shirk v. Schmunk ---------- 25
2. When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under section 34-301, R. R. S. 1943. Shirk v. Schmunk ---------- 25
3. A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute. § 25-202, R. R. S. 1943. Shirk v. Schmunk ---------- 25
4. When a fence is constructed as a boundary line between two properties, and parties claim ownership

of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Shirk v. Schmunk ------ 25

5. In order to establish title by adverse possession, the possession is sufficient if the land is used continuously for purposes for which it may in its nature be adapted. Shirk v. Schmunk ---------- 25

6. In order to establish title by adverse possession, the possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold the land as the owner of it. It must have been under a claim of ownership. Shirk v. Schmunk ---------- 25

7. One who claims title to real estate by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute. Campbell v. Buckler ---- 336

8. A quiet title action is equitable in character and is tried de novo on appeal. Robinson v. Thompson -- 428

Rape.

A victim of forcible rape is only required to make reasonable resistance in good faith under all the circumstances, and such that nonconsent and actual opposition are genuine and real. State v. Smith -- 794

Receipts.

It is well settled that a simple receipt is only prima facie evidence of the truth of the statements recited therein, and that oral evidence is admissible for the purpose of explaining, varying, or modifying its terms. Christiansen Constr. Co. v. A. J. Hiller Enterprises, Inc. ---------- 37

Records.

1. Whenever the court refuses to grant an order to produce pursuant to the provisions of section 29-1912, R. S. Supp., 1972, it shall render its findings in writing together with the facts upon which the findings are based. State v. Eskew ---------- 76

2. An offer of a composite record under the provisions of the Uniform Composite Reports as Evidence Act,

sections 25-12,115 to 25-12,119, R. R. S. 1943, is prima facie sufficient if a foundation is laid under section 25-12,115, R. R. S. 1943. A failure of the party offering the evidence to comply with the provisions of section 25-12,117, R. R. S. 1943, must be called to the attention of the court by specific objection. Gateway Bank v. Department of Banking .. 109

3. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Rogers v. Swanson ---------- 125

4. A state may, in a post conviction hearing, cure otherwise defective plea-taking transcript to show that a plea of nolo contendere or guilty was entered voluntarily and intelligently. State v. Elliott ---- 217

5. Ordinarily the duly authenticated record of a county court imports absolute verity. State v. Morford -- 412

6. The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Morford ---------- 412

7. The record should affirmatively disclose that the defendant entered his plea of guilty or nolo contendere intelligently and voluntarily. State v. Lewis 518

8. The provision of the statutes requiring the plaintiff in error to file with his petition an authenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory. Downer v. Ihms -- 594

9. An appeal to the District Court in an adoption proceeding is tried de novo on the record. § 24-541, R. S. Supp., 1972. Riggert v. King ---------- 607

10. Error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous. Riggert v. King ---------- 607

11. In an appeal to the District Court in an adoption proceeding, it is the duty of the appellant to see that a record of the evidence in the county court is properly presented in the District Court. Riggert v. King ---------- 607

12. In the absence of a record of the evidence in the lower court, it is presumed the evidence sustained the findings of the court. Riggert v. King -------- 607

13. In the absence of a record of the evidence which

was received in the county court, and in the absence of a showing as to what additional evidence should have been received in the District Court and why it was reasonably necessary, it was not an abuse of discretion for the District Court to refuse to receive additional evidence in a trial de novo on the record. Riggert v. King ---------- 607

14. Where, upon direct appeal to this court from a finding of guilty in a criminal prosecution, a constitutional claim of ineffectiveness of counsel is made, we will not consider the issue where the determination of its merits may depend upon the existence of facts not shown in the record. State v. Hert -- 751

Regulations.

1. Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the court ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. Such regulations must be reasonable considering the nature of the business and not such as would prevent the carrying on of the business. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

2. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89
United States Brewers' Assn., Inc. v. State -------- 328

3. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

4. We hold that the Dairy Industry Trade Practices Act, as amended, insofar as it purports to fix a minimum basic cost, discriminates against efficient

producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anti-competitive influences in the industry, contrary to the purposes stated by the Legislature. We therefore conclude the act is an unnecessary and unwarranted interference with individual liberty. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

5. The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. United States Brewers' Assn., Inc. v. State ---------- 328

Remittitur.

Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. Hays v. County of Douglas ---------- 580

Replevin.

1. Where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the property, and neither has the right to the immediate and exclusive possession of the property as against the other. Cromwell v. Ward -------- 178
2. In general there must be a substantial, although not a technical, correspondence between the petition and the affidavit in replevin. Cromwell v. Ward ------ 178
3. One having custody of the property in dispute is a proper defendant in replevin. Cromwell v. Ward -- 178

Right to Counsel.

1. An accused is entitled to be represented by counsel at all "critical stages" of criminal proceedings against him, including the occasion upon which he is sentenced. State v. Harig ---------- 49
2. Under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which

a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceedings. State v. Harig ---------- 49

3. A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy. State v. Reyes - 153

4. It is a sufficient waiver of counsel if it is made intelligently and understandingly with knowledge of the right to counsel. State v. Morford -------- 412

5. The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Morford ---------- 412

Reports.

A written report from the probation officer is not a jurisdictional requirement in a probation revocation proceeding. State v. Kartman ---------- 803

Robbery.

The crime of assault and battery is a lesser included offense within a charge of robbery with force and violence. State v. Jacobs ---------- 246

Sales.

1. A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption. Renna v. Bishop's Cafeteria Co. ---------- 33

2. Where the seller at the time of contracting has reason to know a particular purpose for which the goods are required, and that the buyer is relying

on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose. Ruskamp v. Hog Builders, Inc. ---------- 168

3. To exclude or modify an implied warranty of fitness, the exclusion must be a writing and conspicuous, except that an implied warranty can also be excluded or modified by course of dealing, or course of performance, or usage of trade. Ruskamp v. Hog Builders, Inc. ---------- 168

4. Warranties, whether express or implied, shall be construed as consistent with each other and as cumulative wherever such construction is reasonable. Expressed warranties displace inconsistent implied warranties, other than an implied warranty of fitness for a particular purpose. Ruskamp v. Hog Builders, Inc. ---------- 168

5. The old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under section 2-315, U. C. C. Ruskamp v. Hog Builders, Inc. ---------- 168

6. Where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes. Ruskamp v. Hog Builders, Inc. ---------- 168

7. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Bank v. Gering v. Glover -- 575

Schools and School Districts.

1. The action of the board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such

court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Friesen v. Clark ---------- 227

2. "The best interest of the petitioner or petitioners" as used in section 79-403, R. R. S. 1943, means the best educative interest of petitioner or petitioners and not the best noneducative interest of petitioner or petitioners. Friesen v. Clark ---------- 227

3. A freeholder's petition under section 79-403, R. R. S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. Friesen v. Clark ---------- 227

4. Article VII, section 11, of the Constitution of Nebraska, provides in part: Neither the state Legislature nor any county, city, or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358

5. By its terms, Article VII, section 11, declares and requires that any educational institution which receives any aid by way of public appropriation must be exclusively owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education ---------- 358

6. The fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school from public funds. Gaffney v. State Department of Education -------- 358

7. Textbooks loans to students or parents of students are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. Gaffney v. State Department of Education ---------- 358

8. The channeling of free textbook loans to students or their parents as distinguished from a grant to

the school is immaterial. Such a device is a patent attempt to sanction by indirection that which the Constitution forbids. Gaffney v. State Department of Education ---------- 358

9. L.B. 659 is in violation of Article VII, section 11, of the Constitution of Nebraska. Gaffney v. State Department of Education ---------- 358

10. In an action by a taxpayer to have declared void upon the grounds of public policy or prohibiting statute a contract for the purchase of real estate by a school district from an officer thereof, there can be no recovery of the purchase price in a case where the real estate is unchanged by improvements thereon and can therefore be readily returned unless the school district offers, or by being made a party can be compelled, to reconvey the title and deliver possession. Davy v. School Dist. of Columbus ------- 468

11. Section 79-1254, R. R. S. 1943, in its present form does not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring a determination that reasonable and just cause exists for termination of such employment. Schultz v. School Dist. of Dorchester ---------- 492

Searches and Seizures.

1. An affidavit for a search warrant which is based in part upon information supplied by an unidentified informant is sufficient if the affidavit contains a factual basis upon which the reliability of the informant can be determined. State v. Torrence ---- 213

2. Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed. State v. Torrence -- 213

3. A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception. State v. Patterson ---------- 308
State v. Pope ---------- 755

4. Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates that this is

the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist. State v. Patterson ---------- 308
State v. Pope ---------- 755
5. Search pursuant to warrant is to be much preferred to search without a warrant and ordinarily a warrant should be obtained. State v. Patterson ------ 308
6. Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them. State v. Gundlach ---------- 692
7. The existence of probable cause must be determined by a practical, and not by any technical, standard. State v. Pope ---------- 755

Security Agreements.

1. When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. Adair v. Adair ---------- 571
2. An accommodation maker is a debtor within the meaning of section 9-504(3), U. C. C. Bank of Gering v. Glover ---------- 575
3. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Bank of Gering v. Glover -- 575

Sentences.

1. Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation. State v. Jackson ---------- 39
State v. Zobel ---------- 480
2. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Spidell 42
3. Where a defendant is simultaneously convicted of more than one felony charged on the same information, and the Habitual Criminal Act is applicable, such defendant may be sentenced separately for each underlying conviction, each sentence being enhanced under the Habitual Criminal Act. State v. Harig - 49
4. Where the punishment of an offense created by statute is left to the discretion of the court, to be

exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harig ---------- 49
State v. Cannady ---------- 404
State v. Gundlach ---------- 692
5. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Merrick -- 157
State v. Wiitala ---------- 727
6. A court may properly sentence a convicted criminal to consecutive terms in the Penal and Correctional Complex for separate offenses. State v. Merrick -- 157
7. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Wade ---------- 159
State v. Jonsson ---------- 730
8. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Ambrose ---------- 285
9. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Rodman ------- 403
State v. Nokes ---------- 844
10. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence. State v. Warner ---------- 438
11. An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case. State v. Warner ---------- 438
State v. Jonsson ---------- 730
12. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Warner ---------- 438
13. The presentence report could be relevant only to

the sentence imposed upon the defendant. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Leadinghorse ------ 485

14. Subsequent to sentence, in the absence of manifest injustice as defined in section 2.1(a) (ii) (1) (2) (3) (4), American Bar Association Standards Relating to Pleas of Guilty, the defendant should not be permitted to withdraw his plea of guilty or nolo contendere. State v. Lewis ---------- 518

15. A sentence imposed within the statutory limits will not be disturbed on appeal without a showing of an abuse of discretion by the sentencing court. State v. Orner ---------- 523

16. Under section 83-1,105(2), R. S. Supp., 1972, where the trial court imposes a sentence for a definite term of years on a defendant, the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law. State v. Hedglin ----- 545

17. A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Combs -------- 551

18. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Ralls ---------- 621

19. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment. State v. Laravie ---------- 625

20. A person convicted of a felony and sentenced to imprisonment in a city or county jail is not eligible to receive work release privileges under section 47-401, R. R. S. 1943. State v. Redwine ---------- 638

21. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holzapfel ------- 672

22. One of the basic principles in determining the appropriate sentence is the possibility of rehabilitation. Before one can be successfully rehabilitated, he must cooperate, and a lack of cooperation prior to sentencing could be a strong indication that the lesser restrictions of probation may not be sufficient

to effect a purposeful rehabilitation. State v. Gundlach ---------- 692

23. The court is not and should not be bound by the recommendation of a probation officer made in a presentence investigation report. State v. Wiitala - 727

24. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence and does not include an appeal in or from a collateral or related proceeding. State v. Jonsson 730

Signatures.

When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. Adair v. Adair ---------- 571

Sodomy.

The sodomy statute, section 28-919, R. R. S. 1943, is not unconstitutional as being vague and indefinite, or as invading the right of privacy. State v. Temple 442

Soldiers and Sailors.

When a serviceman, or his dependent, is treated in a government hospital free of charge, no expense is incurred. Hollister v. Government Emp. Ins. Co. - 687

Special Assessments.

1. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Midwest Development Corp. v. City of Norfolk ---- 475

2. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and so may be collaterally attacked. Midwest Development Corp. v. City of Norfolk ------ 475

3. All defects, irregularities, and inequalities in the making of assessments, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. Midwest Development Corp. v. City of Norfolk ---------- 475

4. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Midwest Development Corp. v. City of Norfolk ---------- 475
5. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Midwest Development Corp. v. City of Norfolk -- 475
6. Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement, on the theory that the property owner has received special benefits from the improvements in excess of the benefits accrued to people generally. Midwest Development Corp. v. City of folk ---------- 475

Specific Performance.

1. Where a party seeks specific performance of an oral agreement to leave property, that person has the burden of proving performance of the alleged contract by clear and convincing evidence. Nestle v. Welsh ---------- 71
2. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. Cromwell v. Ward ---------- 186
3. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Ross v. Ross ---------- 186

States.

Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a

State may impose on a student a reasonable durational residency requirement that can be met in student status. Bauer v. Board of Regents of University of Nebraska ---------- 87

Statutes.

1. Section 14-1115, R. S. Supp., 1972, effectively removed from a metropolitan city whatever right it may have had to sell and convey the utility property described in the statute; transferred that right to the metropolitan utilities district; and determined the manner and method of disposition of the proceeds of any such sale and conveyances. Lynch v. Metropolitan Utilities Dist. ---------- 17
2. Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court. Lynch v. Metropolitan Utilities Dist. 17
3. Sections 77-202.25 to 77-202.33, R. S. Supp., 1972, do not constitute an appropriation of state funds and are not violative of Article II, section 1, Article III, section 22, or Article III, section 25, Constitution of the State of Nebraska. Stahmer v. State -- 63
4. It is the duty of this court to give the statute an interpretation which meets constitutional requirements if it can reasonably be done. Stahmer v. State ---------- 63
5. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. Stahmer v. State ---------- 63
6. It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Stahmer v. State ---------- 63
7. Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the court ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. Such regulations must be reasonable considering the nature of the business and not such as

would prevent the carrying on of the business. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---------- 89

8. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---------- 89
United States Brewers' Assn., Inc. v. State ------ 328

9. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

10. We hold that the Dairy Industry Trade Practices Act, as amended, insofar as it purports to fix a minimum basic cost, discriminates against efficient producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anti-competitive influences in the industry, contrary to the purposes stated by the Legislature. We therefore conclude the act is an unnecessary and unwarranted interference with individual liberty. Gillette Dairy, Inc. v. Nebraska Dairy Products Board ---- 89

11. An act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act. State ex rel. Rogers v. Swanson ---------- 125

12. The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions. State ex rel. Rogers v. Swanson ---------- 125

13. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what

it may not do directly. State ex rel. Rogers v. Swanson ---------- 125
Gaffney v. State Department of Education ---------- 358

14. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment. State ex rel. Rogers v. Swanson ---------- 125
15. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each. State ex rel. Rogers v. Swanson ---------- 125
16. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201
17. Where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Nebraska Technical Community College Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201
18. "The best interest of the petitioner or petitioners" as used in section 79-403, R. R. S. 1943, means the best educative interest of petitioner or petitioners and not the best noneducative interest of petitioner or petitioners. Friesen v. Clark ---------- 227
19. A freeholder's petition under section 79-403, R. R.

S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. Friesen v. Clark ---------- 227

20. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Ambrose ---------- 285

21. The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Hale v. Taylor ---------- 298

22. A statute which changes the substantive rights and obligations of the parties to an otherwise valid contract violates the constitutional prohibition against impairment of obligation of contracts. United States Brewers' Assn., Inc. v. State ---------- 328

23. The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. United States Brewers' Assn., Inc. v. State ---------- 328

24. L.B. 234, Laws 1971, as amended by L.B. 66, Laws 1972, held unconstitutional. United States Brewers' Assn., Inc. v. State ---------- 328

25. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. ---------- 343

26. It is the policy of the Legislature to regulate transportation by motor carriers in intrastate commerce

in such manner as to preserve the inherent advantages of, and foster sound economic conditions in, transportation by motor carriers, in the public interest; and to promote economical and efficient service and reasonable charges, without unjust discrimination, or unfair or destructive competitive practices. Ruan Transport Corp. v. Herman Bros., Inc. 343

27. Constitutional and statutory provisions are not open to construction as a matter of course. Gaffney v. State Department of Education ---------- 358

28. L.B. 659 is in violation of Article VII, section 11, of the Constitution of Nebraska. Gaffney v. State Department of Education ---------- 358

29. Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. Schmidt v. Henke ---------- 408

30. The purpose of section 25-301, R. R. S. 1943, is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause, as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy. Schmidt v. Henke ---------- 408

31. A requirement that one convicted of driving while intoxicated attend and complete an "Alcohol Abuse Course" established under sections 39-669.31 and 39-669.32, R. R. S. 1943 (Reissue of 1974), is a valid condition of probation under section 29-2262(2) (e) and (m), R. S. Supp., 1972. State v. Muggins 415

32. A statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. The only restriction on the exercise of this power is that the Legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment. Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc. 431

33. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal"

means a direct appeal from the criminal conviction and sentence. State v. Warner ---------- 438
34. The sodomy statute, section 28-919, R. R. S. 1943, is not unconstitutional as being vague and indefinite, or as invading the right of privacy. State v. Temple ---------- 442
35. Section 28-1011.15, R. S. Supp., 1972, is constitutional. State v. Haynes ---------- 445
36. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. State v. Haynes ---------- 445
37. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection. State v. Haynes ---------- 445
38. Under section 83-1,105(2), R. S. Supp., 1972, where the trial court imposes a sentence for a definite term of years on a defendant, the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law. State v. Hedglin ---------- 545
39. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality. Zoimen v. Landsman ---------- 561
40. It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Zoimen v. Landsman ---------- 561
41. Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows: When the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed. Bank of Gering v. Glover ---------- 575
42. Section 49-609, R. R. S. 1943, provides that all acts of a general nature, as revised and reported to the fifty-sixth session of the Legislature by the 1943 Statute Commission, shall be construed, as soon as

such report is approved and adopted by the Legislature, as a continuation of such laws and not as new enactments. Shames v. State ---------- 614

43. A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. No presumption arises from changes of this character that the revisors or the Legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears. Shames v. State ----- 614

44. Under the provisions of sections 76-401, 76-402, and 76-408, R. R. S. 1943, nonresident aliens may not inherit an interest or title to lands in the State of Nebraska, but the heirs or persons who would have been entitled to such lands shall be paid compensation by the State of Nebraska to the extent of the full value thereof in the manner provided in section 76-408, R. R. S. 1943. Shames v. State ---------- 614

45. Section 25-1315.02, R. R. S. 1943, outlining the procedure for a motion for judgment notwithstanding the verdict, is limited to civil proceedings. State v. Torrence ---------- 720

46. Chapter 29, article 21, R. R. S. 1943, covering motions for new trial and arrest of judgment, details remedies dealing with criminal procedure after a verdict of guilty is entered in a criminal action. State v. Torrence ---------- 720

47. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence and does not include an appeal in or from a collateral or related proceeding. State v. Jonsson 730

48. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by this court. State v. Hert ---------- 751

49. The authority to bring error proceedings under section 29-2315.01, R. R. S. 1943, is not extended to

city attorneys nor to prosecutions under city ordinances. State v. Linn ---------- 798

Summary Judgments.

A summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Hale v. Taylor ---------- 298

Taxation.

1. The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. Stahmer v. State ---------- 63
2. The partial exemption from taxation of the classes of property specified in section 77-202.25, R. S. Supp., 1972, are not unreasonable, constitutionally objectionable as discriminatory, or violative of Article III, section 18, Article VIII, sections 1, 2, or 4, Constitution of the State of Nebraska. Stahmer v. State ---------- 63
3. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201
4. Where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Nebraska Technical Community College Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution. State ex rel. Western Nebraska Technical Community College Area v. Tallon ---------- 201
5. Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainder-

man have an interest, should be charged against principal. Reller v. Hays ---------- 354

6. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust. Reller v. Hays ---------- 354

Tenure.

Section 79-1254, R. R. S. 1943, in its present form does not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring a determination that reasonable and just cause exists for termination of such employment. Schultz v. School Dist. of Dorchester ---------- 492

Time.

1. Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court. Lynch v. Metropolitan Utilities Dist. ---------- 17
2. A defendant's right to a speedy trial begins when he is indicted or informed against or arrested. State v. Spidell ---------- 42
3. Under section 25-12,109, R. S. Supp., 1972, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission. State v. Watson -------- 44
4. The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Harig ---------- 49
5. An act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent

amendment to the Constitution authorizing it to pass such an act. State ex rel. Rogers v. Swanson 125

6. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Buss ---------- 407

7. A statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. The only restriction on the exercise of this power is that the Legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment. Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc. ---------- 431

8. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence. State v. Warner ---------- 438

9. Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time, but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest. Prettyman v. Karnopp 451

10. Delay resulting from the fact the defendant was serving a sentence imposed by a Canadian court can not be considered in determining whether the defendant was denied the right to a speedy trial. State v. Brown ---------- 505

11. The right of a partner to an accounting accrues at the time of dissolution in the absence of an agreement to the contrary. An agreement between partners that an accounting will be made when accounts receivable are collected prevents the accrual of the

right to an accounting at the time of dissolution. Barthuly v. Barthuly ---------- 610

12. The power of the District Court to modify or vacate a decree of marriage dissolution under the provisions of section 42-372, R. R. S. 1943, within 6 months of the entry of the decree does not exist after an appeal has been made to this court and the appellant has suffered an involuntary dismissal here. Dewey v. Dewey ---------- 676

13. Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence and does not include an appeal in or from a collateral or related proceeding. State v. Jonsson 730

14. Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to speedy trial provided for by section 29-1208, R. S. Supp., 1972. State v. Hert ---------- 751

15. It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207, R. S. Supp., 1972. However, under the provisions of section 29-1209, R. S. Supp., 1972, it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute. State v. Hert ---------- 751

16. A probationer charged with a violation of probation is entitled to a preliminary hearing reasonably near the place of the alleged violation or his arrest and as promptly as convenient after his arrest. State v. Kartman ---------- 803

Torts.

1. The common law rule of governmental immunity has not been completely abrogated in Nebraska. Hall v. Abel Inv. Co. ---------- 256

2. An action for damages against a political subdivision for misrepresentation and deceit is barred by the Political Subdivisions Tort Claims Act. Hall v. Abel Inv. Co. ---------- 256

3. An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action

on the part of the insured against the tort-feasor. Schmidt v. Henke ---------- 408

Trial.

1. When the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict if motions therefore are timely and appropriately made. Welsh v. Zuck -- 1
2. Fact issues not fully explored and which may rest on the determination of the credibility of witnesses must be resolved by trial on the merits. Armstrong v. Armstrong ---------- 11
3. A motion for a directed verdict for the purpose of decision thereon must 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. Renna v. Bishop's Cafeteria Co. ---------- 33
4. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Renna v. Bishop's Cafeteria Co. ---------- 33
5. A defendant's right to a speedy trial begins when he is indicted or informed against or arrested. State v. Spidell ---------- 42
6. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Harig ---------- 49
7. After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Harig -------- 49
8. Where a party seeks specific performance of an oral agreement to leave property, that person has

the burden of proving performance of the alleged contract by clear and convincing evidence. Nestle v. Welsh ---------- 71

9. If a general objection to admission of evidence is overruled, the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose. Gateway Bank v. Department of Banking ---------- 109

10. An objection on the ground of insufficient foundation is a general objection. Where the lack of foundation is not readily apparent and is lacking in some particular respect, the specific attention of the court should be called to such lack. Gateway Bank v. Department of Banking ---------- 109

11. An offer of a composite record under the provisions of the Uniform Composite Reports as Evidence Act, sections 25-12,115 to 25-12,119, R. R. S. 1943, is prima facie sufficient if a foundation is laid under section 25-12,115, R. R. S. 1943. A failure of the party offering the evidence to comply with the provisions of section 25-12,117, R. R. S. 1943, must be called to the attention of the court by specific objection. Gateway Bank v. Department of Banking 109

12. A witness may be examined concerning prior inconsistent statements to show his testimony has operated as a surprise, to test his recollection, refresh his memory, induce him to change his testimony, or show the circumstances which induced the party to call him. State v. Casper ---------- 120

13. A trial judge may, in his discretion, set aside a verdict whenever it is inconsistent. Johnson v. Enfield ---------- 191

14. There is no requirement in our law that trial judges discuss parole possibilities with defendants. State v. Graham ---------- 196

15. Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed. State v. Torrence -- 213

16. Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights. State v. Torrence ---------- 213

17. It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion

and render a verdict based on the evidence presented in court. State v. Torrence ---------- 213

18. When the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. State v. Jacobs ---------- 246

19. The refusal to instruct upon a lesser included offense after request by the defense is reversible error. State v. Jacobs ---------- 246

20. Where voluntary statements or confessions are not offered or received in evidence, testimony by a police officer that the defendant had been advised of his constitutional rights and refused to waive them is improper. State v. Jacobs ---------- 246

21. The Summary Judgment Act, by its terms grants to the District Court the power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and contemplates and requires a trial and final order or judgment upon the material facts that are actually and in good faith controverted. Burroughs Corp. v. James E. Simon Constr. Co. ---------- 272

22. Circumstantial evidence alone is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can reasonably be drawn therefrom. So Soo Feed & Supply Co. v. Morgan ---------- 277

23. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than the other. So Soo Feed & Supply Co. v. Morgan 277

24. Section 29-2025, R. R. S. 1943, provides that upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense. State v. Ambrose ---------- 285

25. In considering the impact of instructions, they must be viewed as a whole. State v. Ambrose ---------- 285

26. Affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the

law or the result of the finding because such matters inhere in the verdict. Selders v. Armentrout -- 291

27. The question of whether a person attempting to enter a motor vehicle is a guest within the meaning of section 39-740, R. R. S. 1943, is generally one for determination in each individual case. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. Hale v. Taylor ---------- 298

28. A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. Anson v. Fletcher ---------- 317

29. An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission. Anson v. Fletcher -- 317

30. It is fundamental that a trial court has broad discretion to exclude cumulative evidence. Anson v. Fletcher ---------- 317

31. Where a defendant, who testifies as a witness, offers evidence of his reputation for truth and veracity, the State may offer contradicting evidence. Such contradicting evidence must be confined to the reputation of the defendant for truth and veracity in the community where he lives or works. State v. Craig ---------- 347

32. In a criminal prosecution for theft, where the determination of the facts by the jury may turn upon its acceptance or nonacceptance of the credibility of the defendant, who has testified on his own behalf, the admission into evidence over objection of the opinion of a law enforcement officer that the defendant's reputation is, "that he would take anything that he could get a hold of," is erroneous and we cannot, under such circumstances, say that it was not prejudicial. State v. Craig ---------- 347

33. The admission of evidence of a tainted showup does not without more violate due process. State v. Sanchell ---------- 380

34. The purpose of excluding evidence made as a result of a tainted identification procedure is to avoid a substantial likelihood of irreparable misidentification. State v. Sanchell ---------- 380
35. In order to find a due process violation, the court must determine if the independent basis of the identification when viewed in the totality of the circumstances defeats a substantial likelihood of irreparable misidentification. State v. Sanchell ---- 380
36. The credibility of the witnesses and the weight of the testimony are questions for the jury to decide. State v. Sanchell ---------- 380
37. A voice identification is enough to support a conviction. State v. Sanchell ---------- 380
38. A trial judge cannot effectively discharge the roles of both judge and defense counsel and one proceeding pro se is bound by his own acts and conduct. State v. Morford ---------- 412
39. Polygraph tests are not admissible in evidence. State v. Temple ---------- 442
40. A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced. State v. Temple -- 442
41. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Temple -- 442
State v. Pope ---------- 755
42. Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error. State v. Temple ---------- 442
43. Defendant's status as a felon is an essential element of the crime described in section 28-1011.15, R. S. Supp., 1972, and evidence must be adduced on that status in the absence of a stipulation. State v. Haynes ---------- 445
44. When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. Loomis v. Estate of Davenport -- 461
45. Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the bur-

den of proof until evidence rebutting the presumption is introduced. Loomis v. Estate of Davenport - 461

46. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Midwest Development Corp. v. City of Norfolk ---- 475

47. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion. State v. Zobel --------- 480

48. If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. State v. Zobel ---------- 480

49. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea. State v. Zobel - 480

50. The findings of the court in an action where a jury is waived have the same weight as a verdict of a jury. City of Beatrice v. Blake ---------- 503

51. Delay resulting from the fact the defendant was serving a sentence imposed by a Canadian court can not be considered in determining whether the defendant was denied the right to a speedy trial. State v. Brown ---------- 505

52. Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence, and the ruling will not be overturned on appeal except for a clear abuse of discretion. State v. Langer ---------- 525

53. A motion for directed verdict must be treated as an admission of the truth of all competent 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 rea-

sonably be deduced from the evidence. Hansen v. Hasenkamp ---------- 530

54. Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence and where there is a conflict in the evidence, such issues must be submitted to the jury. Hansen v. Hasenkamp ---------- 530

55. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry. The use of motion pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge. Hansen v. Hasenkamp ---------- 530

56. After the cause has been submitted to the jury, a further communication by the trial judge to the jury in the absence of the parties and their counsel, which communication merely repeats or affirms an instruction already given to the jury, is not reversible error. Hansen v. Hasenkamp ---------- 530

57. Generally, a party cannot claim error when an issue submitted to the jury is found in his favor. And this is especially true when no issue of contributory negligence or comparative negligence exists. Brewer v. Case ---------- 538

58. A verdict and judgment will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Brewer v. Case ---------- 538

59. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Combs ---------- 551

60. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Combs ---------- 551

61. If the evidence as to gross negligence is conflicting and reasonable minds could draw different conclusions, it is for the jury. But, when the evidence is resolved most favorably to the existence of gross negligence, and thus the facts are determined, the inquiry of whether or not they support a finding

of gross negligence is one of law for the court. Zoimen v. Landsman ---------- 561

62. The extent of the cross-examination of a witness must be left to the discretion of the trial court. State v. Brauner ---------- 602

63. Error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous. Riggert v. King ---------- 607

64. In the absence of a record of the evidence which was received in the county court, and in the absence of a showing as to what additional evidence should have been received in the District Court and why it was reasonably necessary, it was not an abuse of discretion for the District Court to refuse to receive additional evidence in a trial de novo on the record. Riggert v. King ---------- 607

65. An action for an accounting between partners is equitable in nature and is reviewed de novo in this court. Barthuly v. Barthuly ---------- 610

66. Generally, in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items. Barthuly v. Barthuly ---------- 610

67. If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken. State v. Campbell ------ 629

68. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense. State v. Campbell ---------- 629

69. In the absence of a showing of diligence, it is not an abuse of discretion to refuse a continuance for the purpose of obtaining additional evidence. Heffernan v. Kissack ---------- 637

70. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Siefford v. Housing Authority ---------- 643

71. Triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. Siefford v. Housing Authority ---------- 643

72. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority 643

73. A defendant's personal absence from inquiries into jurors' impartiality at in-chambers meetings is not prejudicial where defense counsel is present. State v. Nevels ---------- 668

74. Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he had ever made such statements. State v. Gundlach 692

75. In order for a party to a contract to be entitled to a jury instruction to the effect, "The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence," there must be some evidence that the parties to the contract, by their mutual act or acts, placed a practical construction upon some ambiguous or contradictory provision of it. Rutherford v. Chief Industries, Inc. ---------- 715

76. The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction. Rutherford v. Chief Industries, Inc. ---------- 715

77. This court on appeal will not consider an issue involving a motion for a directed verdict where the party making the motion withdraws it before it is ruled on by the trial court. Rutherford v. Chief Industries, Inc. ---------- 715

78. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found. State v. Torrence ---------- 720

79. Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to speedy trial provided for by section 29-1208, R. S. Supp., 1972. State v. Hert ---------- 751

80. Where, upon direct appeal to this court from a finding of guilty in a criminal prosecution, a constitutional claim of ineffectiveness of counsel is made, we will not consider the issue where the determination of its merits may depend upon the existence of facts not shown in the record. State v. Hert -- 751

81. It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207, R. S. Supp., 1972. However, under the provisions of section 29-1209, R. S. Supp., 1972, it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute. State v. Hert ---------- 751

82. Section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that the trial court is not precluded from correcting errors at the trial. State v. Pope ---------- 755

83. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. H. D. Fager Oil Co., Inc. v. Vanice ---------- 789

84. The general conduct of the trial rests within the sound discretion of the trial court. State v. Smith - 794

85. A request to produce evidence that is irrelevant is properly refused. State v. Smith ---------- 794

86. In examining a witness concerning prior inconsistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. To the extent that Cropsey v. Averill, 8 Neb. 151, conflicts with the above rule, it is overruled. State v. Wilmore ---------- 807

87. Secondary evidence of the contents of a written instrument may be introduced where proof is made that the writing has been lost or destroyed, or is otherwise unavailable. State v. Grooms --------- 851

Trusts.

1. Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal. Reller v. Hays ---------- 354
2. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust. Reller v. Hays ---------- 354

Undue Influence.

1. When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. Loomis v. Estate of Davenport ----- 461
2. Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced. Loomis v. Estate of Davenport ---------- 461

Vendor and Purchaser.

1. Where the seller at the time of contracting has reason to know a particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose. Ruskamp v. Hog Builders, Inc. ---------- 168
2. To exclude or modify an implied warranty of fitness, the exclusion must be a writing and conspicuous, except that an implied warranty can also be excluded or modified by course of dealing, or course of performance, or usage of trade. Ruskamp v. Hog Builders, Inc. ---------- 168
3. Warranties, whether express or implied, shall be construed as consistent with each other and as cumu-

lative wherever such construction is reasonable. Expressed warranties displace inconsistent implied warranties, other than an implied warranty of fitness for a particular purpose. Ruskamp v. Hog Builders, Inc. ---------- 168

4. The old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under section 2-315, U. C. C. Ruskamp v. Hog Builders, Inc. ---------- 168

5. Where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes. Ruskamp v. Hog Builders, Inc. ---------- 168

Venue.

Venue in either case lies in the county of residence of the applicant or recipient affected by the final order under section 68-1016, R. R. S. 1943. Downer v. Ihms 594

Verdicts.

1. A trial judge may, in his discretion, set aside a verdict whenever it is inconsistent. Johnson v. Enfield ---------- 191

2. A verdict and judgment will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Brewer v. Case --------- 538

3. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Combs --------- 551

4. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Combs ---------- 551

5. Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. Hays v. County of Douglas ---------- 580

Waiver.

1. Under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Harig ---------- 49
2. A defect of parties will be waived if not raised by demurrer or answer. Cromwell v. Ward ---------- 178
3. Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221(2), R. S. Supp., 1972. State v. Graham ---------- 196
4. A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Klatt --- 219
5. The right to challenge a juror for cause may be waived or lost by a lack of diligence. Selders v. Armentrout ---------- 291
6. The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Hale v. Taylor ---------- 298
7. A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. Anson v. Fletcher ---------- 317
8. It is a sufficient waiver of counsel if it is made intelligently and understandingly with knowledge of the right to counsel. State v. Morford ---------- 412

9. The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Morford ---------- 412
10. All defects, irregularities, and inequalities in the making of assessments, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. Midwest Development Corp. v. City of Norfolk ---------- 475
11. It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Zoimen v. Landsman ---------- 561
12. Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to speedy trial provided for by section 29-1208, R. S. Supp., 1972. State v. Hert ---------- 751
13. It is the duty of the trial court and the prosecutor to bring defendants in criminal cases to trial within the time provided by section 29-1207, R. S. Supp., 1972. However, under the provisions of section 29-1209, R. S. Supp., 1972, it is incumbent upon defendant and his counsel to file a timely motion for discharge in order to avoid the waiver provided for by that statute. State v. Hert ---------- 751
14. A valid and voluntary plea of guilty establishes the defendant's guilt of the offenses charged and embodies a waiver of all defenses to the charge, whether procedural, statutory, or constitutional. State v. Nokes ---------- 844

Warranty.

1. Where the seller at the time of contracting has reason to know a particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose. Ruskamp v. Hog Builders, Inc. ---------- 168
2. To exclude or modify an implied warranty of fitness, the exclusion must be a writing and conspic-

uous, except that an implied warranty can also be excluded or modified by course of dealing, or course of performance, or usage of trade. Ruskamp v. Hog Builders, Inc. ---------- 168

3. Warranties, whether express or implied, shall be construed as consistent with each other and as cumulative wherever such construction is reasonable. Expressed warranties displace inconsistent implied warranties, other than an implied warranty of fitness for a particular purpose. Ruskamp v. Hog Builders, Inc. ---------- 168

4. The old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under section 2-315, U. C. C. Ruskamp v. Hog Builders, Inc. ---------- 168

5. Where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes. Ruskamp v. Hog Builders, Inc. ---------- 168

Weapons and Firearms.

The pointing of an unloaded weapon at another is an assault, if the person aimed at does not know but that it is loaded, and has no reason to believe that it is not. State v. Brauner ---------- 602

Wills.

1. When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. Loomis v. Estate of Davenport ---- 461

2. Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the

presumption is introduced. Loomis v. Estate of Davenport ---------- 461

Witnesses.

1. Fact issues not fully explored and which may rest on the determination of the credibility of witnesses must be resolved by trial on the merits. Armstrong v. Armstrong ---------- 11
2. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Shirk v. Schmunk ---------- 25
Campbell v. Buckler ---------- 336
3. Under section 25-12,109, R. S. Supp., 1972, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission. State v. Watson -------- 44
4. In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other. Nestle v. Welsh ---------- 71
5. A witness may be examined concerning prior inconsistent statements to show his testimony has operated as a surprise, to test his recollection, refresh his memory, induce him to change his testimony, or show the circumstances which induced the party to call him. State v. Casper ---------- 120
6. The payment of money by a divorced husband directly to his ex-wife is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and a divorced husband is a person having a direct legal interest in the result of proceedings to revive judgment as to unpaid installments of child support vested in the deceased ex-wife. Harrison v. Grizzard ---------- 243
7. Where a defendant, who testifies as a witness, of-

fers evidence of his reputation for truth and veracity, the State may offer contradicting evidence. Such contradicting evidence must be confined to the reputation of the defendant for truth and veracity in the community where he lives or works. State v. Craig ---------- 347

8. In a criminal prosecution for theft, where the determination of the facts by the jury may turn upon its acceptance or nonacceptance of the credibility of the defendant, who has testified on his own behalf, the admission into evidence over objection of the opinion of a law enforcement officer that the defendant's reputation is, "that he would take anything that he could get a hold of," is erroneous and we cannot, under such circumstances, say that it was not prejudicial. State v. Craig ---------- 347

9. The credibility of the witnesses and the weight of the testimony are questions for the jury to decide. State v. Sanchell ---------- 380

10. If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. State v. Zobel ---------- 480

11. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea. State v. Zobel - 480

12. The extent of the cross-examination of a witness must be left to the discretion of the trial court. State v. Brauner ---------- 602

13. Triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. Siefford v. Housing Authority ---------- 643

14. Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he had ever made such statements. State v. Gundlach 692

15. In examining a witness concerning prior inconsistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. To the extent that Cropsey v. Averill, 8

Neb. 151, conflicts with the above rule, it is overruled. State v. Wilmore ---------- 807

Words and Phrases.

1. "The best interest of the petitioner or petitioners" as used in section 79-403, R. R. S. 1943, means the best educative interest of petitioner or petitioners and not the best noneducative interest of petitioner or petitioners. Friesen v. Clark ---------- 227
2. The payment of money by a divorced husband directly to his ex-wife is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and a divorced husband is a person having a direct legal interest in the result of proceedings to revive judgment as to unpaid installments of child support vested in the deceased ex-wife. Harrison v. Grizzard ---------- 243
3. The term "willful failure" as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. Herman Brothers, Inc. v. Hennis Freight Lines, Inc. ---------- 258
4. "Arising out of" refers to the origin or cause of the accident and is descriptive of its character, while "in the course of" refers to the time, place, and circumstances of the accident. Mauser v. Douglas & Lomason Co. ---------- 421
5. "Arrest" within the meaning of 18 U. S. C. A., § 3182, means an arrest caused by the executive authority of the asylum state, after formal demand in compliance with the statute has been made by the governor of the state from which the prisoner fled. Prettyman v. Karnopp ---------- 451
6. Reasonable certainty and reasonable probability mean exactly the same thing when used in medical testimony. Marion v. American Smelting & Refining Co. ---------- 457
7. The definition of gross negligence as defined by the guest statute is great and excessive and it indicates the lack of slight care in the performance of duty. Zoimen v. Landsman ---------- 561

8. Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows: When the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed. Bank of Gering v. Glover 575
9. When an offense is not designated by the statute creating it as either a felony or a misdemeanor, the grade of the offense is determined by the maximum punishment authorized by the statute. State v. Redwine ---------- 638
10. Ordinarily the term "incurred" is construed to mean that one has become obligated or liable for the expense involved. Hollister v. Government Emp. Ins. Co. ---------- 687
11. The term "compensation," as used in section 39-6,191, R. R. S. 1943, is not limited to payment for transportation in cash or its equivalent. Vandenberg v. Langan ---------- 779
12. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Nokes -- 844

Work Release.

A person convicted of a felony and sentenced to imprisonment in a city or county jail is not eligible to receive work release privileges under section 47-401, R. R. S. 1943. State v. Redwine ---------- 638

Workmen's Compensation.

1. An accidental injury sustained by an employee on the premises where she is employed, during her lunch hour, in a lunchroom maintained by and under the control of the employer, for the exclusive use of its employees, is an injury arising out of and in the course of her employment. Thomsen v. Sears Roebuck & Co. ---------- 236
2. The Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Thomsen v. Sears Roebuck & Co. -- 236
3. In order to recover under the Workmen's Compensation Act, the evidence must show the plaintiff's dis-

ability was the result of accident arising out of and in the course of the employment. Mauser v. Douglas & Lomason Co. ---------- 421

4. "Arising out of" refers to the origin or cause of the accident and is descriptive of its character, while "in the course of" refers to the time, place, and circumstances of the accident. Mauser v. Douglas & Lomason Co. ---------- 421

5. Injury to plaintiff resulting from donation of blood to Red Cross did not arise out of nor in course of employment as punch press operator although employer gave employees time off without loss of pay to participate in program. Mauser v. Douglas & Lomason Co. ---------- 421

6. 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. Marion v. American Smelting & Refining Co. ---------- 457
Chester v. Douglas County ---------- 666

7. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Marion v. American Smelting & Refining Co. ---------- 457

8. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Chester v. Douglas County ---------- 666