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STATE OF NEBRASKA, APPELLEE, V. JOHN ALLAN LARSEN, APPELLANT.

233 N. W. 2d 776

Filed October 9, 1975. No. 39922.

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

Jack R. Knicely, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant appeals from sentences for automobile theft and escape. The sole issue is whether the sentences imposed were excessive.

The defendant is approximately 24 years of age. He was sentenced to 18 months imprisonment for grand larceny on December 13, 1973. While serving that sentence he was taken to Cheyenne County to work at the Western Nebraska Technical College. On August 15, 1974, he escaped with another prisoner and stole an automobile. The defendant was apprehended near Hemingford, and the automobile recovered near Scottsbluff.

Upon a plea of nolo contendere, the defendant was sentenced to imprisonment for 1 to 3 years for auto theft and 1 to 3 years for escape. The sentence for auto theft is concurrent with the previous sentence, but the sentence for escape is consecutive to both sentences.

The defendant argues that he should have been placed on probation so that he could have continued his rehabilitation training and education at the Western Nebraska Technical College. Unfortunately, the defendant has demonstrated that he is not ready to accept the trust

and responsibility that is required from a prisoner placed on probation.

The record shows no abuse of discretion and the sentences imposed were not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARNOLD MACE EAGLE DEER, APPELLANT.

233 N. W. 2d 775

Filed October 9, 1975. No. 39923.

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

Jack R. Knicely, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant appeals from sentences for automobile theft and escape. The sole issue is whether the sentences imposed were excessive.

The defendant is approximately 21 years of age. He was sentenced to imprisonment for 1 to 3 years for grand larceny on December 10, 1973. While serving that sentence he was taken to Cheyenne County to work at the Western Nebraska Technical College. On August 15, 1974, he escaped with another prisoner and stole an automobile. The defendant was apprehended near Hemingford, and the automobile was recovered near Scottsbluff.

Upon a plea of nolo contendere the defendant was sentenced to imprisonment for 1 to 3 years for auto

theft and 1 to 3 years for escape. The sentence for auto theft is concurrent with the previous sentence and the sentence for escape is consecutive to both sentences.

The defendant argues that he should have been placed on probation so that he could continue his education and training at the Western Nebraska Technical College. Unfortunately, the defendant has shown that he is unwilling to accept the trust and responsibility that is required from a prisoner placed on probation.

The record shows no abuse of discretion and the sentences imposed were not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT DEAN SPIDELL, APPELLANT.

233 N. W. 2d 900

Filed October 9, 1975. No. 39932.

1. **Criminal Law: Evidence: Witnesses.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
2. **Criminal Law: Attorney and Client: Privileged Communications.** In order to come within the attorney-client privilege of section 25-1206, R. R. S. 1943, the communication must have been between the attorney and client and made in the course of professional employment and with reference to the subject matter of that employment.
3. ———: ———: ———. A communication between attorney and client made in the presence of others does not constitute a privileged communication within the meaning of section 25-1206, R. R. S. 1943.
4. **Criminal Law: Burglary: Aiders and Abbetors: Instructions: Trial.** Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a

principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943.

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

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

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury of the crime of burglary. He was sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex. Upon this appeal he assigns the following errors: (1) The evidence was insufficient to support the verdict. (2) The trial court erred in admitting, over objection, rebuttal testimony by a deputy sheriff, relating statements made by the defendant within the hearing of that witness and in the presence of the defendant's attorney and the defendant's father, which statements contradicted explanations he had given on the witness stand. (3) The trial court erred in giving to the jury NJI No. 14.12, defining aiding and abetting. (4) The sentence is excessive. We affirm.

A brief and conclusionary summary of the State's evidence disposes of the first assignment. The principal witness for the prosecution was one Jorstad, a confessed accomplice of the defendant in the burglary. Jorstad was apprehended by the police while in the act of burglarizing the Weaver service station at 2400 South 48th Street, Lincoln, Nebraska. Entry had been gained by breaking a window. Jorstad, a former employee of the Weaver station, knew where the combination of the

Weaver safe was recorded. By means of that information, the safe was opened and the contents removed. At that point the burglary was interrupted by appearance of the police, who, during a routine check, observed activity within the building. Jorstad was arrested within the building. Shortly after his arrest he apparently advised the officers of the defendant's participation and the defendant was arrested a few minutes later a short distance away from the station, driving Jorstad's car away from the neighborhood. Jorstad's testimony indicated that the defendant was an actual participant in the burglary and suggested the burglary. The prosecution's theory explaining the failure to apprehend the defendant inside the building was that he had left unobserved through the broken window during the few minutes which elapsed while Jorstad lay on the floor of the station under police cover and during which time the two officers who discovered the burglary remained outside the station awaiting additional police help.

The defendant took the stand in his own defense and denied participation in and knowledge of the crime and gave innocent explanations for his presence in the area in Jorstad's automobile at the time of the arrest.

Clearly the above direct evidence was sufficient to create a jury question. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480; State v. Garza, 187 Neb. 407, 191 N. W. 2d 454.

The second assignment of error arises from the following circumstances. The defendant testified that Jorstad, on the night of the burglary, loaned his car to the defendant at the defendant's place of residence, and then left the defendant's place in the company of another in-

dividual. He further testified that he then used Jorstad's car to take his sister to her home and performed other errands which accounted for his presence alone in Jorstad's car at the time and place of his arrest. To rebut in part defendant's testimony that he had not accompanied Jorstad that evening, the prosecution presented the testimony of a deputy sheriff who had been charged with the custody of the defendant during trial. This witness testified that during a trial recess while the defendant, his counsel, the defendant's father, and the witness were walking down a hallway in the courthouse, the defendant told his father that the defendant *and Jorstad* had taken the defendant's sister to her home and that the reason the defendant had done this was because he did not want his sister to be alone with Jorstad. The defendant further explained in this conversation that he did not want to use his own car for that purpose at that time of night because it had a defective muffler and was therefore noisy. The objection to this contradicting testimony was founded upon the premise that the matter related was a confidential communication between an attorney and client and was therefore privileged under the provisions of section 25-1206, R. R. S. 1943. The record establishes that the communication was between the defendant and his father, although made in the presence of his attorney. Even if the communication had been between the attorney and client, it would not have been privileged because it was made in the presence of the father and witness, neither of whom were eavesdroppers, but were known to be present. In order to come within the privilege of the statute the communication must have been between the attorney and client and made in the course of professional employment and with reference to the subject matter of that employment. Castle v. Richards, 169 Neb. 339, 99 N. W. 2d 473. Communications between attorney and client made in the presence of others do not constitute "privileged communications" within the mean-

ing of the statute. Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907.

The defendant's objection to the giving of NJI No. 14.12 is based upon the position that the State's theory of prosecution was that the defendant was an actual participant in the burglary and its evidence supported only that theory, and that therefore the issue of conviction as a principal under the terms of section 28-201, R. R. S. 1943, by reason of having aided and abetted the crime was not present for the jury's determination and the giving of the instruction was erroneous. State v. Garza, 193 Neb. 283, 226 N. W. 2d 768.

It is true that Jorstad testified the defendant was present and an actual participant in the burglary. He also testified the defendant was the instigator of the crime and suggested its commission. At common law this would make the defendant an accessory before the fact. The evidence further was such that the jury could also have believed defendant was present, merely aiding and abetting as by driving the defendant's vehicle, or giving assistance at the scene by breaking the window, but not making entry. At common law in this latter situation he would have been a principal in the second degree. All these distinctions and that of principal in the first degree have been abolished by section 28-201, R. R. S. 1943. See, Scharman v. State, 115 Neb. 109, 211 N. W. 613; In re Resler, 115 Neb. 335, 212 N. W. 765; Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698; 22 C. J. S., Criminal Law, § 86a, p. 252, § 85, p. 250, § 90, p. 268. Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. The giving of instruction NJI No. 14.12 was not erroneous and in any event was not prejudicial.

See State v. Garza, 193 Neb. 283, 226 N. W. 2d 768.

The 2 to 4 year sentence was not excessive. The defendant has a previous criminal record, including conviction of one felony from the sentence of which he was on parole at the time of the burgary.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND E. HULETT, APPELLANT.

233 N. W. 2d 570

Filed October 9, 1975. No. 39948.

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

William M. Berlowitz, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with five counts of robbery and use of a firearm in commission of a felony. Pursuant to a plea bargain, the defendant pleaded guilty to two counts of robbery and was sentenced to imprisonment for 4 to 6 years on each count, the sentences to run concurrently. The other counts were dismissed. The defendant has appealed and now contends his sentences were excessive.

The robberies took place in a bar in Omaha. The defendant carried a starter's pistol, and his companion was armed with a shotgun. The defendant drove the get-away car and attempted to elude capture by the police. He did not stop the automobile until after the police had opened fire.

The defendant is 26 years of age, married, and has two children. At the time of the offense the defendant was employed and living with his family. The defendant had attended the University of Nebraska at Omaha and had expressed interest in becoming a law enforcement officer.

The defendant has an arrest record dating back to 1966 which includes burglary and shooting with intent to kill, wound, or maim. While the present charges were pending the defendant was charged with loitering and prowling.

Because of the serious nature of the offenses involved in this case, probation would not have been appropriate. Under all the circumstances, the sentences which were imposed were not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE ALLEN DEDRICK, APPELLANT.

233 N. W. 2d 777

Filed October 9, 1975. No. 39976.

Criminal Law: Sentences: Records. Exercise of discretion by the trial court to impose sentence of imprisonment is properly exercised when the record shows risk of further criminal conduct, and that most effective correctional treatment will be provided by commitment to a correctional facility.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke & Wiseman, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from convictions for assault and battery and larceny from the person.

Appellant was charged originally with assault and battery and robbery. Pursuant to a plea bargain shown by the record, the charge of robbery was withdrawn, and a charge of larceny from the person was substituted. Appellant then pleaded guilty to each of the charges, admitting that he had assaulted a hotel clerk, and had taken money from the cash drawer of the hotel. The plea bargain did not include a recommendation by the county attorney.

The trial court then secured a presentence report and an evaluation from the Nebraska Division of Corrections. From these it appeared that appellant had previously been in custody as a juvenile for a period of 3 years; and that appellant seems to be emotionally disturbed and to have a drinking problem. Although he has not previously been convicted of a felony, none of the various examiners had the opinion that a probationary program could deal with appellant's known problems and tendencies.

The trial court imposed a sentence of 60 days confinement in the county jail upon count I, assault and battery, and an indeterminate term of 2 to 5 years in the Nebraska Penal and Correctional Complex, without solitary confinement, upon count II, larceny from the person, both sentences to run concurrently. Appellant contends that the sentence is excessive.

Section 29-2260(2), R. S. Supp., 1974, provides: "Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because: (a)

The risk is substantial that during the period of probation the offender will engage in additional criminal conduct; (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law."

From the record, it appears that the trial court was amply justified under both (a) and (b) in concluding that a sentence of imprisonment was necessary. No abuse of judicial discretion is shown.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE JOSEPH BARTLETT, APPELLANT.

233 N. W. 2d 904

Filed October 9, 1975. No. 39989.

1. **Criminal Law: Trial: Controlled Substances: Evidence.** 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.
2. ———: ———: ———: ———. 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 narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient.
3. ———: ———: ———: ———. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown.
4. **Criminal Law: Evidence: Witnesses.** In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.

5. **Criminal Law: Evidence.** The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
6. **Criminal Law: Evidence: Waiver: Time: Motions, Rules, and Orders.** If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material.
7. **Criminal Law: Searches and Seizures: Witnesses: Police Officers and Sheriffs.** Where, as a consequence of a lawful search, police officers lawfully obtain knowledge of relevant and material facts they may testify to those facts.
8. **Criminal Law: New Trial: Appeal and Error.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred.
9. **Trial: Instructions.** It is not error for the trial court to refuse to give instructions tendered where the substance of the request is covered by instructions given.

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

Thomas P. Kelley and Michael Kelley of Kelley & Kelley, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

CLINTON, J.

The defendant, Bartlett, was found guilty by a jury of

knowingly or intentionally possessing heroin with intent to deliver. After the verdict, he was found guilty by the court on a second count of being a habitual criminal and was sentenced to a term of 20 to 30 years in the Nebraska Penal and Correctional Complex. On appeal he assigns as error the following: (1) He did not receive a fair trial because the prosecution intentionally and deliberately attempted to establish an association of the defendant with persons known or reputed to be dealers in controlled substances. (2) The court erred in overruling a pretrial motion of the defendant asking the court to prohibit the prosecutor from questioning the defendant concerning a large sum of cash purportedly found in the defendant's home at about the time of the offense charged. (3) The court erred in refusing to give a requested instruction that the jury insist on clear and convincing proof that defendant had the controlled substance in his possession. (4) The habitual criminal statute is unconstitutional. (5) The sentence is excessive. (6) The evidence was insufficient to sustain the verdict. We affirm.

Economy of space and time will be served by dealing with the last assignment first. The defendant, for reasons not explicitly appearing in the record, was suspected by the Omaha police of being a dealer in controlled substances and for that reason became the subject of surveillance by some of the department's undercover officers. This surveillance centered on the defendant's activities at Russ' Lounge in Omaha, Nebraska, from July 31 to August 6, 1974, on which last date he was arrested together with one John Davis in Davis' automobile parked in the lounge parking lot. At that time a quantity of heroin was discovered in the vehicle.

Surveillance by the officers on July 31, August 1, and August 4, 1974, indicated that surreptitious exchanges of money and small packages were taking place between the defendant and others. Examples of the apparent nature of some of these transactions will suffice. On

one occasion, when Bartlett was in the lounge, he was joined by persons identified as Larry and Barbara Glouser. After a brief period Mrs. Glouser left the booth in which the persons were seated, went to the restroom, and shortly returned. Upon her return she was seen to hand a small white package to Glouser. He in turn handed it under the table to Bartlett. After a few minutes conversation the Glousers left. Bartlett then made a telephone call and a few minutes later, after apparently making observation for someone's expected arrival in the parking lot, went to the parking lot where he handed something to another individual. Bartlett then returned alone to the lounge. On another occasion the defendant was observed in the lounge receiving money from one Fuller, then leaving the lounge through the rear door to the parking lot where his motor vehicle was located, and then returning and handing something to Fuller. Shortly thereafter Bartlett made telephone calls. A little later a black male entered through a rear door of the lounge and walked through the bar without speaking or acknowledging anyone, and on out the front door. Immediately thereafter Bartlett left through the rear door and was then seen meeting this black man at that person's automobile on the parking lot. After a brief time Bartlett returned to the bar and the other individual departed.

On August 6, 1974, the undercover officers again had Bartlett under surveillance at Russ' Lounge. On this occasion they had received instructions from their superiors that if they observed an apparent transaction taking place they were to make arrests. On this occasion Bartlett entered the bar through the front door. He then made a telephone call or calls and after drinks and conversation with third persons he left through the rear door and joined John Davis (the same individual who had walked through the bar without recognition of the defendant on the previous occasion) in an automobile in the parking lot. Two of the officers approached the

car from the rear and on opposite sides. One of the officers saw currency in Bartlett's left hand and a roundish ball of foil on the seat between the two men. The two were directed to get out of the automobile and were frisked. Immediately thereafter the package of foil was recovered from the floor of the car on the passenger's side where Bartlett had been seated. It contained what is described as three "spoons" of what later chemical analysis determined to be heroin. The evidence shows that a spoon sells on the street for $100 and the heroin is later broken down into separate packages of 15 or 18 "hits" which sell for $10 each. Currency in the amount of $819 was found on Bartlett at the time of his arrest and $425 on Davis.

Bartlett took the stand on his own behalf. He denied he had ever been engaged in the drug traffic. He denied knowledge of the presence of heroin in Davis' car and explained his presence there by stating that he had been asked by his wife, who was present in the bar with him, to close the window on her car as it had just started to rain. When Bartlett left the bar through the rear door to do this chore, Davis, whom he had known previously, had just driven into the parking lot and asked Bartlett to get in his car as he wanted to talk to Bartlett about getting a job with Bartlett's employer, a waterproofing company.

The foregoing prosecution evidence, if believed by the jury, was sufficient to permit it to find that the defendant was knowingly engaged in the sale of heroin to Davis. The applicable rules are: "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 narcotic drug at the place where it was found.

But mere presence at a place where a narcotic drug is found is not sufficient. . . . Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown." State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187. So far as the questions of his credibility are concerned, the rule is: "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury." State v. Spidell, *ante* p. 494, 233 N. W. 2d 900.

Defendant asserts that the evidence against him is circumstantial and insufficient because a reasonable theory consistent with innocence can be supported by that evidence. He cites Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. The evidence in this case is only in part circumstantial and the inferences from it are strong. If the jury disbelieved the defendant's explanations, which it obviously did, the evidence is practically conclusive. We have recently restated the circumstantial evidence rule in what we believe is a more accurate formulation of the principle involved. The reformulation is: The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Young, 190 Neb. 325, 208 N. W. 2d 267. See, also, State v. Morgan, 187 Neb. 706, 193 N. W. 2d 742. The evidence here is sufficient to meet the criterium of those cases.

After trial began the defendant filed an unverified motion as follows: ". . . moves the Court for an order limiting the prosecution from mentioning or inquiring

about cash money found in the home of George Bartlett on or about the 6th day of August, 1974, pursuant to a search warrant issued on August 6, 1974, by Judge A. Q. Wolf, Judge of the Municipal Court of the City of Omaha, Nebraska, for the reason that said money was not one of the items to be seized under the terms of the search warrant and seizure of this money amounted to a general search of the premises; and further for the reason that said money was not contraband." The court overruled the motion without an evidentiary hearing. No previous motion to suppress, directed to the money found in the search of defendant's home, had been made under the provisions of section 29-822, R. R. S. 1943. A motion to suppress the evidence seized at the time and place of the defendant's arrest had been timely filed, hearing was held thereon, and that motion was overruled.

The motion at issue on this appeal arises in the following context. The evidence showed that Bartlett was employed by a waterproofing company and worked regularly, earning about $300 per week. In his household were Pauline Bartlett and eight children. Four of the children received some support from sources other than the income of the defendant. Pauline was not employed. Pauline testified that the family had to budget and manage carefully to get by on Bartlett's pay. After that, Bartlett took the stand. On cross-examination he admitted that on August 6, 1974, he had eight or nine uncashed payroll checks; that it was not unusual for him to have large amounts of money on his person; and that he had no means of support other than from his employment with the waterproofing company. He was then asked: "Q. Do you have any large amounts of money around your house?" Objection was made and overruled. Counsel for the defendant then in substance orally renewed the motion previously made in writing. The oral motion recited, as did the prior written motion, that the search had been made pursuant to warrant, but that the warrant did not recite that the money was

among the items to be seized. The defendant did not offer the warrant and it does not appear in the record. The oral motion was overruled. Following this, the next question and answer were: "Q. . . . On August 6, 1974, did you have a sum of money in excess of $22,000 in small bills in your home? A. Yes." In response to further questioning the defendant explained that the $22,000 had been saved over a period of 8 or 9 years. On redirect examination he testified that a number of years earlier he had received a workmen's compensation settlement in the amount of $6,000 and that was part of the $22,000 which he had on hand. Neither the payroll checks nor the $22,000 were offered or received in evidence.

The defendant's position cannot be sustained for several reasons. The statement of two of those reasons is sufficient. If we were to assume without proof that the prosecutor's knowledge of the $22,000 was the product of an unreasonable and therefore unlawful search and seizure in violation of the Constitution, it would follow that if the currency itself were offered in evidence, that evidence would be subject to timely motion to suppress under the provisions of section 29-822, R. R. S. 1943. It seems evident that if the search were illegal and an order suppressing the evidence were granted, the State could not avoid the consequence of the order simply by not offering the physical evidence, but merely introducing testimony as to what was found. The converse must logically be true. If a party waives his right to have the physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. Section 29-822, R. R. S. 1943, provides that all motions to suppress are required to be made at least 10 days prior

to trial or they are deemed to be waived unless the defendant is surprised by the possession of such evidence by the State or unless the defendant is not aware of the grounds for such motion before the trial. We hold, therefore, that a party may not avoid the consequence of a waiver under the provisions of section 29-822, R. R. S. 1943, of the right to suppress by an untimely motion to limit the interrogation of witnesses on relevant and material matters.

A second reason for denial of the defendant's claim is this. The sole reason asserted for the claimed illegality of the alleged seizure of the $22,000 is that the money was not described in the warrant. It is not claimed that probable cause for issuance of the warrant did not exist. There is no allegation or claim of any kind that the discovery of the money was unlawful and the result of a search illegal in itself. Under these circumstances the following principles are applicable. If the search is lawful the officers can testify to facts about which they obtain knowledge in the process of a lawful search. Zap v. United States, 328 U. S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477. In that case there was a contractual consent to inspection of books and records as part of a government contract. In the course of the inspection a check was seized by government agents. The Supreme Court of the United States there said: ". . . the knowledge they acquired concerning petitioner's conduct under the contract with the Government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. See Paper v. United States, 53 F. 2d 184, 185; In re Sana Laboratories, Inc., 115 F. 2d 717, 718. Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained. United States v. Lee, 274 U. S. 559, 563. The agents did not become trespassers ab initio when they took the

check. See McGuire v. United States, 273 U. S. 95. Had the check been returned to petitioner on the motion to suppress, a warrant for it could have been immediately issued. . . . The search and the discovery were wholly lawful. A search warrant would be merely the means of insuring the production in court of the primary source of evidence otherwise admissible. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained."

The distinction, made in defendant's written motion and upon which he relies in part, between "contraband" and "mere evidence" is no longer a viable distinction and does not aid defendant's position. See Warden v. Hayden, 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782.

Defendant's claim of deprivation of a fair trial because of the prosecutor's misconduct rests on the following occurrences. During examination of one of the witnesses for the prosecution the prosecutor put the following question: "Q. Can you tell us whether or not the two Glousers are known narcotics dealers —." The defendant's attorney objected on the ground of lack of foundation and the objection was sustained and the jury was instructed to disregard the implication. During the cross-examination of the defendant the prosecutor asked: "Q. Did you ever have any conversations with Larry Glouser in regard to mixing of any heroin?" Objection was made and a conference took place out of hearing of the jury, after which the court sustained the objection for the reason that the State had not given notice as required by statute of intent to use information obtained by wiretapping. During the direct examination of one of the undercover officers, the following question and answer were admitted: "Q. What did you observe on that date? A. At that time, I observed parties known to me as Barbara Glouser and Larry Glouser arrive in a white over maroon Ford and park in the park-

ing lot in the back there." No objection was made to that testimony.

As is shown by the factual recital earlier given, Larry and Barbara Glouser were two of the persons with whom the defendant was apparently dealing. The defendant, on cross-examination, admitted that he was probably present with the Glousers in the bar on the occasion referred to in the evidence. Under the circumstances here testimony that those persons were narcotics dealers would have been relevant, material, and admissible if appropriate foundation had been laid. Such foundation was not laid and an objection to the question was sustained. There was no error under the circumstances of this case in asking the question. The association with the Glousers had already been established. Their identities could not be appropriately concealed. The probable nature of the transaction with the Glousers in the cafe was already before the jury without objection.

Even if we assume that the asking of the two questions to which objection was sustained was error, we do not believe that the asking could have affected the verdict. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Riley, 182 Neb. 300, 154 N. W. 2d 741; § 29-2308, R. R. S. 1943.

The assignment of error relative to the request for an instruction that possession must be proved by "clear and convincing" proof is unmeritorious. The instructions which the court gave properly defined the crime charged and the term "possession," and then properly laid the burden of proof, and required that proof by the State of all the elements of the crime charged be "beyond a reasonable doubt." The latter term the instructions al-

so properly defined. Defendant cites no decision of this court and no constitutional authority which requires that a special instruction be given on the State's burden of proving a particular element of a crime. Such an instruction would have been redundant and confusing. The authorities on which the defendant relies do not support the giving of the requested instruction. It is not error for the trial court to refuse to give instructions tendered where the substance of the request is covered by instructions given. State v. Davis, 186 Neb. 457, 183 N. W. 2d 753.

We have several times upheld the constitutionality of the habitual criminal statute and will not discuss it further in this opinion. See, State v. Martin, 190 Neb. 212, 206 N. W. 2d 856; State v. Graham, 192 Neb. 196, 219 N. W. 2d 723; State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298.

It may be admitted that a sentence of 20 to 30 years is severe. We do not conclude, however, that it is excessive. The defendant, after having been convicted of six prior felonies for burglary or escape and having served four terms in penitentiaries, has since launched upon a new and more vicious criminal career. He was not in the lowest echelon of the hard drug traffickers.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRIS E. KISER, APPELLANT.

233 N. W. 2d 571

Filed October 9, 1975. No. 39991.

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

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

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

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

BOSLAUGH, J.

The defendant in this case was charged with receiving, buying, or concealing an automobile knowing it to have been stolen. The offense consisted of stealing a pickup truck by "hot-wiring" it. The defendant and two companions were arrested several days later in Aurora, Nebraska, after the truck had broken down. On April 26, 1974, upon a plea of nolo contendere, the defendant was placed on 3 years' probation.

On August 24, 1974, after the defendant had been on probation for about 4 months, he was found in the front seat of an automobile in a used car lot at 5:58 a.m. A window in the car had been broken, the ignition wires cut, and the ignition removed. The defendant admitted that he was trying to remove the automobile from the lot.

The defendant pleaded guilty to violation of probation and was sentenced to imprisonment for 2 to 10 years. The defendant has appealed and contends the sentence was excessive.

The defendant is 19 years of age and single. He has a tenth grade education. His arrest record includes burglary for which he was sentenced to 60 days in jail.

Section 28-522, R. R. S. 1943, provides a penalty of 1 to 10 years' imprisonment for the offense for which the defendant was convicted. Ordinarily, the defendant's youth would indicate the sentence should be something less than the statutory maximum. Here the defendant attempted to repeat the same offense after only 4 months' probation. The trial court probably thought the penal authorities should have a great deal of flexibility in dealing with the defendant. Under the circumstances

we conclude the indeterminate sentence imposed was not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY H. SWIFT, APPELLANT.

233 N. W. 2d 572

Filed October 9, 1975. No. 39996.

Criminal Law: Sentences. A sentence within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears.

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

Paul E. Watts and George R. Sornberger, for appellant.

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

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

WHITE, C. J.

The only assignment of error in this case is the excessiveness of the defendant's sentences. The defendant was originally charged with three counts of felony motor vehicle homicide. As a result of a plea bargain, two of the felony counts were reduced to charges of misdemeanor motor vehicle homicide. The defendant entered a plea of no contest to these two misdemeanor charges. The third felony count was then dismissed.

The District Court imposed the maximum sentence of imprisonment provided by law for each count. The defendant was sentenced to serve 6 months in the county jail on each count, the sentences to run consecutively.

The charges against the defendant arose out of an automobile accident on March 23, 1974, in Sarpy County.

Three people lost their lives in this accident. While the defendant would only admit to driving 35 to 40 miles per hour, the District Court was convinced by the evidence that the defendant was going over 85 miles per hour at the time of the accident. There was also evidence in the presentence report that the defendant had been drinking prior to the accident.

The rule is well established that when a sentence is within the statutory limits, this court will not disturb it, unless the District Court clearly abused its discretion. State v. Johnson, 191 Neb. 54, 213 N. W. 2d 716 (1974).

We have carefully reviewed the record, and there was no abuse of discretion by the District Court in imposing the sentence that it did under the circumstances as revealed by the record.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANDREW PAUL SCHNATZ, APPELLANT.

233 N. W. 2d 778

Filed October 9, 1975. No. 40003.

1. **Criminal Law: Coram Nobis.** The common law writ of error coram nobis is intended to correct a judgment in the same court in which it was rendered on the ground of error of fact for which the statute provides no other remedy.
2. **Criminal Law: Coram Nobis: Records.** The writ of error coram nobis is available when that error of fact for which the statute provides no other remedy does not appear of record or was unknown to the court when the judgment was pronounced and which if known would have prevented the judgment.
3. **Criminal Law: Appeal and Error.** In an appeal the appellant has the burden of establishing that there was error in the proceedings from which he appeals.

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

Andrew Paul Schnatz, pro se.

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

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

SPENCER, J.

Andrew Paul Schnatz appeals from an order dismissing his application for a writ of error coram nobis. We affirm.

On October 18, 1971, Schnatz, while represented by private counsel, pled nolo contendere in the county court of Gage County, Nebraska, to a complaint charging petit larceny. The court accepted defendant's plea, found him guilty, fined him $30 and costs, and ordered him to make restitution in the sum of $36.45. The fine, costs, and restitution were paid.

Three years later, on October 16, 1974, applicant filed an application in the county court for a writ of error coram nobis. He sought to have the conviction vacated and expunged from the records of the court on two grounds: (1) He was not effectively represented by counsel; and (2) the county judge did not advise him that by paying the fine and costs he waived his right to an appeal.

Hearing was had on the application on October 21, 1974. No sworn testimony or other evidence was adduced. The county attorney presented an argument for the State. The appellant, appearing pro se, made statements to the court. The application was denied.

Appellant took an appeal to the District Court. On the hearing there, no sworn testimony was taken. The only evidence adduced was a bill of exceptions from the county court which contained no evidence. The only sworn testimony taken in either court was the testimony in District Court regarding appellant's indigency at that moment and his inability to pay the

costs of appeal. The county court's dismissal was affirmed and this appeal resulted.

The common law writ of error coram nobis is intended to correct a judgment in the same court in which it was rendered on the ground of error of fact for which the statute provides no other remedy. It is available when that error of fact does not appear of record or was unknown to the court when the judgment was pronounced and which if known would have prevented the judgment. The writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure. Hawk v. State (1949), 151 Neb. 717, 39 N. W. 2d 561.

Schnatz is seeking to vacate the original county court judgment because his attorney did not fully explain his legal rights. Obviously, this is not cognizable under a writ of error coram nobis. In any event, appellant was represented by privately retained counsel of his own choice.

Schnatz also argues the failure of the county judge to advise him that by paying the fine and costs he would waive his opportunity for an appeal was a violation of his constitutional rights. If the county judge had the obligation to do so, it would not be cognizable by a writ of error coram nobis.

Appellant Schnatz appears pro se in this court. In an appeal the appellant has the burden of establishing that there was error in the proceedings from which he appeals. This rule is so fundamental that it needs no citation of authority. Here, appellant adduced no proof of any nature to sustain his allegations which, as suggested heretofore, are not cognizable under a writ of error coram nobis. His application was properly dismissed.

Judgment affirmed.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LONNIE ST. CLAIR, APPELLANT.

233 N. W. 2d 780

Filed October 9, 1975. No. 40038.

1. **Criminal Law: Kidnapping: Words and Phrases.** The Nebraska statute on kidnapping, section 28-417, R. S. Supp., 1974, refers to "any person" and does not exclude a wife or former wife as a victim.
2. **Criminal Law: Guilty Plea: Trial.** In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative.

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

William H. Sherwood, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

The defendant was charged with breaking and entering with intent to commit kidnapping, assault and battery, and kidnapping. On entering a plea of guilty to the first two charges, the kidnapping charge was dismissed in conformity with a plea bargain. He received a sentence of 2 years for breaking and entering and 6 months for assault. The sentences were to run concurrently. We affirm the judgment of the District Court.

The defendant was separated from his wife and a divorce had been decreed but was not final. His statement to the probation officer appearing in the presentence report verifies the charges made in the information. He broke and entered his wife's home, forcibly removed his wife and child, drove them a considerable distance in his automobile, had sexual relations with

his wife, and finally returned them. He assigns two errors, that he was not guilty of breaking and entering and that the sentence is excessive.

Defendant insists he had no intent to and could not kidnap his wife and that consequently he was not guilty of breaking and entering with the intent to commit a felony. The Nebraska statute on kidnapping, section 28-417, R. S. Supp., 1974, refers to "any person" and does not exclude a wife or former wife as a victim. In the present instance the parties were separated and a decree of divorce had been entered. Under such circumstances any right of control by a husband over his wife's actions has been terminated along with most other marital rights.

In regard to a factual basis for the plea, it is observed that the defendant informed the court at the time he plead guilty that he did break and enter the home of his former wife. The court also, at the time of pronouncing sentence, had before it the report of the presentence investigation revealing defendant's admission of breaking and entering and forcibly removing his former wife. "In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative." State v. Daniels, 190 Neb. 602, 211 N. W. 2d 127.

The sentence imposed is not excessive. It is in essence a 1 to 2 year sentence. The defendant was at all times represented by counsel and the 2 year sentence was recommended by the county attorney pursuant to a plea bargain.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN F. MCCARTHY, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH MCCARTHY, APPELLANT.

233 N. W. 2d 782

Filed October 9, 1975. Nos. 40049, 40050.

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

Richard E. Gee, for appellants.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

These cases were argued together, present an identical issue, namely, whether sentences were excessive, and will be combined herein.

Defendants were convicted of breaking and entering and each received a sentence of 3 to 9 years. Examination of the records fails to disclose an abuse of discretion in either case. The appeals are frivolous and the judgments are affirmed.

See Rule 20 and State v. Orner, 192 Neb. 523, 222 N. W. 2d 819.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES WAYNE HOWARD, ALSO KNOWN AS MARK HOWARD, APPELLANT.

233 N. W. 2d 573

Filed October 9, 1975. No. 40051.

Criminal Law: Sentences. A sentence within the statutory limits

will not be disturbed on appeal unless an abuse of discretion appears.

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

Leo M. Bayer, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

WHITE, C. J.

The only assignment of error in this case is the excessiveness of the defendant's sentence. The defendant was apprehended on November 26, 1974, after breaking into the Laeger Inn at Alliance, Nebraska. He was subsequently charged with burglary and with being a habitual criminal. The habitual criminal portion of the complaint charged the defendant with having been convicted on a burglary charge in 1968, and on an escape charge in 1969. Each of these convictions resulted in imprisonment for terms of not less than 1 year. The defendant plead guilty to both charges. The District Court accepted the pleas and sentenced the defendant to 15 years in the Nebraska Penal and Correctional Complex with credit for 72 days spent in custody awaiting disposition of his case. We affirm the judgment and sentence of the District Court.

It is argued on behalf of the defendant that the imposition of the 15-year sentence under the habitual criminal statute is not warranted because one of the crimes used to support the charge was that of escape, which is malum prohibitum rather than malum in se. It is further argued that the other crime used to support the charge, the 1968 burglary, was committed when the defendant was "a young boy who apparently had no parental guidance."

Nebraska's Habitual Criminal Law, section 29-2221, R. S. Supp., 1974, makes no distinctions between malum in se and malum prohibitum offenses. It provides for no exceptions based upon the age of the offender at the time of the prior conviction or upon any other factor. See Kennedy v. Sigler, 397 F. 2d 556 (8th Cir., 1968). The statute requires only the bare ascertainment of two prior convictions, each resulting in at least 1 year's imprisonment to support a habitual criminal charge upon conviction of a third felony in this state. This court must apply the law as it is enacted by the Legislature, and has no discretion where the terms of the statute are clear and unambiguous. The court cannot rewrite the law, nor create exceptions to it.

The defendant's sentence fell within the statutory limits provided for in section 29-2221, R. S. Supp., 1974. A sentence within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears. State v. Ralls, 192 Neb. 621, 223 N. W. 2d 432 (1974).

We have carefully reviewed the record and there was no abuse of discretion in this case by the District Court in imposing the sentence that it did under the circumstances as revealed by the record.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT W. HASKETT, APPELLANT.

233 N. W. 2d 782

Filed October 9, 1975. No. 40113.

Post Conviction: Pleadings: Motions, Rules, and Orders. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by

the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

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

Robert W. Haskett, pro se.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

This is a post conviction proceeding. The defendant was found guilty of second degree murder. On January 20, 1975, the defendant filed a motion for post conviction relief, which was denied in part and sustained in part. On February 21, 1975, the defendant filed a second motion seeking a rehearing on the first motion, stating that he had failed to raise issues in the first motion which were contained in the second motion. The defendant's second motion was denied, and the defendant appeals.

"After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief." State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826 (1971). See, also, State v. Hall, *ante* p. 173, 231 N. W. 2d 123 (1975).

The issues raised by the defendant in his second motion were available at the time of his first motion and could have been raised then. "The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same pris-

oner." State v. Huffman, 190 Neb. 319, 207 N. W. 2d 696 (1973).

The District Court acted properly and within its discretion in denying the defendant's second motion.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY LYNN SALTZMAN, APPELLANT.

233 N. W. 2d 914

Filed October 16, 1975. No. 39937.

1. **Criminal Law: Trial.** Where defendants participated in the same series of acts or transactions constituting the offense charged, in the absence of a showing that a defendant would be prejudiced by a consolidation of the cases for trial, the consolidation is proper and will not be disturbed on appeal.
2. **Criminal Law: Trial: Witnesses: Instructions: Confessions.** The admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant.
3. **Criminal Law: Trial: Witnesses: Confessions.** The improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error in some cases.
4. ———: ———: ———: ———. The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination.
5. ———: ———: ———: ———. In a joint trial where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable.

6. **Statutes.** It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results.
7. ———. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
8. **Criminal Law: Statutes: Constitutional Law.** It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite.

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

Mark T. Starr, for appellant.

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

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

McCOWN, J.

The defendant, Gary Lynn Saltzman, was charged with unlawfully taking away, holding, or imprisoning a police officer against his will for the purpose of compelling the performance of an act by such officer in violation of the kidnapping statute, section 28-417, R. S. Supp., 1974. The defendant was found guilty by a jury and the District Court sentenced him to a term of 5 to 15 years imprisonment.

On October 27, 1974, the defendant Saltzman and his codefendant, Billy Boyce, spent several hours of the afternoon and evening drinking together in Blair, Nebraska. The defendant Saltzman was carrying a loaded gun during the drinking bout. Their conversation finally reached the point where the two men decided to "get" the county prosecutor, Roy Anderson, and "pay him back" for everything he had ever done to them. They didn't know where Anderson lived. They made some efforts by telephone to obtain the information, but were

unsuccessful. They continued drinking and ultimately decided that any policeman would know where the prosecutor lived. Shortly after 11 p.m., by arrangement between them, they waited at the entrance to an alley near the police station until they saw an officer get into the police cruiser. Saltzman then called and motioned to the officer and the officer drove the cruiser over to the alley where Saltzman was and got out of the cruiser. As Saltzman began a conversation with the officer, Boyce, who by now had Saltzman's gun, came up behind the officer and put the gun in the officer's back. They asked the officer where the county prosecutor lived. The officer was new in town and had been on the police force less than 2 weeks. He told them he did not know where the prosecutor lived. They took the officer's service revolver and made him get into the police cruiser. They got into the cruiser also, each holding a gun on the officer, and Boyce drove out of town and several miles into the country. While they were in the cruiser and holding the guns on the officer, they again demanded to know where the county prosecutor lived, and they wanted the officer to take them there. Boyce threatened to shoot the officer. The officer testified that both of them said they were going to kill the county prosecutor. The officer finally convinced them that he did not know where the county prosecutor lived. They then got out of the car, handcuffed the officer with his hands behind his back, threatened him again at gunpoint, and drove away. The two men drove the cruiser a short distance further and abandoned it. They set off on foot and spent the night in the field. The next day they walked back into Blair and turned themselves in to law enforcement officers.

Saltzman and Boyce were tried together after denial of Saltzman's motion for a separate trial. Statements by each of the defendants were admitted into evidence with admonition by the court that each statement was to be considered only against the defendant making it.

Both Saltzman and Boyce testified at the trial. The statements and the testimony of both defendants as to their actions were substantially identical. The jury found both defendants guilty and each was sentenced to 5 to 15 years imprisonment. The appeals in this court were separately docketed, briefed, and argued.

The defendant Saltzman first contends that either his motion for a separate trial should have been granted, or his objection to the introduction in evidence of the written statement of Boyce should have been sustained. The offense charged against each defendant was based on the same act or transaction and the cases could be properly consolidated for trial, in the absence of a showing that one of the defendants would be prejudiced by the consolidation. See § 29-2002, R. R. S. 1943.

In the absence of a showing of prejudice to a defendant, consolidation of criminal prosecutions for trial is proper where the defendants participated in the same series of acts or transactions constituting the offense charged. The ruling of the District Court on a motion for consolidation under such circumstances will not be disturbed on appeal in the absence of an abuse of discretion. See, State v. Shiller, 191 Neb. 291, 214 N. W. 2d 616; State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627. There was no showing here of any prejudice caused by the consolidation.

The defendant contends also that the written statement of Boyce was erroneously admitted in the joint trial, even though the jury was admonished to consider it only against Boyce. The defendant relies on Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476.

Bruton holds that the admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and

must be disregarded with respect to the other defendant. The denial of the right of confrontation and cross-examination resulting from the declarant codefendant's failure to take the witness stand is the basic foundation for Bruton.

In the context of the case before us, if Boyce had failed to take the witness stand, the admission of his statement inculpating the defendant would have been error. In a joint trial it was error to admit Boyce' statement into evidence at a time when Boyce had not taken the stand. That error, however, does not become irretrievably prejudicial. Neither does every admission of inadmissible evidence constitute reversible error. In some cases the improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error. Harrington v. California, 395 U. S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284; Schneble v. Florida, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340. In the case before us, however, it is not necessary to determine whether or not the error was harmless since the Bruton rule is not applicable.

The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statements, so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination. See, California v. Green, 399 U. S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489; McDonnell v. United States, 472 F. 2d 1153 (8th Cir., 1973), cert. den. 412 U. S. 942, 93 S. Ct. 2785, 37 L. Ed. 2d 402.

In a joint trial, where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable. See, Nelson v. O'Neil, 402 U. S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222; United States v. Maddox, 492 F. 2d 104 (5th Cir.,

1974). Under such circumstances instructions to the jury that the statement is to be considered only against the declarant is sufficient to protect the nondeclarant against prejudice so that the evidence can be admitted against the declarant. United States v. Maddox, *supra.*

It is obvious that the Bruton rule requires a prosecutor to make advance determinations regarding joint or separate trials where statements by one defendant inculpating a codefendant are critical to the case. That choice ought to be made without reliance upon any assumptions or assurances that any particular defendant will take the stand and testify.

Saltzman's remaining assignments of error center on the argument that the word "act" was improperly defined in the instructions to the jury, and that section 28-417, R. S. Supp., 1974, is unconstitutional because it uses the term "any act" and is therefore vague and overbroad.

The applicable portion of section 28-417, R. S. Supp., 1974, provides: "Whoever shall unlawfully carry off or decoy, entice away, secrete, imprison, or otherwise hold against his will any person, * * * for the purpose of compelling the performance of any act by such person or by any other person, association or corporation, shall upon conviction be imprisoned in the Nebraska Penal and Correctional Complex for not less than three nor more than fifty years."

Saltzman requested that the jury be instructed that "talking or the oral disclosure of information is not an act." The trial court refused the instruction and instead instructed the jury that an act is "A thing done." Saltzman contends that such a definition is too broad, and that the statute is vague and unconstitutional. He conjures up a parade of imaginary examples in an effort to support the contention that a penal statute must be strictly construed and cannot be applied to situations or parties not clearly within its provisions.

We find no support for the defendant's contention that

the giving of specific information under compulsion is not "an act," regardless of the physical method by which it is given. The act of speaking is as much an "act" as is the writing of a ransom note. The proscribed acts which constitute the crime of kidnapping are set out in the statute in specific and definite terms. When those acts are done "for the purpose of compelling the performance of any act" by the victim or any other person, the essential elements of the crime are complete. In such a context, it is obvious that the Legislature intended a broad and comprehensive application of the term "any act." It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Goham, 191 Neb. 639, 216 N. W. 2d 869; Keller v. State, 184 Neb. 853, 172 N. W. 2d 782.

It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Green, 182 Neb. 615, 156 N. W. 2d 724. The statute here is sufficiently clear that a person of ordinary intelligence has fair notice of exactly what is forbidden. The actions of the defendant were clearly prohibited under any reasonable construction of the statute. Although hypothetical factual situations might be imagined where the application of the statute might raise constitutional issues, such imaginary factual situations do not help the defendant, nor make the statute unconstitutional.

The evidence here was more than sufficient to establish that the defendant was guilty of the crime charged. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL BILLINGSLEY, APPELLANT.

233 N. W. 2d 783

Filed October 16, 1975. No. 39951.

1. **Criminal Law: Trial: Evidence.** Circumstantial evidence is sufficient to sustain a finding of guilty if it is substantial.
2. ———: ———: ———. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the evidence is sufficient to sustain a finding of guilty.

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

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

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

BOSLAUGH, J.

The defendant was charged with robbery and assault with intent to rob. Upon trial to the court he was found guilty of robbery and sentenced to imprisonment for 5 to 10 years. Upon appeal the sole issue is the sufficiency of the evidence to sustain the finding of guilty.

The record shows that Alma Holmberg, a woman 91 years of age, was assaulted and robbed in her home at 4331 Seward Street in Omaha, Nebraska, on the early afternoon of June 19, 1974. She testified that when she answered the door, two black boys were on the front porch. One of the boys entered the house although she told him to stay outside. She remembered nothing further until she was found on the floor by one of the neighbors after the boys had left. She was unable to identify the defendant as one of the boys.

Elvira Peterson lives directly across Seward Street from Mrs. Holmberg. Mrs. Peterson saw the boys open the screen door of Mrs. Holmberg's house and called the emergency number. When she saw the boys enter the house, and the drapes in the living room being closed, she requested emergency assistance. She saw the boys run from the Holmberg house and noticed that the taller boy was wearing a white T-shirt and light pants. The other boy had on a maroon colored T-shirt and darker pants that were multi-colored or striped. Mrs. Peterson went over to the Holmberg house and found Mrs. Holmberg lying on the floor in a pool of blood.

Saundra Muir lives on Seward Street in the fourth house east of Mrs. Holmberg. She heard a screen door slam and then saw the boys running east on Seward Street. One boy was wearing a reddish-colored shirt and some sort of multi-colored pants. She heard one boy say to the other, "We had better get out of here." They ran east on Seward Street and turned north on Military at the corner.

Judy Rae Carbaugh lives at 1602 Military. She noticed a 1962 beige Ford automobile with four boys in it going around the block several times and then stopping at a florist shop across the street from her house. She noted the license number of the car and noticed that three boys got out of the car. The car was driven away and then returned with another boy riding in the back seat. The car was stopped in the same place and the two boys then in the car kept looking to the west. After several minutes two boys came running down the street from the west. One boy had on a maroon shirt and the other appeared to have on a blue shirt. She heard one of the boys say, "We have got to get out of here." The car picked up the two boys who had been running and they drove north on Military.

Shortly thereafter, the car was found by the police at 45th and Grant, approximately 7 or 8 blocks from 43rd and Seward. A latent fingerprint on the right

front wing vent window was identified as that of the defendant.

Marshall Henderson testified that he, the defendant, and two other boys had been to see the probation officer at about noon on June 19, 1974. After they had been to see the probation officer they drove in Martin Mitchell's car, the 1962 beige Ford automobile identified by Mrs. Carbaugh, to about 45th and Seward Streets. Martin Mitchell was driving and the defendant was riding on the right side in the front seat.

When the car was stopped, Mitchell and the defendant got out of the car and went down the street in the opposite direction or behind the car. They were gone about 5 minutes and then came back in "kind of" a hurry. The defendant got back in the front seat on the right side and they drove away. They stopped the car at 45th and Grant when they heard a siren. They got out of the car and then went to Lake Street.

The issue in this case is identification. The record shows without dispute that a robbery occurred. The question is whether the evidence was sufficient to support a finding beyond a reasonable doubt that the defendant was one of the participants. The identification evidence is largely circumstantial. There was no direct positive identification of the defendant by any of the witnesses other than Henderson.

Circumstantial evidence is sufficient to sustain a finding of guilty if it is substantial. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the evidence is sufficient to sustain a finding of guilty.

The evidence in this case placed the defendant in the Mitchell automobile near the scene of the crime at about the time the robbery was committed. The defendant and another boy left the automobile and returned about 5 minutes later in kind of a hurry. The testimony of Mrs. Peterson, Mrs. Muir, and Mrs. Carbaugh will sus-

tain a finding that the boys who committed the robbery returned to the Mitchell car which was then driven away.

There was a slight conflict in the testimony of Mrs. Carbaugh and Henderson as to the location of the Mitchell car when the boys were picked up after the robbery. This was a matter to be resolved by the trier of fact.

The evidence was sufficient to sustain a finding that the defendant was one of the participants in the robbery.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. CHARLES MCCLELLAND, APPELLANT.

233 N. W. 2d 786

Filed October 16, 1975. Nos. 39953, 39954.

1. **Post Conviction: Trial: Evidence.** In a post conviction proceeding the petitioner has the burden of establishing a basis for relief.
2. **Appeal and Error.** The findings of the trial court on conflicting evidence will not be disturbed on appeal unless clearly wrong.

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

J. William Gallup, for appellant.

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

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

NEWTON, J.

The defendant was charged in two cases with first degree murder and plead guilty on December 22, 1948,

to two charges of second degree murder. He received two life sentences. In this post conviction proceeding he asserts that the guilty pleas were induced by fraudulent representations, were not supported by corroborative evidence, and that evidence favorable to him was suppressed. The defendant was at all times represented by competent counsel. We affirm the judgment of the District Court.

Examination of the voluminous record supports the judgment of the trial court. The defendant gave several confessions of guilt to the county attorney. The earlier confessions contained statements which sometimes varied from the known facts, but in a letter later written to the Attorney General on June 15, 1949, he admitted guilt and stated that he had given "several wild stories." In any event, his later confessions did agree with the known facts. The defendant attempts to explain this situation by saying he was innocent but amended his statements as he learned the facts from the officers involved. There is nothing in the record to corroborate his evidence in this respect.

In addition to the confessions given the authorities, the record discloses numerous letters written by defendant to relatives, friends, and others, both before and after his conviction, admitting guilt. It appears that defendant was determined to plead guilty as one of his attorneys testified that he would not cooperate with his attorneys but did with the county attorney. In one instance he indicated to his attorneys that he had an alibi. This was thoroughly investigated and eventually found to be nonexistent. Also, in one letter he subsequently admitted that his alibi story was false.

A bullet was found in one of the victims which was too badly deformed to permit positive identification of its caliber but it was the opinion of F.B.I. experts that it was a .41 caliber bullet from an old style rimfire shell not using smokeless powder and possibly fired from a derringer. Similar shells were found in defendant's

possession but the gun used was never recovered. A witness was available who had laundered defendant's clothing soon after the killings and was positive there was blood on them. Defendant's jacket, obtained at the time of his arrest sometime after the murders, was ascertained to have human blood on it but due to the passage of time, it could not be type-matched with the victims. Two witnesses were available who placed defendant in the general area on the day of the crime. Finger and palm-prints in the victims' automobile did not match defendant's. A lock of hair found caught in a ring of one of the victims did not match the color of defendant's hair. The evidence is conflicting as to whether the defense attorneys were aware of all these facts but it is clear that they knew about the lock of hair, the falsity of the alibi, and that the prosecution had a bullet and a blood-stained jacket. Whether they had knowledge of the prints in the automobile, or evidence placing defendant in the area at the time of the crime, is disputed. However, the defense attorney who testified said the defendant convinced him of his guilt; told him that he had an accomplice with blond hair such as was found in the victim's ring; and that defendant insisted on pleading guilty. Similar corroborative statements regarding the hair and an accomplice is present in other statements and letters of the defendant. The deputy county attorney in charge of the investigation testified that the State's entire file on the case was made available to the principal defense attorney.

The evidence is such that the trial court may well and reasonably could have found that defendant and his attorneys were in no way deluded as to the nature of the evidence against the defendant, the voluntariness of his pleas, or his guilt. In fact, a defense attorney stated the pleas were voluntary and that he was convinced of defendant's guilt.

In a post conviction proceeding the petitioner has the burden of establishing a basis for relief. See State v.

Fusby, 188 Neb. 139, 195 N. W. 2d 495. "The findings of the trial court on conflicting evidence will not be disturbed on appeal unless clearly wrong." Prudential Ins. Co. v. Holliday, 191 Neb. 144, 214 N. W. 2d 273.

The record discloses that the defendant's guilt is clear and that his pleas were voluntarily entered at his own insistence. His contention that he was deceived, threatened, and that evidence was suppressed is not established. We find that the judgment of the District Court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY BOYCE, APPELLANT.
233 N. W. 2d 912

Filed October 16, 1975. No. 39961.

1. **Criminal Law: Time: Continuances.** An application for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion.
2. **Criminal Law: Prosecuting Attorneys: Trial.** Where a county attorney has a disqualifying personal interest in obtaining an acquittal or conviction, a special prosecutor should be appointed to conduct the criminal prosecution.

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

Dennis E. Koley, for appellant.

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

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

MCCOWN, J.

The defendant, Billy Boyce, was charged with unlawfully taking away, holding, or imprisoning a police of-

ficer against his will for the purpose of compelling the performance of an act by such officer, in violation of the kidnapping statute, section 28-417, R. S. Supp., 1974. The defendant was found guilty by a jury and was sentenced to a term of 5 to 15 years imprisonment.

The facts involved are fully set out in the case of State v. Saltzman, *ante* p. 525, 233 N. W. 2d 914. Some of the issues are disposed of in State v. Saltzman, and are controlling here as to those issues. The defendant Boyce raises additional issues for determination.

Boyce first contends that the District Court erred in overruling his motion for a continuance of the trial. The offense charged occurred on October 27, 1974. Counsel was appointed to represent Boyce on October 28, 1974. Preliminary hearing was held on November 15, 1974. The defendant was arraigned and pleaded not guilty on November 18, 1974, and at that time jury trial was set for November 25, 1974, 1 week later. On November 21, 1974, the defendant filed his motion for continuance. The motion requested a continuance to January 1975, "so that defendant's counsel can effectively prepare a defense." The motion was denied and trial proceeded on November 25, 1974. By that time the defendant's counsel had been appointed and acting for approximately 1 month. There was no showing that any witnesses were unavailable or had not been interviewed, nor that the defense would be prejudiced in any specific item of trial defense. The basic complaint was simply the general shortness of time for preparation.

An application for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Newton, 193 Neb. 129, 225 N. W. 2d 562. The time between arraignment and trial here was shorter than usual, and a reasonable extension of time might well have been a proper exercise of discretion. Nevertheless, the defendant must also show that his rights were prejudiced by the failure of

the court to grant a continuance. See State v. Woods, 182 Neb. 668, 156 N. W. 2d 786. No satisfactory showing was made here and we cannot say that the denial of the continuance was a clear abuse of discretion.

Boyce also contends that the court erred in overruling defendant's motion for appointment of a special prosecutor. He contends that the county attorney was personally involved and had a personal interest in convicting the defendants, and that the failure to relieve the county attorney and appoint a special prosecutor denied the defendant the right to a fair and impartial trial. A prosecuting attorney who has a personal interest in obtaining an acquittal or conviction may be disqualified. Where he is the actual victim of the alleged crime, or his property is the subject of it, the cases generally find him to be disqualified. The basis for the rule is that where the county attorney is, in effect, an injured party, he has a personal interest in securing a conviction and therefore can no longer be disinterested and impartial in seeking equal justice in the public interest only. See, State v. Cox, 246 La. 748, 167 So. 2d 352; People v. Krstovich, 338 N. Y. Supp. 2d 132, 72 Misc. 2d 90.

In Ress v. Shepherd, 84 Neb. 268, 120 N. W. 1132, this court said: "The county attorney is the public prosecutor, and his office is quasi judicial. In the discharge of the functions of that office he is called upon to exercise a sound discretion to distinguish between the guilty and the innocent, and to refrain from prosecuting those persons whose guilt is so doubtful that in his judgment justice will not be subserved by prosecutions, and there should not be anything in the way of private interest to possibly sway that judgment or to tempt him to depart from a disinterested and conscientious discharge of his duty." See, also, Stewart v. McCauley, 178 Neb. 412, 133 N. W. 2d 921.

Boyce contends that the county attorney was the injured party in this kidnapping offense because the defendants committed the offense with the *intention* of

committing a subsequent and different crime against the person of the county attorney. The subsequent intended crime was never committed however. The county attorney was not an injured party in the kidnapping offense charged simply because he was the intended victim of a subsequent intended crime which was never committed. Although the county attorney would have been justified in disqualifying himself, he was not disqualified as a matter of law. There is no showing or claim that any action of the county attorney in the trial of the case was not fair and impartial. Under the circumstances here, the District Court did not err in overruling the motion for appointment of a special prosecutor.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY MAC PURVIANCE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. LEE CHARLES BLODGETT, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. RANDY BRUCE BUCKLEY, APPELLANT.

233 N. W. 2d 788

Filed October 16, 1975. Nos. 40005, 40006, 40007.

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.

Appeals from the District Court for Sioux County: ROBERT R. MORAN, Judge. Affirmed.

Robert L. Gilbert, for appellants.

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

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

McCOWN, J.

The defendant, Terry Mac Purviance, pleaded guilty to burglary. The defendant, Lee Charles Blodgett, pleaded guilty to receiving stolen property. The defendant, Randy Bruce Buckley, pleaded guilty to grand larceny. Each of the defendants was sentenced to 1 year imprisonment. The cases were consolidated on appeal to this court. The cases were all based on the same factual occurrence and each defendant contends only that his sentence is excessive and that probation should have been granted.

The record in these cases shows that the three defendants were riding around the countryside in Blodgett's car on the night of November 22, 1974. They saw a man, who was reputed to keep large sums of money in his farmhouse, leave the house to go to work. The defendants decided that Purviance and Buckley would break into the farmhouse while Blodgett remained in the car. The two pried the lock off the door, broke into the house, and took $1,000 in currency which they found in a can in the refrigerator, and they also took a shotgun and shells, a bridle and spurs, and various tools. When Purviance and Buckley returned from the house, they gave Blodgett $200 of the stolen currency and divided the rest. Purviance retained the items of personal property in addition to his share of the currency.

The defendant Purviance was 22 years of age, had a high school education, was married, and had five dependents. He had no prior criminal record except for one charge, which had been dismissed. The defendant Blodgett was 22 years of age, had a ninth grade education, was married, and had one child. He had one prior felony conviction and two misdemeanor convictions. The defendant Buckley was 19 years old, had

completed high school, and was single. He had two misdemeanor convictions but no felony record.

The court, at the time of sentencing, determined that so far as culpability was concerned, the defendants were all equally at fault. The trial judge also felt that all three of the defendants very likely would successfully complete a probationary term. He also determined that breaking into a farm home under the circumstances here was a serious offense, and that a sentence of probation would depreciate the seriousness of the crime and would promote disrespect for the law. The sentence of each defendant was 1 year imprisonment, the minimum sentence for each of the offenses.

The defendants each contend that his sentence is excessive and that he should have been placed on probation rather than to receive any sentence of imprisonment.

The court in sentencing these defendants specifically stated his approval of probation wherever it might be justified and effective, as well as indicating his belief that the three defendants here would be likely to complete successfully a probationary term. He also specifically found however that the granting of probation in these cases would tend to depreciate the seriousness of the offense and promote disrespect for law among the public. That is a specific statutory reason authorizing the imposition of imprisonment rather than probation. § 29-2260(2)(c), R. S. Supp., 1974. We cannot say that finding is wrong.

Inevitably there are cases in which the decision to grant or not to grant probation is one of delicate balance and in those cases the judicial discretion of the trial court should be accorded great weight. 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, 192 Neb. 641, 223 N. W. 2d 490. We cannot say that the trial court abused its discretion here.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST YOUNG, APPELLANT.

234 N. W. 2d 196

Filed October 16, 1975. No. 40017.

1. **Juries: Constitutional Law: Criminal Law.** The guarantee of a jury trial contained in the Sixth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment does not apply to petty offenses. Offenses for which the possible penalty does not exceed 6 months are classified as petty.
2. ———: ———: ———. The purpose of the provision of Article I, section 6, of the Nebraska Constitution, providing that the "right of trial by jury shall remain inviolate" was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. The constitutional right to a trial by jury under the Nebraska Constitution does not apply to a charge of second offense drunk driving because it is a misdemeanor, not recognized by the common law or any statute in existence when the Nebraska Constitution was adopted.
3. **Juries: Appeal and Error: Criminal Law: Courts.** A defendant in a criminal case prosecuted in the municipal or county court is not, upon trial of his appeal to the District Court under the provisions of section 29-613, R. S. Supp., 1974, entitled to have the facts again determined by a jury.

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

Ralph R. Bremers, for appellant.

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

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

CLINTON, J.

The sole question in this case is whether the defendant, who was found guilty by a jury in the municipal court of Douglas County on a charge of second offense drunken driving, was, upon appeal to the District Court, en-

titled to a jury trial in that court. He argues that the Constitution of the United States, the Constitution of the State of Nebraska, and a proper interpretation of the pertinent statutes of the State of Nebraska entitle him to have a jury determine the facts a second time.

Insofar as the defendant's position is founded upon claims of constitutional right, his contentions must be answered negatively if he was not entitled under those Constitutions to a jury trial even in the first instance.

We will first deal with the question as it relates to the Constitution of the United States. In Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, the Supreme Court of the United States held that: "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." In that opinion the court noted: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, Cheff v. Schnackenberg, 384 U. S. 373 (1966)."

The United States Supreme Court has long held: ". . . in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose," a jury trial is not required. Callan v. Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. Ed. 223. See, also, Codispoti v. Pennsylvania, 418 U. S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912. In the latter case the court said that since Duncan v. Louisiana, *supra*: ". . . our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." Codispoti v. Pennsylvania, *supra*.

The maximum penalty which may be imposed for

second offense drunk driving is 3 months. § 39-669.07(2), R. R. S. 1943. The defendant was not entitled to a jury trial under the provisions of the Sixth Amendment to the Constitution of the United States.

Article I, section 6, of the Nebraska Constitution, provides: "The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court." In Bell v. State, 104 Neb. 203, 176 N. W. 544, we held: "The purpose of this provision was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. At that time the misdemeanors now under consideration were not recognized by the common law or by any statute then in existence. New misdemeanors and modes of trial therefor are proper subjects of legislation. The better view seems to be that the legislature acted within its powers in declaring possession and transportation of intoxicating liquors to be misdemeanors, and in providing for the trial of violators of the law before magistrates and police courts without a jury where the penalty does not exceed a fine of $100 or imprisonment for three months." In State v. Hauser, 137 Neb. 138, 288 N. W. 518, we noted that it was "clearly within the province of the legislature to authorize the addition of petty offenses to certain classes of subjects previously triable without a jury." In State v. Amick, 173 Neb. 770, 114 N. W. 2d 893, this court held that a prosecution under a city ordinance for drunk driving, where the maximum penalty for the offense was 6 months' imprisonment and the loss of driving privileges, was a petty offense "placing it outside the constitutional right to a trial by jury." We cited District of Columbia v. Clawans, 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843. The defendant was not entitled to a jury trial under the Nebraska Constitution.

We now examine the claim of a statutory right to a jury trial upon appeal to the District Court. Under the

appellate procedures existing prior to the adoption of L.B. 1032, Laws 1972, p. 333, effective January 4, 1973, the defendant was entitled to a jury trial upon appeal to the District Court. See, §§ 29-603 and 29-613, R. R. S. 1943, Vol. 2A, Reissue of 1964; State v. Hauser, *supra.* Section 29-603, R. R. S. 1943, was repealed by L.B. 1032, section 287. See § 29-603, R. S. Supp., 1974. Section 29-613, R. R. S. 1943, was amended by L.B. 1032, section 169. See § 29-613, R. S. Supp., 1974. Section 29-603, R. R. S. 1943, expressly granted a jury trial in the county court and the justice court just as L.B. 1032 grants the right to a jury trial in the county court and municipal court. See § 24-536, R. S. Supp., 1974. Section 29-613, R. R. S. 1943, prior to amendment, clearly provided for a jury trial on appeal as well, for it stated: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint." It further provided that if a complaint was defective, a new complaint could be filed in the appellate court and "the case shall proceed thereon the same in all respects as if the original complaint had not been set aside." This statute and other comparable statutes, to wit, section 18-203, R. R. S. 1943 (also repealed by L.B. 1032), contemplated trial de novo upon appeal in the same manner as if the case had originated in the appellate court, and it was so held in State v. Hauser, *supra.* Section 29-613 as amended provides: "The district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial." § 29-613, R. S. Supp., 1974. It seems clear to us that the Legislature intended to and did eliminate the statutory right to a jury trial upon appeal to the District Court from the county and municipal courts.

The case of Rothweiler v. Superior Court of Pima County, 100 Ariz. 37, 410 P. 2d 479, upon which the de-

fendant relies, is not on point under our interpretation of our own constitutional provision and under the provisions of our statutes. The opinion in that case, which held that the defendant was entitled to a jury trial both in the city court and in the Superior Court upon appeal, turned upon the Arizona court's determination under its own Constitution that the charge of drunk driving was a serious and not merely a petty offense and upon "practical construction of the state statutes relating to trial by jury in courts not of record." The court then went on to hold that "since the matter must be tried de novo on appeal, [the defendant] is entitled to a jury trial in the Superior Court."

None of the defendant's positions are well founded.

AFFIRMED.

NEWTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ANTONIO ALMIO LARAVIE, APPELLANT.

233 N. W. 2d 789

Filed October 16, 1975. No. 40021.

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

Leo M. Williams, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

McCOWN, J.

The defendant was charged with first degree murder and pleaded guilty to a reduced charge of second degree

murder. The conviction was affirmed by this court but remanded for resentencing. The District Court resentenced the defendant to life imprisonment and the case is once more here on appeal from that sentence. The only question involved in this appeal is whether the sentence is excessive.

The facts are set out in State v. Laravie, 192 Neb. 625, 223 N. W. 2d 435. The crime was a vicious one in which the defendant broke into a residence at night, stabbed a 2½-year-old child in the chest, and killed him. The trial court at the resentencing hearing specifically found the crime involved to be a heinous crime, and that the defendant was a dangerous offender.

The record overwhelmingly supports the action of the trial court. The only possible mitigating factor is the defendant's age. He was 15 years old at the time of the commission of the crime and 16 years old at the time of resentencing, and had an eighth grade education. The defendant's record of offenses contains 42 entries over a period of 6 years. His first listed offense was threatening three children with a knife when he was 9 years old. The final offense listed is the murder involved here. Between the two is a continuous, almost uninterrupted series of offenses, some minor and some serious. At the age of 15, several years of his life had already been spent in juvenile correctional institutions. The psychological evaluation fully confirmed the court's finding that he was a dangerous offender. The doctor who testified as a witness for the defendant stated that he did not think it would be safe for the defendant to go at large.

In spite of the defendant's youth, the record here fully supports the action of the District Court in finding the defendant to be a dangerous offender and in imposing a maximum sentence of life imprisonment. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State

v. Ralls, 192 Neb. 621, 223 N. W. 2d 432. There was no abuse of discretion here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD J. SKONBERG, APPELLANT.

233 N. W. 2d 919

Filed October 23, 1975. No. 39809.

1. **Searches and Seizures: Constitutional Law: Criminal Law: Police Officers and Sheriffs.** The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons.
2. **Searches and Seizures: Criminal Law: Trial: Evidence.** The existence and voluntariness of a consent to search is a question of fact.

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

Frank B. Morrison and Joseph F. Bataillon, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction and sentence for possession of marijuana with intent to deliver. The assignments of error relate to the ruling of the trial court on the defendant's motion to suppress evidence which was discovered through a search of his luggage.

The defendant purchased an airline ticket to Minneapolis at the Omaha airport on the morning of May 17, 1974. At that time he checked two suitcases at the ticket counter which were then placed in a baggage

room. A senior passenger agent for the airline who handled the suitcases noticed the smell of marijuana about them and opened one of the cases in the baggage room. He found a plastic bag containing about 4 pounds of marijuana in the first suitcase. He then called the police who arrested the defendant, and took the defendant to the baggage room where the second suitcase was opened by the police. A plastic bag containing about 16 pounds of marijuana was found in the second suitcase.

The airline senior passenger agent who opened and searched the first suitcase was not a law enforcement officer. The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons. State v. Gundlach, 192 Neb. 692, 224 N. W. 2d 167. See, also, United States v. Issod (7th Cir.), 508 F. 2d 990. So far as the search of the first suitcase was concerned the motion to suppress was without merit.

The police officer who arrested the defendant and later opened the second suitcase testified, "We asked the party at that time if we could open it, and he said, yeah. He said that he didn't have a key, that we would have to pry it open." The defendant did not testify but there was other testimony which raised some question as to whether the defendant had consented to the search of the second suitcase.

The existence and voluntariness of a consent to search is a question of fact. State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85. The evidence presented a question of fact as to consent which the trial court resolved against the defendant. The finding was not clearly wrong and was sustained by the testimony of the police officer. The motion to suppress was properly overruled.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JESSIE BROWN, APPELLANT.

233 N. W. 2d 923

Filed October 23, 1975. No. 39847.

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

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

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

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

BRODKEY, J.

The defendant, Jessie Brown, was convicted in the District Court for Douglas County, Nebraska, of the offense of possession of a controlled substance with intent to deliver, and was sentenced to the custody of the Director of the Department of Correctional Services for a term of 10 years. He has appealed his conviction and sentence to this court, assigning as error that certain evidence received in the trial of his case to the court, to wit, heroin, which had been obtained by the Omaha police department in a search of the premises at 1538 North 18th Street, Omaha, Nebraska, pursuant to a search warrant, was obtained in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and therefore the trial court erred in overruling defendant's motion to suppress the evidence, and in denying defendant's motion for a new trial. Specifically, defendant attacks the validity of the search warrant involved in the search by the police, and the sufficiency of the affidavit which was the basis for the issuance of the search warrant. We affirm.

This is a companion case to State v. Graves and State v. Roach, 193 Neb. 797, 229 N. W. 2d 538 (1975), and the

operative facts in all these cases are substantially the same. Defendant was arrested at the same time and place as Gizelle Pearle Graves and Donald Lee Roach, all of whom were found in the premises at 1538 North 18th Street during the search of those premises by the police. The evidence seized at the time of the arrest was used against them, as well as against the defendant Brown. All three individuals were subsequently charged with the offense of possession of a controlled substance with intent to deliver, but subsequently the charges against Graves and Roach were reduced and they were charged only with the offense of possession of a controlled substance. The three cases were originally consolidated for trial but the court later entered a severance, and the cases were tried separately. All three defendants were convicted, and appealed to this court. The cases of State v. Graves and State v. Roach, *supra,* have already been appealed and decided. In their consolidated appeals, Roach and Graves made the same arguments challenging the sufficiency of this very same affidavit. In an opinion by Spencer, J., this court rejected Graves' and Roach's attacks on the affidavit, and sustained their convictions. The affidavit in question is set out in the opinion in State v. Graves and Roach, *supra,* and will not be repeated here. That opinion is controlling in this case.

Since this court has already upheld the sufficiency of the affidavit in question, there is no reason to reach a different result in this case. Defendant's conviction must be affirmed.

AFFIRMED.

WHITE, C. J., not participating.

McCOWN, J., dissenting.

See my dissent in State v. Graves and State v. Roach, 193 Neb. 797, 229 N. W. 2d 538.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. BELL, APPELLANT.

233 N. W. 2d 920

Filed October 23, 1975. No. 39943.

1. **Criminal Law: Trial: Instructions.** In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses.
2. **Criminal Law: Robbery: Larceny: Words and Phrases.** A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, and escape with the loot is as important in the commission of the crime as gaining possession of the property.
3. **Criminal Law: Robbery.** If one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, the crime of robbery has been committed.

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

Quintin S. Hughes, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

NEWTON, J.

Defendant was convicted of robbery. The evidence shows that he entered a filling station, picked up the cash register when the attendant's back was turned, and made off with it. He was pursued by the attendant, threw the cash register in an automobile driven by a companion, and leaped in. The pursuing attendant tried to get the cash register by reaching through an open window, was struck and pushed by the defendant, and finally fell from the moving car.

Defendant assigns as error the failure of the court to

instruct on the lesser included offense of larceny from the person and the refusal to direct a verdict because the taking was not accomplished with force, violence, or putting in fear. We affirm the judgment of the District Court.

There was no request for an instruction on a lesser included offense. This assignment must fail. "In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses." State v. Maxwell, 193 Neb. 807, 229 N. W. 2d 195. See, also, State v. Warner, 187 Neb. 335, 190 N. W. 2d 786.

The second assignment of error presents a proposition on which the authorities are divided. We have said, in regard to larceny: " 'Any removal of the property, after the same is under the *complete control of the taker,* from the spot where found, with the requisite intent of the taker to steal, is a sufficient asportation * * *.' " (Emphasis supplied.) Daugherty v. State, 154 Neb. 376, 48 N. W. 2d 76. The precise point presented in connection with robbery has not previously been presented in this jurisdiction. The primary question would appear to be in regard to when the taking had been accomplished or completed. Can it be said that "the taking" is no longer in process when a struggle is in progress for possession of the stolen property? Or is the struggle for possession an essential part of the taking? Here the defendant was intercepted before he could make good his escape with the stolen property. Until he did escape with it, although there was a taking, it was not completed.

In People v. Kennedy, 10 Ill. App. 3d 519, 294 N. E. 2d 788, defendant removed money from the safe in a filling station; the attendant attempted to recover the money and was assaulted. It was held to be robbery and the court stated: "The record is clear that force was used to complete the taking of the money from the possession and custody of its custodian, and was a means used to accomplish such taking. * * * while the taking

may be without force, the offense is robbery if the departure with the property is accomplished by the use of force."

In People v. Anderson, 64 Cal. 2d 633, 51 Cal. Rptr. 238, 414 P. 2d 366, it was held: "In this state, it is settled that a robbery is not completed at the moment the robber obtains possession of the stolen property and that the crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. * * *

"Accordingly, if one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, as defendant did here, the crime of robbery has been committed." See, also, People v. Sanders, 28 Mich. App. 274, 184 N. W. 2d 269; Durham v. Commonwealth, 214 Va. 166, 198 S. E. 2d 603.

We conclude that the record does show the use of force during the taking of the cash register and the judgment of the District Court is correct.

AFFIRMED.

CLINTON, J., concurs in the result.

McCOWN, J., dissenting.

Some important factual elements are not fully reflected in the majority opinion. The defendant took the cash register from the service station salesroom when no one else was in the room. At that time the service station attendant was some 50 feet away in a service bay installing a battery in a car. The defendant carried the small cash register out of the service station, across the property, and into a driveway behind and off the service station property where he placed it in a car, and got in himself. The service station attendant saw the defendant leaving with the cash register, pursued him, but did not catch up until after the defendant and the cash register were already in the car. The station attendant attempted to get the cash register back and it was at

that point in attempting to keep the cash register and also escape that force and violence was used by the defendant.

2 Wharton's Criminal Law and Procedure, § 559, p. 264, provides: "When the defendant is able to take possession of the property without the use of force or fear but then employs force or fear in order to keep the property or to effect his escape, it is generally held that his offense is not robbery."

The general distinction between robbery and larceny is in whether the taking is by the use of fear and violence. In general the force and violence must be present at the time of the taking in order to constitute robbery. Force and violence used to keep the property or effect an escape does not generally sustain a charge of robbery. The decisions in many cases seem to be in confusion because of uncertainty as to when a taking is complete. See Annotation, 58 A. L. R. 656.

In Daughtery v. State, 154 Neb. 376, 48 N. W. 2d 76, this court, in a case of larceny, said: " 'Any removal of the property after the same is under the complete control of the taker, from the spot where found, with the requisite intent of the taker to steal, is a sufficient asportation * * *.' "

On the facts here the cash register was taken by the defendant without force or violence and was removed by the defendant from the building and taken entirely off the premises. At that time larceny was complete and the defendant had obtained possession and control of the stolen cash register. The force and violence used by the defendant to prevent the station attendant from retaking possession or interfering with the escape constituted a separate and distinct crime of assault, but it did not convert the original larceny into a robbery simply because violence was used in effecting an escape.

It is undisputed that larceny is a lesser included offense in the crime of robbery and it is equally clear that the defendant could have been charged with larceny and

a separate count of assault. The defendant would have been entitled to an instruction here that larceny is a lesser included offense in the crime of robbery had he asked for it. The fact that he failed to ask for it did not convert the larceny and assault into a robbery, nor make the evidence sufficient to sustain the conviction for robbery.

STAR K. PETERS, APPELLANT, V. RICHARD F. PETERS, APPELLEE.
233 N. W. 2d 924

Filed October 23, 1975. No. 39944.

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

Walter J. Matejka and William E. Pfeiffer, for appellant.

Russell S. Daub, for appellee.

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

SPENCER, J.

This was an action for dissolution of a marriage and for child custody. The marriage was dissolved; custody of the child was retained by the court with possession, control, and care given to the respondent, Richard F. Peters, subject to the supervision of the Douglas County conciliation court. The only issue presented by the appeal is whether the District Court erred in denying petitioner a new trial due to unusual circumstances surrounding a stipulation. We affirm.

The issue now presented was not assigned in petitioner's motion for a new trial. The evidence adduced on the motion for a new trial was specifically directed to the fact that petitioner had changed her mind that the marriage was irretrievably broken. She also wanted ad-

ditional visitation rights, as well as a Pontiac automobile.

It will serve no useful purpose to detail the evidence herein. The issue now briefed was not properly raised for presentation in this court. Even if it had been, we do not believe the trial court abused its discretion in refusing to grant a new trial.

From the record herein, we find the appeal to be frivolous. We affirm the judgment and tax the costs on appeal to the appellant, Star K. Peters.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOEL EVANS, APPELLANT.
234 N. W. 2d 199

Filed October 23, 1975. No. 39971.

1. **Criminal Law: Judges: Plea Bargains: Guilty Plea.** A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence.
2. ———: ———: ———: ———. It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice.
3. **Criminal Law: Judges: Plea Bargains: Guilty Plea: Sentencing.** In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty.

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

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

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

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

SPENCER, J.

This is an appeal from a burglary conviction on a nolo contendere plea entered pursuant to a plea bargain. The county attorney agreed to recommend a 6-month county jail sentence. Appellant-defendant received a 2 to 4 year term in the Nebraska Penal and Correctional Complex. His motion to withdraw his plea was overruled. Defendant alleges the court, in overruling his motion to withdraw his plea, abused its discretion, violated his right to the equal protection of the laws, and denied the due process of law guaranteed by the United States Constitution. We affirm.

When defendant entered his plea the trial court inquired whether there had been any plea bargaining. Counsel for defendant informed the court there had, and explained the agreement to the court. He then requested that the plea be entered with leave to withdraw it if the court chose not to honor the county attorney's recommendation of a county jail sentence. The court advised defendant and his counsel it would not be bound by any recommendations. It further advised defendant any plea made would be binding and if that was not the understanding of defendant and his counsel there should be no further proceedings on the plea. Defendant was then asked by his counsel if this was agreeable to him and he replied in the affirmative. The court then stated: "The only position I am taking, Mr. Evans, is that, as the Court, I am not going to be bound by such a recommendation. You are either guilty of a charge, or you are not. I am not saying it won't be considered, because it will. Certainly the recommendation of the County Attorney will be considered, as will the presentence investigation and anything else that is brought to the Court, either by your lawyer, or you.

Is that your understanding, Mr. Evans?" Defendant answered affirmatively.

At the sentencing the judge reviewed the defendant's presentence investigation with him. He asked the defendant if it was about right, and the defendant replied in the affirmative. The judge then stated the probation officer had recommended incarceration. He advised defendant he had taken note of the county attorney's recommendation but chose not to follow it. Defendant, who had a previous felony record, was then sentenced to 2 to 4 years in the Nebraska Penal and Correctional Complex.

Defendant, in his motion to withdraw his guilty plea, alleged he would not have pled guilty except for the plea bargain and that he entered his plea in reliance upon the plea bargain being honored. He further alleged that if it had not been for his prior felony conviction and a juvenile record, he would have sought a different plea bargain rather than one which involved county jail time.

This is not a situation where a plea bargain has been violated. The county attorney made the recommendation called for by the agreement. The judge declined to accept the recommendation. At the time of the plea defendant's counsel asked the trial court if the defendant would be permitted to withdraw his plea if the court chose not to honor the county attorney's recommendation. The court advised the parties such procedure was not acceptable to him and that any plea entered would be binding on the defendant. After being so advised, the defendant still chose to enter his plea. This was the proper procedure. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if he does not accept the county attorney's recommendation on sentence.

As defendant's counsel suggests, in State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763, we enunciated the following rule concerning pleas of guilty: "* * *

the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of such pleas." We have consistently adhered to this position and have set aside pleas where the ABA Standards were not followed.

The ABA Standards Relating to Pleas of Guilty cover the withdrawal of pleas. Section 2.1 of the Pleas of Guilty is as follows:

"2.1 Plea withdrawal.

"(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

"(i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.

"(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

"(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

"(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

"(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or

"(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

"(iii) The defendant may move for withdrawal of

his plea without alleging that he is innocent of the charge to which the plea has been entered.

"(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea."

It is evident that the defendant did not bring himself within the manifest injustice standard. The only reason we can deduce from his motion is that he expected the recommendation of the county attorney would be honored. He was specifically advised by the trial court that it would not be bound by the recommendation and that if he did plead guilty he would not be permitted to withdraw the plea.

The procedure followed herein comported fully with our interpretation of the ABA Standards Relating to Pleas of Guilty. Section 3.3 of the standards sets out the responsibilities of the trial judge. That section is as follows:

"3.3 Responsibilities of the trial judge.

"(a) The trial judge should not participate in plea discussions.

"(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the rep-

resentations made to him. If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions.

"(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8."

It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice. Definitely, it should never be done merely because the defendant would not have entered into a plea bargain if he had known the trial judge would not accept the sentence recommendation. To so hold is a violation of section 3.3 (c). Its effect would be to permit the defendant to bargain with the court on his sentence and make a mockery of the judicial function and the discretion which must be exercised by a trial judge.

In his brief defendant argues: "* * * the present state of affairs in the plea bargaining process in Nebraska, as clearly manifested by the instant case, is that the prosecutor can make a promise to the defendant, and then keep that promise 'so that it can be said to be part of the inducement or consideration' for the defendant's plea. Santobello v. New York, 404 U. S. 257, 262, 92 S. Ct. 495, 499 (1971). But with the bargain completed on both sides the defendant who enters his plea in part because of the prosecutor's promise or 'inducement' can have his expectations shattered by the trial court without being afforded a chance to withdraw his plea of the bargained-for performance."

In the area of sentencing the defendant should be

fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty.

It is true, as defendant argues, section 4.1 (c) of the ABA Standards Relating to the Function of the Trial Judge would permit the procedure contended for by him. We have not adopted the Standards Relating to the Function of the Trial Judge. We specifically disapprove of section 4.1 (c) of those standards insofar as it would permit the withdrawal of a guilty plea unless, as set out heretofore, withdrawal is necessary to correct a manifest injustice.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The defendant here contends that where a plea bargain agreement contemplates the approval or granting of sentence concessions by the trial court, and the court, after acceptance of the guilty plea, later decides to reject the sentence concessions contemplated by the plea bargain, the defendant should be given an opportunity to withdraw or affirm the guilty plea. The defendant contends also that the practice in the District Court varies in this regard. Some District Judges automatically grant a right to withdraw under such circumstances while others, as in the instant case, refuse it. The lack of uniformity results in an arbitrary and uneven administration of criminal justice. A defendant who pleads guilty before one judge may be permitted to withdraw his plea before sentence, while the same defendant before another judge under the same circumstances might be sentenced without an opportunity to withdraw a plea.

The majority opinion in responding to the defendant's contention first reaffirms the adoption by this court of

the ABA Standards Relating to Pleas of Guilty. Section 2.1(b) of those standards provides: "In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere *as a matter of right* once the plea has been accepted by the court. *Before sentence,* the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." (Emphasis supplied.)

The majority opinion now holds that it is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice, and also holds that a trial judge should not enter into an agreement in advance that the defendant *will be* permitted to withdraw his plea if the court does not accept the recommendation on the sentence. The opinion completely ignores the second sentence of section 2.1(b) of the ABA Standards, without any attempt to limit or overrule it, and after having first reaffirmed the complete standards. Neither does the opinion define what will constitute a manifest injustice sufficient to authorize withdrawal of the plea as a matter of right. The present opinion will emphasize and enlarge the disparity of treatment resulting from the differing attitudes of the individual trial judges, rather than provide a uniform and fair rule for the acceptance or rejection of plea bargains contemplating specific sentencing concessions.

There can be no real doubt that the rules permitting a defendant to affirm or withdraw a plea of guilty if the court determines to reject the sentence concessions contemplated by a plea bargain have developed from experience and practice and a desire to provide a more even-handed administration of justice. Such rules are now in effect in a majority of the jurisdictions which recognize plea discussions and plea agreements as an

appropriate part of the administration of criminal justice. The majority opinion acknowledges that section 4.1(c) of the ABA Standards Relating to the Function of the Trial Judge specifically mandates the granting of a right of withdrawal under circumstances such as those present here. This court, however, discards the rule on the basis that the Standards Relating to the Function of the Trial Judge have not yet been adopted in Nebraska, and are therefore not binding on this court.

It should be pointed out also that the American Law Institute adopted the final draft of the Model Code of Pre-Arraignment Procedure in May 1975. Section 350.6 of that code provides in part: "If at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided for in a plea agreement between the parties, the court shall inform the defendant of that fact and shall inform the defendant that the court will entertain a motion to withdraw the plea."

The Federal Rules of Criminal Procedure have also been amended, one portion effective August 1, 1975, and the remainder effective December 1, 1975. Rule 11 of the Federal Rules of Criminal Procedure, as amended, continues to provide that the court shall not participate in any plea bargain discussions. Rule 11, subsections (e)(2), (e)(3), and (e)(4), now provides:

"(2) If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

"(3) If the court accepts the plea agreement, the court shall inform the defendant that it will embody in

the judgment and sentence the disposition provided for in the plea agreement.

"(4) If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

Some courts have adopted rules requiring an opportunity for withdrawal of a guilty plea under the circumstances present here, simply on the strength of having adopted the ABA Standards Relating to Pleas of Guilty. See, State v. Wolske, 280 Minn. 465, 160 N. W. 2d 146; State v. Loyd, 291 Minn. 528, 190 N. W. 2d 123. Other courts have relied on Standards Relating to the Function of the Trial Judge. State v. Fisher, 223 N. W. 2d 243 (Iowa, 1974).

It is noteworthy that not one case is cited in support of the majority holding here. It is difficult to understand the reluctance of the court to accept a rule which all federal courts and an overwhelming majority of all state courts already follow. We are cited to no state court which recognizes plea discussions and plea agreements as an appropriate part of the administration of criminal justice which has refused to follow the rule since Santobello v. New York, 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). The majority opinion here is a step backward in the continuing search for even-handed justice.

STATE OF NEBRASKA, APPELLEE, V. JOHN MICHAEL MCFARLAND, APPELLANT.

234 N. W. 2d 204

Filed October 23, 1975. No. 40011.

Criminal Law: Larceny: Trial: Evidence. When the evidence is insufficient to establish a taking of property or the ownership of such property, a charge of larceny should be dismissed.

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

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

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

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

KUNS, Retired District Judge.

The appellant was charged with petty larceny. It was alleged that he had stolen a roll of speaker wire from Richman-Gordman, on September 18, 1974. He was tried in the municipal court of Omaha, Nebraska. At the conclusion of the evidence for the prosecution, appellant moved for dismissal of the charge for the reason that the evidence was insufficient to establish said charge. The motion was overruled, appellant offered no further evidence, and sentence was imposed. An appeal was taken to the District Court for Douglas County and the judgment of the municipal court was affirmed. This appeal followed. We reverse.

Evidence was taken from one witness, Kevin P. Nelson, security officer for Richman-Gordman. Nelson testified that he saw appellant in possession of a roll of speaker wire which appellant placed in a hip pocket. The wire was similar to other rolls offered for sale in the hardware department of that store, but Nelson had not seen

appellant in the hardware department and did not know how he came into possession of the wire. The roll did not have a Richman-Gordman tag at the time it was taken from appellant. No other evidence was given on the subject of the taking or the ownership of the property.

It is an essential element of the crime of larceny that the State must establish beyond a reasonable doubt that the accused took property from the owner thereof. The evidence previously summarized is completely insufficient to show a taking by the accused, either directly or circumstantially, or to establish that the roll of wire was the property of Richman-Gordman. Appellant's motion to dismiss should have been sustained.

The order of the District Court is reversed and the charge against appellant is ordered to be dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD COUNTRY, APPELLANT.

234 N. W. 2d 593

Filed October 23, 1975. No. 40014.

Criminal Law: Statutes: Sentences. 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. The above principle does not apply, however, where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crimes, and where the new statute, taken as a whole, may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively.

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

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

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

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

CLINTON, J.

The issue in this case is whether the doctrine enunciated in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, that 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, applies to require reduction of a sentence imposed for conviction of the crime of rape under section 28-408, R. S. Supp., 1974. The question arises because of the enactment of L.B. 23, Laws 1975, p. 92, which redefined most nonconsensual sexual crimes and placed them in two categories of sexual assault.

The defendant entered a plea of nolo contendere to a charge of forcible rape and, as part of a bargain in connection with said plea, a second count charging him with being an habitual criminal was dismissed. The trial judge imposed a sentence of 10 to 30 years in the Nebraska Penal and Correctional Complex. After his conviction and sentence and while this appeal was pending, L.B. 23 was enacted. The defendant appeals and asserts that the sentence is excessive and seeks the benefit of the doctrine announced in Randolph. If Randolph applies in this case, the maximum effective penalty which could be imposed would be 8⅓ to 25 years.

The doctrine of Randolph is founded upon the premise that where the Legislature amends a statute to ameliorate the penalty for a crime, it is the legislative intent that the lesser penalties apply in all cases where the judgment is not final, including cases on appeal.

Accordingly, our inquiry here should be to determine

whether we can garner from a review of the statutes a legislative intent to ameliorate the penalty for rape under L.B. 23, or whether a different intention seems to be indicated.

For the following reasons which we develop more fully later in this opinion we conclude that Randolph ought not to be applied in the case of L.B. 23. The first is that L.B. 23 is not merely an amendatory act changing the penalty for a particular offense. It defines new crimes. Secondly, the new statute contains requirements in connection with the determination of punishment which incline us to the view that the Legislature did not contemplate retroactive application to convictions under former statutes. Thirdly, the primary legislative purpose in the enactment of L.B. 23 was not the reduction of penalties. The reduction was simply a part of the general overhaul of the statutes on sexual crimes. Fourthly, where, as here, a charge of being an habitual criminal was dismissed as a part of a plea bargain, it would be unfair to the State to apply Randolph because both the State and the defendant made the bargain in light of the penalty for rape as it existed at the time the bargain was made.

L.B. 23 repealed sections 28-407, R. R. S. 1943, and 28-408, R. S. Supp., 1974, and amended section 28-409, R. R. S. 1943. Section 28-407, R. R. S. 1943, defined the crime of rape against a sister or daughter and provided for a term of life imprisonment. Section 28-408, R. S. Supp., 1974, defined common law and statutory rape and provided for a penalty of imprisonment for not more than 50 nor less than 3 years. L.B. 23 also eliminated from section 28-409, R. R. S. 1943, the crime of assault with intent to commit rape, the prescribed penalty for which was not more than 15 nor less than 2 years.

L.B. 23 defines two crimes: Sexual assault in the first degree and sexual assault in the second degree. Sexual assault in the first degree includes within the scope of its definition rape, forcible sodomy, and statutory rape,

as well as other forms of sexual assault not heretofore defined by our statutes. § 28-408.03 (1), R. S. Supp., 1975. Sexual assault in the second degree includes within its definition assault with intent to commit rape and other sexual assaults, some of which could have been prosecuted formerly only as simple assault and battery. § 28-408.04(1), R. S. Supp., 1975.

The section of L.B. 23 defining the new crime of sexual assault in the first degree imposes a penalty of not less than 1 and not more than 25 years and requires that in determining the punishment for this crime the judge shall consider "whether the actor shall have caused serious personal injury to the victim." § 28-408.03(2), R. S. Supp., 1975. The section of L.B. 23 defining sexual assault in the second degree limits punishment to 1 year unless "the actor shall have caused serious personal injury to the victim." § 28-408.04(2), R. S. Supp., 1975. Under the provisions of the former statutes defining rape and assault with intent to commit rape, the punishment depended upon no such considerations.

The record before us discloses none of the details of the commission of the crime in question. It cannot be determined from the record before us whether or not serious personal injury, as that term is defined by L.B. 23, has occurred. This may in part, of course, be because of the nature of the plea entered.

It seems to us that the provisions relating to the determination of punishment make it necessary that before a judge can, on a plea of guilty or nolo contendere, determine a sentence he must in some manner determine the fact and extent of the serious personal injury inflicted on the victim by the actor. Probably, this determination can be made only by means of an evidentiary hearing unless serious personal injury is admitted. The Legislature, when it enacted L.B. 23, did not contemplate that cases pending on appeal would require evidentiary hearing to determine a new and reduced

penalty. Yet as a practical matter this is the only way in which the Randolph doctrine could be made applicable in the present and similar cases.

In addition to the provisions of L.B. 23 already mentioned, section 28-408.01, R. S. Supp., 1975, contains recitals which indicate that a primary purpose of the statute is procedural and directed to protecting the dignity of the victim and also to insure effective due process for the person charged. These purposes are effectuated by section 28-408.05, R. S. Supp., 1975. This latter section provides for an in camera hearing to enable the judge to determine the relevance of the victim's or the alleged offender's past sexual conduct and authorizes the judge to determine the "extent" of admissibility of evidence on these points. It also provides that past sexual activity between the victim and any person other than the defendant shall not be admitted into evidence unless the consent of the victim is at issue and unless it is finally established at an in camera hearing that ". . . such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent." § 28-408.05(3), R. S. Supp., 1975.

L.B. 23, at least in some types of cases, makes the sex of the actor or the victim irrelevant. An analysis of the statute seems to make it clear that previous to the enactment of L.B. 23 a female could not be convicted, except as an accessory, of the crimes as previously defined.

For the reasons indicated we believe it is clear that the Legislature did not contemplate when it enacted L.B. 23 that it was simply changing a penalty and that Randolph would be applicable.

In addition to the factors already discussed, there is another consideration which bears weight under the facts of this case. The defendant, pursuant to plea bargain, secured the dismissal of an habitual criminal charge.

Under the provisions of the habitual criminal statute the possible penalty is a maximum of 60 years imprisonment. § 29-2221, R. S. Supp., 1974. To apply Randolph under the circumstances would be unfair to the State by introducing after the fact an element which it had no opportunity to consider when it made the bargain. The defendant has had the complete benefit of that bargain. The State obviously cannot in this case refile the habitual criminal count.

For the reasons set forth we hold that the doctrine of State v. Randolph, *supra,* is not applicable to a sentence for rape imposed before L.B. 23 became effective.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

MCCOWN, J., dissenting.

The majority opinion here approves the doctrine of State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, but determines that it should not apply to L.B. 23, Laws 1975, on the strength of semantical and technical arguments from which this court concludes that the Legislature did not intend the Randolph doctrine to apply to the complete revision of the statutes dealing with sexual assault and related criminal sexual offenses.

The principle underlying Randolph is simply that of even-handed justice. The holding makes the inevitable inference that when the Legislature adopts a new statute imposing a lighter penalty which it now deems to be sufficient for the criminal actions involved, it must have intended the new penalty to apply to every case to which it could constitutionally apply. The actual intent of the Legislature is the single vital and controlling issue.

The majority opinion assumes that the Legislature intended to apply the old harsher penalty to a defendant sentenced for rape or assault with intent to commit rape before the effective date of L.B. 23, even though exactly the same criminal actions are now subject to a lighter maximum penalty. The majority opinion supports that conclusion by the argument that rape is no

longer called rape but instead is called sexual assault, and that the new law includes not only all the old crimes but forms of sexual assault not heretofore defined by statute. Two facts, however, are undisputable. Any and all criminal acts which formerly constituted the crimes of rape and assault with intent to commit rape are still crimes under the new law. The new law has also reduced the maximum or minimum penalties for such crimes. To hold that the Legislature deliberately intended to deny a defendant the benefit of a reduced maximum penalty provided by the new law simply because the defendant was sentenced a day, a week, a month, or even several months, before the new law and the new penalty became effective, assumes that the Legislature had no concern for even-handed justice but instead was motivated by a desire for vengeance. As this court said in State v. Randolph, *supra*: " '* * * it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.' " Here the defendant's sentence is clearly not final and there is no reason whatever that the principle of even-handed justice under the Randolph doctrine should not apply in the absence of a clear indication by the Legislature that it was not to apply.

The legislative approval of the principle of even-handed justice and the doctrine of Randolph is already apparent in other statutes. The Randolph opinion was filed January 22, 1971. Section 29-2204.01, R. S. Supp., 1974, was adopted by the Legislature shortly thereafter and became effective July 6, 1972. That statute provides: "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period

of confinement authorized by the new law, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law."

On the basis of that declared legislative policy, it is difficult to understand how the majority opinion can find that the Legislature did not intend that the new maximum punishment which the Legislature now feels fits the old crime of rape and the new crime of sexual assault in the first degree should not apply to a defendant whose sentence for rape is not yet final.

The majority opinion makes much of the fact that the new law makes the fact and extent of serious personal injury to the victim a matter to be considered in determining punishment and may require an evidentiary hearing on a plea of guilty. In the case before us, however, it is clear that even if the most serious personal injury be assumed, and that the defendant here was entitled to receive the maximum possible sentence under the new law, that sentence would be 8⅓ years to 25 years rather than the sentence of 10 to 30 years which he received under the old law. The fact that an evidentiary hearing might be required in some cases of sexual assault in the second degree in order to determine the applicable maximum penalty is certainly no reason for denial of relief to a defendant whose sentence exceeds the maximum that could be imposed, no matter what the evidentiary hearing disclosed. If any evidentiary hearing is required before sentencing under the new law it is obviously also necessary for an offense which occurred before the effective date of the new law if the new penalty is to be applied. But it is the new law which makes it necessary and not the application of the Randolph doctrine.

There are probably comparatively few defendants in Nebraska who were sentenced for rape or assault with intent to commit rape in the short time between the date the new law was adopted and the date it became

effective, and there are even fewer of those whose sentences are not yet final. At least three of them, however, were involved in the September 1975 hearings in this court. If a rule is just and can properly be applied to a certain class of cases, the fact that the number of defendants involved may be small does not justify an injustice to any one of them, nor provide an adequate excuse for denying justice to all of them, however small the number. The fact that it may require a hearing to determine the relevant facts ought not to be an insurmountable roadblock in the pursuit of justice.

Even-handed justice ought to be an actual, vital standard which all courts and legislatures realistically strive to achieve rather than merely an idealistic principle to which they pay only lip service. It seems transparently clear that the Legislature did not intend to discard that basic principle when it completely revised and rewrote the laws of this state dealing with sexual assault and related criminal sexual offenses. Hopefully the Legislature may clarify that intent at the next session.

STATE OF NEBRASKA, APPELLEE, V. RICHARD T. FISCHER, APPELLANT.

234 N. W. 2d 205

Filed October 23, 1975. No. 40026.

1. **Criminal Law: Arrest: Probable Cause: Intoxicating Liquors.** Sufficient probable cause for an arrest is shown when the investigating officer of a fatal collision identifies the driver of one of the vehicles and observes his physical condition, including a strong odor of alcohol.
2. **Criminal Law: Trial: Instructions.** When the instructions given to the jury correctly submit the essential elements of the offense charged and state generally the law of the case, error may not be predicated on the failure to further instruct the jury on some particular phase of the case, when no proper instruction on the subject was requested by appellant.
3. **Criminal Law: Evidence: Appeal and Error.** A verdict of

guilty, based upon conflicting evidence, will not be set aside on appeal unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding beyond a reasonable doubt.

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

William J. Riedmann and E. Terry Sibbernsen of Riedmann & Welsh, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

KUNS, Retired District Judge.

On May 1, 1974, an automobile driven by the appellant, Fischer, collided with a motorcycle operated by the decedent, Thomas, at the intersection of 38th and Hamilton Streets, Omaha, Nebraska. Thomas received injuries causing his death. Appellant was charged with felony motor vehicle homicide. At trial, the jury returned a verdict of guilty. Appellant was sentenced to imprisonment.

Appellant assigns errors, as follows: (1) That the foundation for the admission of evidence of the blood alcohol test was insufficient because there was no probable cause for the arrest of appellant; (2) that the trial court failed to instruct the jury properly in regard to consideration of decedent's conduct; and (3) that the evidence was insufficient to support the verdict of the jury. We affirm.

Appellant first contends that evidence relating to the test for blood alcohol should not have been received. The objection was raised at the trial by a motion to suppress and by an objection for lack of foundation, both of which were overruled. The record shows that appellant was placed under arrest by Lynch, the police

officer in charge of the investigation of the collision. Lynch testified that he examined the scene of the collision, interviewed witnesses, identified appellant as one of the drivers, and observed his condition including the strong odor of alcohol upon his breath. Thereupon, he arrested appellant and directed that he be taken to the Douglas County Hospital by another officer for a blood alcohol test. The test was taken and, upon analysis, it was found that the sample showed an alcoholic content by weight of 0.33 of one percent. The procedure followed by the officer was correct and the facts and circumstances as they appeared to him were amply sufficient to warrant a prudent man in believing that an offense had been committed by the appellant. Probable cause for the arrest existed, and the foundation for the evidence was proper. State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595 (1974). The first assignment of error is overruled.

Next, the appellant contends that the trial court erred in failing to instruct the jury that it might consider the acts of the decedent in determining whether the alleged unlawful conduct by appellant was, in fact, the proximate cause of the collision and the death of the decedent. The record does not show that appellant requested any such instruction or that he objected to any of the given instructions before the case was submitted to the jury. In such a situation, the assignment of error may not be sustained unless it is shown that the given instructions were such as to cause a miscarriage of justice. State v. Claire, 193 Neb. 341, 227 N. W. 2d 15 (1975). The instructions given by the trial court correctly stated the elements of the offense charged, the burden of proof upon the State, and the definition of the term "proximate cause." Even without the language desired by the appellant, the given instructions allowed ample scope for the presentation of an argument that other causes, including conduct by the decedent, were the only proximate cause, thus raising a reason-

able doubt whether the State had established that appellant's conduct was the proximate cause, as required and defined. No miscarriage of justice could result from the given instruction. The second assignment of error is overruled.

Finally, the appellant contends that the evidence is insufficient to support the verdict. The appellant concedes the establishment of all the elements of the offense charged except the issue of proximate cause. Reference has already been made to the result of the chemical analysis of appellant's blood, showing an alcoholic content thereof by weight amounting to 0.33 of one percent, more than three times the maximum allowed by statute. Two officers testified to an opinion that appellant was under the influence of alcohol immediately following the collision. An eyewitness, who could see the approach of both vehicles to the point of collision, testified that after appellant had met and passed three motorcycles, his vehicle, displaying a left-turn signal, was stopped briefly in the intersection of 38th and Hamilton Streets and then commenced a left turn; that the witness had first observed the motorcycle when it was about three car lengths from the corner of the intersection, with lights on and traveling at a speed of 25 to 30 miles per hour, and that the collision followed immediately after appellant commenced his left turn. This testimony is consistent with the few physical facts shown, including short skidmarks made by appellant's vehicle, and the jury might well have based its finding thereon rather than matters brought out on cross-examination and in the contradicting testimony by appellant. The jury was entitled to find that appellant's condition, taken together with his conduct in failing to see decedent's motorcycle and in making an improper turn to his left, constituted the proximate cause of the collision and death. The resolution of conflicts in evidence, the plausibility of explanations, the credibility of witnesses, or the weight of evidence are for the jury and not for

this court. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480 (1974). A verdict of guilty, based upon conflicting evidence, will not be set aside unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding beyond a reasonable doubt. State v. Corfield, 189 Neb. 163, 201 N. W. 2d 818 (1972). Since this is not the case under the record presented, the third assignment of error is overruled.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK WAYNE TROWBRIDGE, APPELLANT.
234 N. W. 2d 598

Filed October 23, 1975. No. 40055.

Criminal Law: Statutes: Sentences: Rape: Sexual Assault. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975).

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

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

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

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

SPENCER, J.

Jack Wayne Trowbridge, defendant, was found guilty by a jury of assault with intent to commit rape and was sentenced to a term of 2 to 6 years imprisonment in the Nebraska Penal and Correctional Complex. His only

assignment of error on this appeal is that he should be sentenced under the sexual assault statute, L.B. 23, Laws 1975, p. 92, which became effective August 24, 1975. We affirm.

Defendant was prosecuted under section 28-409, R. R. S. 1943, the felonious assault statute, which included rape. The penalty provided by that statute was not more than 15 nor less than 2 years imprisonment. Section 28-409 was amended May 1, 1975, to be effective August 24, 1975, by eliminating "rape" from that statute. The offense for which defendant was convicted occurred July 12, 1974. Defendant was sentenced January 31, 1975.

Section 49-301, R. R. S. 1943, provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

Defendant is seeking relief under State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225. We there held: "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."

Section 28-407, R. R. S. 1943, which punished carnal knowledge of a daughter or sister, and section 28-408, R. S. Supp., 1974, punishing carnal knowledge of any other female, were repealed by L.B. 23, Laws 1975, p. 92. L.B. 23, which includes sections 28-408.01 to 28-408.05, R. S. Supp., 1975, was signed by the Governor on May 1, 1975, but did not become effective until August 24, 1975. At the time the defendant was convicted and sentenced there was no sexual assault statute. That offense was included in the felonious assault statute, section 28-409, R. R. S. 1943.

The present law covers sexual assault in the first degree, section 28-408.03, R. S. Supp., 1975, and sexual as-

sault in the second degree, section 28-408.04, R. S. Supp., 1975. Section 28-408.03 requires penetration. Section 28-408.04 requires sexual contact, which is defined in section 28-408.02, subsection (4), as follows: "Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."

There was no penetration in the instant case. The defendant was scared off when he thought there was someone in the upstairs portion of the victim's home. The defendant, however, had thrown the victim on the floor, torn out some of her hair, torn off her earring, and tried to pull up her dress and to get on top of her. The victim received a cut on the lip and suffered extreme emotional distress. The record would indicate that it was necessary for her to consult two doctors. The details, however, are not in the record because defendant's objection to the testimony was sustained.

If we were to hold defendant's sentence should be imposed under the present statute, a new trial would be necessary. In no other way could a determination be made whether the penalty under second degree sexual assault, section 28-408.04, R. S. Supp., 1975, should be 1 year or less, or not more than 15 years. This would depend upon whether the victim sustained serious personal injury within the intent of the statute.

State v. Country, *ante* p. 570, 234 N. W. 2d 593, is decisive of the question presented. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975).

In State v. Country, *supra,* we held that L.B. 23 is not merely an amendatory act changing the penalty for a particular offense. It defines new crimes. It contains

requirements in connection with the determination of punishment which indicate that the Legislature did not contemplate retroactive application to convictions under former statutes. Finally, the primary legislative purpose in the enactment of the act was not the reduction of penalties.

There is no merit to the defendant's assignment of error. The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

My views on the general issues involved here are set out in my dissent in State v. Country, *ante* p. 570, 234 N. W. 2d 593.

The contention that a new trial would be necessary in this case if the defendant were to be resentenced under the present statute is wholly spurious. An affirmance of the conviction, and a hearing to determine whether the sentence imposed under the old law was or was not greater than the maximum allowable under the new law, would be all that would be necessary.

STATE OF NEBRASKA, APPELLEE, V. GARY L. ASHBY, APPELLANT.

234 N. W. 2d 600

Filed October 23, 1975. No. 40080.

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

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

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, Mc-

COWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The defendant was charged with committing a forcible rape on August 26, 1974. While released on bond, he was charged with committing a robbery and a second rape on October 20, 1974.

The defendant pleaded guilty to the rape committed on August 26, 1974, and was sentenced to imprisonment for 15 to 45 years. The other charges were dismissed. The defendant appeals, claiming that the sentence was excessive and he is entitled to a reduction in sentence under the terms of L.B. 23, Laws 1975.

The defendant is 20 years of age. He has a juvenile record and was committed to the Youth Development Center twice. Apparently, he is very aggressive sexually, particularly with older women.

On August 26, 1974, the defendant broke into the home of a 60-year-old woman who lived alone, and abused her physically and sexually for a period of 3 hours. When he left he took a small amount of money from her home. The charge on October 20, 1974, involved the robbery and rape of a 75-year-old woman. On this occasion he carried a gun.

The crime involved in this case was an aggravated offense which involved considerable violence and abuse of the victim. As the trial court observed, a sentence was necessary for the protection of the public. There was no abuse of discretion and the sentence imposed was not excessive.

The defendant's contention in regard to L.B. 23 has no merit. In State v. Country, *ante* p. 570, 234 N. W. 2d 593, this court held L.B. 23 defined a new crime and was not an amendatory act. The doctrine of State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, is not applicable. See, also, State v. Trowbridge, *ante* p. 582, 234 N. W. 2d 598.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

My views on the general issues involved here are set out in my dissent in State v. Country, *ante* p. 570, 234 N. W. 2d 593.

The sentence here is 15 to 45 years under the old law. The maximum sentence under the new law would be 8⅓ to 25 years for the same identical acts. The result speaks for itself.

STATE OF NEBRASKA, APPELLEE, v. JOHN WILSON, APPELLANT.

234 N. W. 2d 208

Filed October 23, 1975. No. 40099.

1. **Criminal Law: Coram Nobis.** 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.
2. ———: ———. A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented entry of the judgment.
3. ———: ———. The remedy of coram nobis is not available to correct errors of law.

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

Patrick J. Heaton, Jr., for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

WHITE, C. J.

The appellant, after satisfying a 6-month jail sentence for possession of marijuana, filed a petition for a writ of error coram nobis. The county attorney of Cheyenne County, Nebraska, demurred to the petition. The District Court sustained the demurrer and dismissed the appellant's petition. The appellant appealed that decision. We affirm the decision of the District Court.

In November 1972, the appellant, an alien, was charged on two counts: For carrying a concealed weapon in violation of section 28-1001, R. R. S. 1943, and for possession of marijuana in violation of section 28-4,125(5), R. S. Supp., 1972. After plea bargaining with the county attorney, the appellant pleaded nolo contendere to the second count. The first count was then dismissed by the county attorney. In December 1972, the District Court entered judgment against the appellant for possession of marijuana and sentenced him to 6 months in the county jail. In May 1973, the District Court ordered the appellant's sentence suspended after the appellant had served 5 months of his jail sentence. In July 1973, an immigration judge ordered that the appellant be deported under Title 8 U.S.C., § 1251(a)(11), on account of his conviction for possession of marijuana. As a result of that determination, the appellant filed a petition for a writ of error coram nobis, claiming first, that he was denied due process of law at the arraignment proceedings when the District Court accepted his plea of nolo contendere without adequately informing him of his constitutional rights, and second, that he did not understand that his plea of nolo contendere would result in his deportation. The appellant makes those same assertions on appeal.

The test to be used in determining whether a writ of error coram nobis is applicable was clearly set out in the recent case of State v. Turner, *ante* p. 252, 231 N. W. 2d 345 (1975). In State v. Turner, *supra,* this court said that a writ of error coram nobis "reaches

only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court they would have prevented the entry of judgment." See, also, Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561 (1949); Parker v. State, 178 Neb. 1, 131 N. W. 2d 678 (1964); Swanson v. State, 148 Neb. 155, 26 N. W. 2d 595 (1947). Thus a twofold test must be passed before the writ of error coram nobis can be utilized. First, do facts exist which could not have been reasonably discovered by a petitioner prior to the original entry of judgment? Second, would those same facts have necessarily caused the court to enter a different judgment? The answer must be "yes" to both questions, if the writ of error coram nobis is to be applicable.

In the case at hand, the facts conclusively show that both of the appellant's claims fail to meet the requirements of the test as given in State v. Turner, *supra.* As for appellant's first claim, that he was denied due process of law at the arraignment, it is obvious that a writ of error coram nobis was intended to remedy errors of fact, not errors of law. In State v. Turner, *supra,* this court said: "The remedy is not available to correct errors of law." Thus, since any alleged failure of the District Court to properly inform the appellant of his constitutional rights would clearly be an error of law, a writ of error coram nobis is not the appropriate remedy.

As for the appellant's second claim, that he was not aware that the immigration service would deport him, it is clear that this claim does not fulfill either requirement for application of a writ of error coram nobis.

In relation to the first requirement of the test, that there exists a fact which the appellant could not have reasonably discovered prior to entry of judgment, the appellant contends he did not know that he would be deported under a federal statute which, in fact, requires

mandatory deportation. It appears that the appellant was not aware of Title 8 U.S.C., section 1251(a), which provides: "Any alien in the United States * * * shall * * * be deported who * * * (11) * * * at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana." However, the real question is: Was the appellant's ignorance of the existence of the federal statute reasonable? The answer is clearly "no." Ignorance of the law is no excuse. See, Satterfield v. State, 172 Neb. 275, 109 N. W. 2d 415 (1961); 22 C. J. S., Criminal Law, § 48, p. 183. The federal statute, Title 8 U.S.C., section 1251(a)(11), was available to both the appellant and to his attorney. The appellant's attorney in the original proceeding admits, through an affidavit, that he was in contact with an agent of the United States immigration service, prior to the appellant's nolo contendere plea, concerning the effect which a conviction of the charge of possession of marijuana might have on the appellant's status with the immigration service. The attorney discussed the possibility of the appellant's deportation if the appellant pleaded nolo contendere. After failing to receive a definitive reply, the attorney either failed to discover Title 8 U.S.C., section 1251(a)(11), under which aliens are automatically deported, or failed to realize that the appellant came under Title 8 U.S.C., section 1251(a)(11). In either event, the mistake of fact was not reasonable. Moreover, when petitioning for a writ of error coram nobis, the facts newly discovered by the petitioner must have been in existence at the time of the entry of judgment. In Swanson v. State, *supra,* this court said: "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." (Emphasis supplied.) Thus, since the fact of the appel-

lant's actual deportation order did not exist at the time of the entry of judgment, it is clear that a writ of error coram nobis is not an appropriate remedy in this case.

Regardless of the reasonableness of the appellant's failure to know the consequences of pleading nolo contendere, the second requirement of the test is not met. In order for a writ of error coram nobis to be applicable, the previously unknown facts would necessarily have caused the court to enter a different judgment. Such is not the case here. Even if the District Court had been aware of Title 8 U.S.C., section 1251(a)(11), and its consequences for the appellant, there is no reason to believe that the District Court would have necessarily entered a different judgment. Thus, the second requirement of the test is not present in this case.

It is clear that under the test given in State v. Turner, *supra,* the facts presented in this case do not lend themselves to a writ of error coram nobis.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CURTIS DALE MORROW, APPELLANT.

234 N. W. 2d 211

Filed October 23, 1975. No. 40109.

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

Michael C. Washburn for Leahy, Washburn & Cavanaugh, for appellant.

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

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

NEWTON, J.

Defendant, following a plea bargain, entered a plea of guilty to a charge of robbery. He received a sentence of 3 to 5 years imprisonment. He asserts on appeal that other charges pending against him should not have been considered by the trial court in fixing sentence and that the sentence is excessive. Examination of the record fails to disclose abuse of discretion. The appeal is frivolous and the judgment is affirmed.

See Rule 20; State v. Orner, 192 Neb. 523, 222 N. W. 2d 819; State v. Welton, 190 Neb. 600, 210 N. W. 2d 925.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DANIEL K. ADAMSON, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. MICHAEL R. CASHON, APPELLEE.

233 N. W. 2d 925

Filed October 23, 1975. Nos. 40124, 40125.

Criminal Law: Sentences: Time. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force.

Appeals from the District Court for Dawes County: ROBERT R. MORAN, Judge. Reversed and remanded with directions to reinstate the convictions.

James W. Slavik, for appellant.

Harris W. Snyder, Charles A. Fisher, and Charles F. Fisher, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, Mc-

COWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

McCOWN, J.

Daniel K. Adamson pleaded guilty to possession of a controlled substance. On February 12, 1975, the District Court sentenced him to 18 months probation and imposed a $100 fine. Michael R. Cashon pleaded guilty to possession of a controlled substance. On February 12, 1975, he was sentenced to 30 days in the county jail. On March 26, 1975, the District Court, on its own motion, set aside the convictions upon the stated ground that "the state agent acted inappropriately in securing evidence against the defendants * * *." Prior to the entry of the order setting aside the convictions, the sentence of probation imposed upon Adamson had been commenced and he was under the supervision of the probation officer at the time of the entry of the order setting aside his conviction. The defendant Cashon had fully served his 30-day jail sentence as of March 26, 1975. No motions for new trial or post conviction relief were ever filed. The State of Nebraska has appealed and the cases have been consolidated. The sole assignment of error is that the trial court had no authority to set aside the convictions of the defendants.

The defendants contend that the District Court has inherent power and jurisdiction to set aside a criminal judgment at any time during the term of court at which it was pronounced. The State contends that the District Court has no jurisdiction or authority to vacate or set aside its judgment in a criminal case after the defendant has been committed and the sentence is in the process of execution.

It should be noted here that the terms "judgment" or "sentence" in a criminal case are often used interchangeably. In general, however, it may be said that final judgment in a criminal case means sentence and the sentence is the judgment. See, Corey v. United

States, 375 U. S. 169, 84 S. Ct. 298, 11 L. Ed. 2d 229; State v. McFarland, 10 Ore. App. 90, 497 P. 2d 1243; People v. Betillo, 279 N. Y. Supp. 2d 444, 53 Misc. 2d 540.

It is the majority rule, as well as the long-established rule in Nebraska, that in the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. See, State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90; Housand v. Sigler, 186 Neb. 414, 183 N. W. 2d 493; State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663; In re Jones, 35 Neb. 499, 53 N. W. 468; Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510.

The District Court, of course, may grant relief where the judgment is void or the court was without jurisdiction. It may also correct a judgment in a criminal case to make it conform to the judgment actually pronounced. Hickman v. Fenton, *supra.*

In holding that the District Court has no power to set aside, modify, or amend a criminal sentence after execution, we have said that the District Court is "without authority," or "has no jurisdiction," or was "without power" to take such action. A realistic appraisal of our cases reflects the view that when a valid sentence has been put into execution, the District Court at that time loses the power to act in that case on its own motion unless specifically authorized by statute. It may also act at the instigation of one of the parties where the request is made under direct or implied statutory authorization.

In the case of the defendant Adamson, sections 29-2263 and 29-2264, R. S. Supp., 1974, authorize the District Court, on its own motion, to discharge an offender from probation at any time and issue an order

releasing him and restoring his civil rights as though a pardon had been issued. Those statutes also authorize an offender, after discharge from probation, to petition the sentencing court to set aside and nullify the conviction, and remove all civil disabilities and disqualifications as though a pardon had been issued. Those statutory provisions, however, do not apply to a jail sentence already served and the procedures used in the cases at bar are not based upon any specific authorization, but rest upon the inherent power of the court.

The order of the District Court setting aside the conviction of the defendant in each case is reversed and vacated, and the conviction in each case is reinstated.

REVERSED AND REMANDED WITH DIRECTIONS TO REINSTATE THE CONVICTIONS.

IN RE INTERESTS OF ROBERT NORWOOD, JR., ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ROBERT NORWOOD ET AL., APPELLANTS.

234 N. W. 2d 601

Filed October 30, 1975. No. 39715.

1. **Statutes: Constitutional Law: Waiver.** The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived.
2. **Physicians and Surgeons: Confidential Communications: Infants.** Former section 25-1207, R. R. S. 1943, does not render confidential the communications to a physician in judicial proceedings involving injuries to children.
3. **Infants: Parent and Child.** A proceeding brought in the interests of dependent and neglected children is one involving injuries to children.
4. **Parent and Child: Infants: Trial: Evidence.** The findings of the trial court as to the evaluation of the evidence and the question of custody will not be disturbed on appeal unless there is a clear abuse of discretion.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

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

Donald L. Knowles and John S. Slowiaczek, for appellee.

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

NEWTON, J.

This is a proceeding to have the five minor children of appellants adjudicated to be neglected and dependent children and to terminate parental rights. The Separate Juvenile Court found the children to be dependent and neglected and placed them in the custody of Douglas County social services which provided for their care by the Nebraska Children's Home Society. The matter of the termination of parental rights was taken under advisement by the court and has not been resolved.

Appellants assign as error the unconstitutionality of sections 43-201 and 43-209, R. R. S. 1943, the admission of evidence of psychiatrists, and insufficiency of the evidence. We affirm the judgment of the Separate Juvenile Court.

The challenge to constitutionality of the statutes was not raised at the trial. Presentation of an issue for the first time in a motion for a new trial is not a ground for granting the motion. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. See Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49.

Appellants object to the admission of the evidence of two psychiatrists who had treated appellants. The question requires interpretation of former section 25-1207, R. R. S. 1943, which nullifies confidential communications to a physician in proceedings under the Separate Juvenile Court Act and "regarding injuries to children." The term "injury" is comprehensive. Webster's Third New International Dictionary, p. 1164, states: "INJURY,

HURT, DAMAGE, HARM, and MISCHIEF mean in common the act or result of inflicting on a person or thing something that causes loss, pain, distress, or impairment. INJURY is the most comprehensive, applying to an act or result involving an impairment or destruction of right, health, freedom, soundness, or loss of something of value * * *." An action to protect a dependent and neglected child necessarily involves a question of impairment of a child's right to parental protection and guidance with consequent loss or destruction of mental and physical health, and the right to a normal and adequate upbringing. Child neglect can result in permanent mental and physical injury with a consequent failure to learn to cope with society and an inability to provide for his or her needs. Furthermore, section 43-209 (5), R. R. S. 1943, provides that one ground for intervention in behalf of dependent and neglected children is that: "The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; * * *." This indicates that former section 25-1207, R. R. S. 1943, was intended to be effective when the mental condition of a parent is in issue. In the judgment of this court the neglect of a child is an injury to the child's welfare and rights. It constitutes one of the exceptions referred to in the statute and the evidence was properly admitted.

An examination of the evidence discloses that the parents of the children are to some extent mentally disturbed; medication helps them, but there is no guarantee that they will continue with the medication nor is there any assurance of the safety of the children. For the most part they have maintained a home described as filthy and they have not spent their welfare checks wisely in providing necessities and will not learn to do so. The children have not attended school regularly. The father has not worked regularly and does not pro-

vide for the family. At times there have been inadequate food and clothing. A 9-year-old retarded boy has not been toilet trained. He twice received such training away from home but each time relapsed on returning home. The findings of the trial court as to the evaluation of the evidence and the question of custody will not be disturbed on appeal unless there is a clear abuse of discretion. See, Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544; Healey v. Hartman, 188 Neb. 682, 199 N. W. 2d 26. We fail to find an abuse of discretion by the trial court in evaluating the evidence or depriving appellants of the custody of the children. It may be well to note that the question of termination of parental rights has not been passed upon by the trial court and is not before us.

The judgment of the Separate Juvenile Court is affirmed.

AFFIRMED.

CARL E. MATHIAS, APPELLEE, V. ANGELA L. MATHIAS, APPELLANT.

234 N. W. 2d 212

Filed October 30, 1975. No. 39899.

1. **Divorce: Words and Phrases.** When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken.
2. **Divorce: Alimony.** A judgment of a trial court making a distribution of property will not be disturbed on appeal unless good cause is shown.
3. ———: ———. The fixing of the amount of alimony rests in each case within the sound discretion of the trial court.

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

William W. Lyons of Russell, Colfer, Lyons & Wood, for appellant.

Fred T. Hanson of Hanson & Hanson, for appellee.

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

SPENCER, J.

This is an action for dissolution of marriage filed September 13, 1973, by Carl E. Mathias, petitioner-appellee. The trial court dissolved the marriage. Respondent-appellant, Angela L. Mathias, prosecutes this appeal. She assigns as error the finding that the marriage is irretrievably broken and the inadequacy of the property division and permanent alimony. We affirm.

Carl and Angela were married June 1, 1941. The only child born to the parties is now of full age and self supporting. Respondent is 55 years of age. She is a college graduate and for a short time during the early years of the marriage taught school. She suffers from a bronchial condition called bronchiectasis, or a chronic infection in one lung. Her occupation has been that of housewife through the course of most of the marriage.

Carl is employed as an engineer for the United States Bureau of Reclamation. His salary at the time of the trial was approximately $19,000 per year. At the time of the trial he was 57 years of age. He had not lived in the family home for 4 years prior to the filing of the action herein. For the first year and a half he lived in a motel and for the next two and a half years in a trailer court. During the period, however, he continued to help with household repairs although the parties maintained separate residences.

On January 2, 1974, evidence was adduced on respondent's motion to determine whether or not the marriage was irretrievably broken. The court made no finding on that fact but sustained the motion of the respondent that the parties be referred to a marriage counselor. On March 26, 1974, the court ordered that the parties to said action report to a marriage counselor at the Southwest Nebraska Mental Health Clinic on April 1, 1974, for

counseling. Upon request of respondent's attorney her appointment with the marriage counselor was continued on several occasions.

On May 9, 1974, the Southwest Nebraska Mental Health Clinic reported to the trial court that after 20 years of a chronically disturbed marriage Mr. Mathias remains adamant in his wish to finalize the divorce.

The case was finally set for trial on June 28, 1974. The trial court made a fact determination that the marriage was irretrievably broken. We are in full agreement with this conclusion. It is fairly evident to us that the marriage is irretrievably broken and the trial court was very tolerant of respondent's procrastination. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken.

The values on the property of the parties were determined by a real estate man agreed on by the parties, and no exception has been taken to his valuations. Using those valuations, petitioner received a net distribution of $26,804.65 whereas respondent received a net distribution of $30,595.30, or approximately 53 percent of the ascertainable net worth of the parties. Additionally, petitioner has a small interest in some farm land in Missouri, whereas respondent is the joint owner of approximately 800 acres of Kansas farm land. The property division is well within the limits heretofore suggested by this court, and there is no merit to the respondent's assignment.

As we suggested in Schwaninger v. Schwaninger (1974), 192 Neb. 681, 223 N. W. 2d 829, a judgment of a trial court making a distribution of property will not be disturbed on appeal unless good cause is shown.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under section 42-365, R. R. S. 1943, as well as under the decisions of this court, is one of reason-

ableness. The relevant considerations may vary from case to case. However, this court is committed to the rule that the fixing of the amount of alimony rests in each case within the sound discretion of the trial court. Young v. Young (1974), 192 Neb. 735, 224 N. W. 2d 361. We conclude that there was no abuse of discretion in the allowance of $300 per month for 15 years. No purpose will be served by discussion in detail of the arguments of the parties.

The judgment of the trial court is affirmed. Costs are taxed to appellee, including a $300 attorney's fee for services in this court.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DANA POULSON, APPELLANT.

234 N. W. 2d 214

Filed October 30, 1975. No. 39900.

1. **Searches and Seizures: Constitutional Law.** The special protection accorded by the Fourth Amendment to the people in their person, houses, papers, and effects is not extended to the open fields.
2. **Trial: Instructions.** An instruction should not be given which is likely to confuse or mislead the jury.
3. ———: ———. Where portions of a statute are inapplicable, it is not error to omit them from an instruction to the jury given in the language of the statute.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Mitchell & Beatty and Larry R. Demerath, for appellant.

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

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

WHITE, C. J.

In this case, the defendant was convicted of possession of marijuana with intent to manufacture, in violation of section 28-4,125, R. S. Supp., 1974. The defendant's two major contentions on appeal are that illegally gathered evidence was introduced at the trial, and that the trial judge improperly instructed the jury. We affirm the judgment of the District Court.

On June 30, 1974, an unidentified informer told Officer Dowling of the Nebraska State Patrol, that the defendant was growing marijuana in the backyard of his house, 2 miles south of Elm Creek, Nebraska. The defendant's house was in the final stages of construction, and he was living in an apartment in Elm Creek. Officer Dowling notified the sheriff's office in Buffalo County, Nebraska, and along with a deputy sheriff, proceeded to a county judge to secure an arrest warrant for the defendant. After being assured that the defendant needed to be arrested immediately for fear that he might destroy the marijuana, the judge issued an arrest warrant.

Since it was Sunday, Officer Dowling, an investigator with the Nebraska State Patrol, believed that the defendant was probably working at his new residence. After securing the arrest warrant, Officer Dowling and the deputy sheriff drove to the defendant's new residence to arrest him. They checked the front and back doors, found them locked, and came to the conclusion that the defendant was not there. Consequently, the defendant was not arrested, and the issue of a search incident to a lawful arrest is not before us. However, the officers, in coming to and leaving the house, in the customary mode indicated by the paths, the construction of the doors, and the location of the residence, observed a cultivated field which Officer Dowling recognized as marijuana, espe-

cially because of a coloration change present in the plant. The officers saw 10 neat rows of what Dowling recognized as marijuana. It was growing approximately 75 feet from the house and was being watered by a hose connected to the house. All this was in plain view from the outside of the house during the time that the officers were attempting to locate and contact the defendant owner in the customary manner. The officers observed no marijuana growing in the area other than the marijuana that was growing in the rows. The officers took photographs of the marijuana and then cut the marijuana plants, placing the marijuana in bags so that it could be retained as evidence. A total of 611 stems were cut from the rows.

The defendant argues that the District Court erred in failing to suppress as evidence the marijuana gathered from the defendant's field behind his house. The defendant contends that the Fourth Amendment prohibition of unreasonable searches and seizures was violated because the officers did not have a search warrant when they confiscated the growing marijuana. We do not agree.

The Fourth Amendment to the United States Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment applies to searches of a person or his house, papers, or effects. This does not encompass a field which is approximately 75 feet behind a house which the defendant had not finished constructing and had not yet moved into.

Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), is directly in point. In Hester, revenue agents were watching the defendant's house because of suspected moonshining activities. When the defendant and another were alerted to the revenue agents'

presence, they ran from the house. In the course of their flight, they dropped jugs of moonshine whiskey in the defendant's yard. The agents seized the jugs and they were used as evidence in the defendant's trial. Even though the agents had no search warrants nor arrest warrants, the United States Supreme Court held that the evidence was admissible because the Fourth Amendment did not apply. Speaking for the court, Mr. Justice Holmes said: "It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. * * * the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

Thus, the trial court was correct in admitting evidence of the marijuana which was cut and collected from the open field by the officers.

The defendant also contends that the trial court erred in failing to give the defendant's requested instruction to the jury concerning the definition of the word "manufacture." The defendant submitted the definition for "manufacture," which set forth the exact language of section 28-4,115 (15), R. S. Supp., 1974. The statute reads: "Manufacture shall mean the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis * * *." The instruction which the District Court read to the jury concerning the term "manufacture" was: " 'Manufacture' shall include the production of a controlled substance* * *. 'Production' shall include the manufacture, planting, cultivation, growing or harvesting of a controlled substance."

From the testimony given at the defendant's trial, it is clear that the defendant sought to prove that the

process by which marijuana is grown, harvested, dried, and divided does not come under the definition of "manufacture" because it does not involve extracts or chemical synthesis. The defendant apparently misconstrued the statute in that he interpreted the phrase "either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis" as modifying production, preparation, propagation, compounding, or processing. Such an interpretation is unreasonable when the phrase is read in light of the entire statute. Section 28-4,115 (22), R. S. Supp., 1974, provides that: "Production shall include the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." When both subsections are read together, it is manifestly clear that the Legislature intended to classify those who grow a controlled substance as being manufacturers of such a controlled substance. Obviously, the statutory requirement of extraction or chemical synthesis applies only to the word "processing" and not to the word "production," or subsection (22), of section 28-4,115, R. S. Supp., 1974, would be meaningless. Marijuana is the principal (only) controlled substance grown in Nebraska, and when the Legislature made growing a controlled substance a crime, it obviously had marijuana in mind. The defendant's contention would remove the growing of marijuana from the prohibition of section 28-4,125 (1), R. S. Supp., 1974, an absurd construction.

We assume that the District Court decided not to read the entire text of section 28-4,115 (15), R. S. Supp., 1974, because it felt that it would confuse the jury. We agree. The defendant's counsel misinterpreted the statute and it is certainly reasonable to fear that the jury might also misinterpret it. The District Court simplified the language of the statute so as to prevent the jury from construing the statute as the defendant did. The District Court's instructions could not be prejudicial error when the instructions merely insured that the jury would give

the statute the interpretation which the Legislature intended.

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

AFFIRMED.

DAVID J. BURHOOP ET AL., APPELLEES, V. B. J. PEGRAM ET AL., APPELLANTS.
234 N. W. 2d 828

Filed October 30, 1975. No. 39913.

1. **Contracts: Evidence: Trial.** When parties to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent.
2. **Contracts: Evidence.** Written evidence of antecedent understandings and agreements will not be used to vary a later unambiguous integrated agreement.
3. **Contracts.** A finding of law that a contract is unambiguous is correct, if the contract as a whole is not susceptible to being understood in more than one sense.
4. **Trial: Judgments.** In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it.

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

Bauer, Galter & Geier, for appellants.

Walter H. Radcliffe, for appellees.

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

BRODKEY, J.

This is an appeal from a judgment entered on October 18, 1974, by the District Court for Lancaster County,

following an extended trial of two separate actions between the parties hereto which by stipulation were consolidated for trial to the court. Both actions involved a contract for the sale of certain real estate in Lincoln, Nebraska. In this opinion B. J. Pegram and Lois Pegram will be referred to as "sellers" and David J. Burhoop and Wendy M. Burhoop will be referred to as "buyers."

The first of the two actions referred to was an action brought by the buyers to recover damages arising out of an alleged breach of a contract for the sale of real estate on the part of the sellers. The buyers alleged that the sellers failed or refused to comply with the terms of a land contract by failing to pay to the buyers a real estate commission agreed upon, and by failing to accept a payment tendered by the buyers to the sellers on the date of closing. The second action referred to was a separate foreclosure action brought by the sellers who alleged that the buyers failed and refused to make payments provided for in that land contract. In its judgment, the court ruled that the buyers could pay the back installments owing under the land contract and take possession of the premises, or in the alternative, a judgment would be awarded to the buyers in the sum of $7,375 plus costs, and title to the property would be quieted in sellers.

The buyers, pursuant to the terms of the judgment, filed a relinquishment of all rights in and to the real estate in question, except for the judgment lien on the property as provided in the judgment, as subsequently modified. Sellers then perfected their appeal to this court in the first of the two consolidated cases, which was the action for damages.

In their appeal, the sellers allege that the trial court erred in awarding judgment to the buyers and in overruling their motion for a new trial, for the reason that the buyers' evidence was not sufficient as a matter of law to sustain a judgment against them. Specifically the

sellers contend that on October 1, 1972, the sale closing date set in the contract, the buyers owed the sellers a downpayment of $10,000 over and above any commission due to the buyers under the terms of the contract, rather than $5,000 as found by the court in its judgment. Sellers also allege as an assignment of error that the ultimate contract signed by the parties, received in evidence as exhibit 3, was ambiguous; and that the court should have looked to the original agreement of the parties, in evidence as exhibit 1, to determine intent and to resolve ambiguities. The issues to be determined in this appeal are, first, whether the parties intended a document referred to by them as "Contract For Conditional Sale of Real Estate," exhibit 3, previously referred to, to be a complete and final expression of their agreement; and second, if so, whether the contract is ambiguous. The District Court found that the contract, exhibit 3, was a final and unambiguous contract for the sale of real estate. We affirm.

The material facts of this case, as revealed by the record, are as follows. The Pegrams were the owners of property legally described as Lots 1, 2, and 3, Block 31, West Lincoln Addition to Lincoln, Lancaster County, Nebraska. They had the property listed for sale with Gateway Realty in Lincoln, Nebraska, which listing, however, expired July 19, 1972. On July 20, 1972, David J. Burhoop, a licensed real estate broker, contacted Mrs. Pegram regarding the sale of the property, and ascertained that she was willing to sell the property on land contract for the sum of $110,000. Mr. Burhoop then informed her that he wanted to earn a commission of $5,000 on the sale in order to protect him from possible claims of another realtor or realty company, and inquired if that was agreeable to her. Mrs. Pegram agreed but stated she wanted to realize $110,000 net from the sale.

On July 22, 1972, an agreement was reached by the parties and reduced to a handwritten document on spiral

notebook paper similar to that commonly found in a secretary's shorthand notebook. The agreement was signed by both parties and was received in evidence as exhibit 1. At the same time, Mr. Burhoop made personal notes, which were not part of the rough draft nor incorporated into the subsequent contract by reference. A subsequent contract was prepared by Mr. Burhoop's attorney, Charles Huff, and was transmitted to Mrs. Pegram's attorney, Paul Galter. The trial court found all parties had adequate notice of the provisions in that contract prior to August 16, 1972, the date of its execution.

That document (exhibit 3) entitled "Contract For Conditional Sale of Real Estate" provided in part as follows:

"I.

The Purchase Price and Manner of Payment

1. The Purchase Price. As the purchase price for the Real Estate, Buyer agrees to pay to Seller and Seller agrees to accept from Buyer the sum of $115,000 Dollars.

2. The Manner of Payment. The purchase price shall be paid in the following manner:

(a) The sum of $500 was paid by Buyer to Seller on July 22, 1972 as earnest money and the receipt of such sum is hereby acknowledged by Seller.

(b) The sum of $5,000 shall be paid by Seller to Buyer on October 1, 1972 as commission for the sale of said Property.

(c) The sum of $4,500 shall be paid by Buyer to Seller on September 1, 1972 as additional earnest money.

(d) The sum of $10,000 shall be paid on Octobet (sic) 1, 1972 by Buyer to Seller, which shall be the balance of the down payment of $15,000, which represents the $500 and $4,500 payments of earnest money plus the $10,000 to be paid on October 1, 1972.

(e) The sum of $1,000 shall be paid on the fifteenth

day of each calendar month hereafter, until the remainder of said purchase price, with interest as herein provided, has been paid in full. Said monthly payments to include interest at the rate of eight (8) percent simple interest per annum computed monthly and to be applied first to accrued but unpaid interest on the unpaid balance of principal to date of payment and then to principal. The first payment hereunder shall be made on January 15, 1973."

This case principally involves the interpretation of subsections (b) and (d) of the above agreement.

On or about October 1, 1972, Burhoop tendered a check for $2,800.21 representing, according to Burhoop, the downpayment of $10,000 minus the commission and the amount of taxes paid by Burhoop. Pegrams refused to accept the check, stating that $7,800.21 was due. The sellers contended that the commission was not to be credited against the downpayment, but that the commission was to be applied against the balance due under the contract, thus providing the sellers with more cash in hand at time of closing.

Sellers point out that the preliminary agreement and notes, previously referred to, both contained calculations indicating that $95,000 was to be the balance carried on contract after the downpayment was made. The "Contract Agreement for Listing and Purchase of Bali Hai NW 10th and Cornhusker Highway" (exhibit 1) contained the following notations as to the terms of the agreement.

"$ 5,000.00	Commission to Dave Burhoop
110,000.00	Net to Lois Pegram
115,000.00	Sale Price
5,000.00	Commission to Dave Burhoop
110,000.00	Net to Lois Pegram
15,000.00	Down Payment
$ 95,000.00	Balance to be carried on contract. . ."

This preliminary contract also provided:

> "This is a rough Draft of the contract to be drawn by the attorney of both parties. Said contract to be drawn and accepted by both parties prior to Sept. 1, 1972 (Additional payment date). Said contract to contain all the above terms and any addition terms desired by the attorneys of both parties and agreed to by both parties."

In addition this agreement contained the following provision:

> "The commission shall be $5,000.00 Five Thousand and 00/100 Dollars, and shall be paid to Dave Burhoop at time of closing."

The personal notes of Burhoop (exhibit 2) stated the terms as follows:

$ 5,000.00	Commission to Dave Burhoop
110,000.00	Your price net
115,000.00	Sale price
$ 5,000.00	Comm. paid to Dave Burhoop
110,000.00	Net to you
15,000.00	Down payment
95,000.00	On contract

The final contract (exhibit 3), executed on August 16, 1972, did not, however, set forth any specific balance to be carried on the contract. Sellers contend that this renders the contract ambiguous.

The trial court, after considering the evidence, found that exhibit 3, the "Contract For Conditional Sale of Real Estate," drawn by the Burhoops' attorney and given to the Pegrams' attorney to approve, was a final and complete expression of the parties' agreement. The July 22 "rough draft" (exhibit 1) refers to a future contract which would contain any additional terms desired. While Burhoop testified that the price, commission, and downpayment were not to be changed from the July 22 terms, Lois Pegram testified that the parties intended to reduce the contract to a more complete agreement. Ad-

ditional provisions were incorporated providing for apportionment of taxes and insurance, and other matters. The date for payment and commencement of monthly installments was also changed. Pegrams and their attorney made changes in a proposed contract given to them by the Burhoops' attorney. At no time prior to the execution of the "Contract For Conditional Sale of Real Estate" (exhibit 3) did the sellers object to the contents of subsections (b) and (d) of the document.

The evidence shows that the parties viewed the August 16th agreement as the final, complete expression of their negotiated terms. As such, the "contract" (exhibit 3) is an integration of their agreement, and the prior written documents may not be used to vary the terms of the agreement if it is unambiguous.

This court has consistently held that when parties to a transaction "have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent." LaPuzza v. Prom Town House Motor Inn, Inc., 191 Neb. 687, 217 N. W. 2d 472 (1974). See, also, Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183 (1969). Nor is written evidence of antecedent understandings and agreements admissible to vary or contradict a later integrated agreement. Knight Bros., Inc. v. State, 189 Neb. 64, 199 N. W. 2d 720 (1972); 3 Corbin on Contracts, § 576. p. 383; Glass v. Nebraska State Bank, 175 Neb. 673, 122 N. W. 2d 882 (1963).

If an integration is ambiguous, however, extrinsic evidence may be admitted to determine the intent of the parties. See, LaPuzza v. Prom Town House Motor Inn, Inc., *supra*; Glass v. Nebraska State Bank, *supra*. A contract is ambiguous when, considered as a whole, it is

capable of being understood in more senses than one. Knight Bros., Inc. v. State, *supra.*

There can be no ambiguity unless an application of the pertinent rules of interpretation leaves it uncertain which of two or more possible meanings represents the true intent of the parties. Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571 (1953).

Ambiguity is measured by an objective standard, not by the subjective contentions of adversaries in a courtroom. That two parties urge opposing interpretations does not necessarily indicate the document is ambiguous. A contract is not ambiguous because it may be difficult to construe. Master Laboratories, Inc. v. Chesnut, *supra.*

It is clear to us from a consideration of the surrounding circumstances that Part I, paragraph 2, has only one meaning—that the commission was to be credited on the downpayment. The previous notations referring to the balance and downpayment do not in themselves create ambiguity in the final draft. Copies of the contract were exchanged, and additions and alterations were made by the Pegrams. They did not object to the wording of subsections (b) and (d) during these negotiations. It would, therefore, be reasonable to assume that the total sales price, not the balance carried on contract, was their principal consideration. Exhibit 3 represented the final meeting of minds of the parties, and superseded any previous discussions and preliminary agreements. It was not ambiguous.

We conclude, therefore, that the District Court was correct in its findings in its judgment entered in this case when it stated that the contract, exhibit 3, was determinative as to the terms and conditions to be performed by each of the parties relative to the sale and purchase of said real estate, and also in its finding of fact that the specific terms of exhibit 3 provide that the commission should be paid on October 1, 1972, by the Pegrams to Burhoop; and, also in its finding as a matter

of law that exhibit 3 was unambiguous and unequivocal. We are also of the opinion that any ambiguity involved in the transactions between the parties is not found in the final contract (exhibit 3), which is clear and explicit; but rather in the preliminary agreement of the parties (exhibit 1) which provided both that the balance to be carried on contract is $95,000, and also provided that a $5,000 commission was to be paid to David Burhoop "at time of closing." It is noteworthy that this last quoted provision was carried over into the parties' final agreement.

Finally, we wish to point out that this was a jury-waived case, tried to the court. In that situation, it is clear that the court determines not only the law applicable to the case but is also the trier of facts. All the contracts and documents involved in this case were offered and received in evidence, and were before the court when it decided the case. The law is well established that in a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Winchell v. National Bank of Commerce Trust & Savings Assn., 181 Neb. 870, 152 N. W. 2d 2 (1967). See, also, McBride v. Fort Kearney Hotel, Inc., 185 Neb. 518, 176 N. W. 2d 911 (1970). In this case it is clear that the trial court was correct both on the law and the evidence, and its judgment must be affirmed.

AFFIRMED.

GLADYS L. WYATT, APPELLANT, V. WOODMEN ACCIDENT AND LIFE COMPANY, A CORPORATION, APPELLEE.
234 N. W. 2d 217

Filed October 30, 1975. No. 39942.

1. **Insurance: Contracts.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and

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

2. ———: ———. The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.

3. ———: ———. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to mean but what a reasonable person in the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction.

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

Wright & Simmons, for appellant.

John Haessler, for appellee.

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

SPENCER, J.

This is an action to recover benefits under an accidental death benefit provision attached to an endowment life insurance policy issued by Woodmen Central Life Insurance Company, defendant's predecessor. The only issue tried was whether the accidental death benefit provision was in force at the date of the insured's death on January 30, 1974. After trial to the court, plaintiff's petition was dismissed. We affirm.

On August 7, 1953, defendant's predecessor issued a 39-year endowment policy to John Norman Wyatt for the face amount of $2,500. The policy contained an accidental death benefit provision rider. The following

language of the rider is sufficient for our purposes: "If, after the payment of the initial premium under the policy and this supplementary provision, and before default in the payment of any subsequent premium, due proof shall be presented at the Home Office of the death of the Insured *during the premium-paying period* and prior to the anniversary of the policy nearest the Insured's sixtieth birthday * * * the Company Will Pay TWO THOUSAND FIVE HUNDRED Dollars in addition to the other proceeds of this policy." (Italics supplied.)

The twentieth annual premium, covering the period of 1 year from August 7, 1972, until August 7, 1973, was paid about July 25, 1972. Plaintiff met with an accidental death January 30, 1974, more than 5 months after the expiration of the premium paying period. The type of policy is described on the first page in the following words:

"39 Year Endowment
"Premiums Payable For 20 Years
"Annual Participation."

This same endorsement appears on the back page of the policy, directly under the name of the company and the policy number. The table of guaranteed values, included as a part of the policy, shows the policy to be paid up at the end of 20 years.

Plaintiff, the surviving spouse of the insured, alleges the application fails to disclose that insured was informed he was applying for any type of life insurance other than life insurance with double indemnity coverage continuing for life. Plaintiff contends the policy is ambiguous and should be construed against the defendant to provide for the payment of an accidental death benefit of $2,500 as provided by the rider attached to the policy. Plaintiff suggests the assured would not have understood that the accidental death benefit provision was to terminate when he was only 46 years of age.

A policy of insurance will be given effect according

to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Koehn v. Union Fire Ins. Co. (1950), 152 Neb. 254, 40 N. W. 2d 874.

The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. Lonsdale v. Union Ins. Co. (1958), 167 Neb. 56, 91 N. W. 2d 245.

In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, if the contract is confusing and uncertain in its terms. See Kent v. Dairyland Mut. Ins. Co. (1964), 177 Neb. 709, 131 N. W. 2d 146.

We are unable to follow plaintiff's argument on ambiguity. The policy is clear in establishing a 20-year premium-paying period. There is no reasonable interpretation that could extend the premium-paying period beyond August 7, 1973, the date the policy became paid up. The accidental death benefit provision is specifically limited to the premium-paying period. It is undisputed that defendant paid no premium after paying the twentieth annual premium in July of 1972. We find no ambiguity in the contract.

An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to mean but what a reasonable person in the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected

and that a new contract is not interpolated by construction. Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. The policy should be given meaning and effect according to the sense of the terms which the parties have used and if they are clear, they should be taken in their plain and ordinary sense. The terms used herein are clear and unambiguous. The premium-paying period is limited to 20 years. The finding of the trial court is correct, and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE GURULE, APPELLANT.
234 N. W. 2d 603

Filed October 30, 1975. No. 39997.

1. **Trial: Evidence: Criminal Law.** The admission of irrelevant evidence and the asking of improper questions is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial.
2. **Entrapment: Criminal Law.** Where a person has no previous intent or purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer apparently provides a favorable opportunity for the violation does not constitute entrapment.
3. ———: ———. The important consideration in determining whether entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime.
4. **Witnesses: Instructions: Criminal Law.** Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers.

5. ———: ———: ———. An undercover agent who is employed by the State and paid a weekly salary to investigate and gather evidence of drug violations is not an informer such as to require that the jury be advised his testimony is entitled to special scrutiny.

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

John J. Battershell of Cunningham Law Office, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

BOSLAUGH, J.

The defendant in this case was charged in two counts with delivery of marijuana. The jury returned a verdict of guilty on both counts and he was sentenced to imprisonment for 18 months to 4 years on each count, the sentences to run concurrently. The defendant has appealed and his assignments of error relate to misconduct of the special prosecutor, the instructions to the jury, and whether the sentence was excessive.

The evidence shows that the defendant sold marijuana to Lawrence Dillon, an undercover agent employed by the Nebraska State Patrol, on March 10, 1974, and again on March 13, 1974. The defendant admitted the transactions took place but attempted to characterize the sales as favors to Dillon.

The alleged misconduct of the special prosecutor related to three evidentiary matters. Dillon testified that on one occasion the defendant gave a marijuana cigarette to the 4-year-old son of the woman who was living with the defendant. The defendant objected to this testimony and other similar evidence on the ground that it was irrelevant. The objection was overruled and the

evidence was received. The testimony had some slight relevance to the issue of intent since the defendant was charged with delivery of marijuana and not mere possession. Testimony of this nature tends to be highly prejudicial and ordinarily should be excluded. However, its admissibility here was a matter within the discretion of the trial court and we do not find it to have been prejudicial error in this case.

In relating the events at the defendant's home preceding the sale on March 10, 1974, Dillon described a handgun displayed by the defendant as a "Saturday Night Special." The term seems to be one in common usage, but upon objection by the defendant, the term was stricken, and the word "handgun" substituted. The testimony relating to the handgun had no real relevance to any issue in the case and should have been omitted from the State's case. However, it did not prevent the defendant from having a fair trial and does not require that the judgment be reversed.

The defendant called a number of witnesses who testified that they knew the defendant; smoked marijuana and had purchased it locally; but had never purchased it from the defendant. The special prosecutor asked each of these witnesses whether the laws prohibiting the delivery of marijuana should be abolished or not enforced. In each instance the defendant's objections to the questions were sustained and the witnesses were not permitted to answer.

The questions were improper and the special prosecutor was advised by the trial court at a conference at the bench that the questions would not be permitted. Nevertheless, the special prosecutor continued to question each witness in the same manner. This was misconduct and if prejudicial would have required a reversal. We do not believe it was prejudicial in this case for several reasons. There was no dispute about the essential facts, the delivery of marijuana on March 10 and March 13, 1974. The attitude of these witnesses toward the drug

laws was apparent to the jury from their other testimony. In each instance the defendant's objections to the question were sustained. Under these circumstances there was no prejudice to the defendant. See State v. Country, 184 Neb. 493, 168 N. W. 2d 918.

The defendant requested three instructions to be given to the jury, all of which were refused. The first requested instruction related to the defense of entrapment. Instruction No. 9 given by the trial court was the Nebraska Jury Instruction on entrapment, NJI No. 14.34, verbatim.

Where a person has no previous intent or purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer apparently provides a favorable opportunity for the violation does not constitute entrapment. State v. Ransburg, 181 Neb. 352, 148 N. W. 2d 324; State v. Smith, 187 Neb. 511, 192 N. W. 2d 158; State v. Young, 190 Neb. 325, 208 N. W. 2d 267.

The Nebraska Jury Instruction is phrased in terms of "improper" inducement. The representations made by an undercover agent are almost always false in some particulars and, to some extent, may constitute an inducement to commit the crime. It is improper inducement that gives rise to the defense of entrapment. Overpersuasion, undue pressure, or coercion may constitute improper inducement and entrapment. State v. Ransburg, *supra*. The important consideration in determining whether entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime. United States v. Russell, 411 U. S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366. Reluctance or unwillingness on the part of the defendant may indicate an absence of predisposition or readiness to commit the offense. These matters are all covered in the Nebraska

Jury Instruction, and we find no error in regard to Instruction No. 9.

The second instruction requested by the defendant was a cautionary instruction concerning the weight and credibility to be given to a paid informer. The trial court gave no instruction of this nature.

Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers. State v. Goff, 174 Neb. 548, 118 N. W. 2d 625.

The principal witness for the State in this case was the undercover agent Dillon. Dillon was employed by the State to investigate and gather evidence of drug violations. He was not a regular officer in the sense of a permanent employee, but he was paid a weekly salary while employed and was not employed to seek evidence against a particular person only.

In a similar factual situation, the Alaska Supreme Court held that no cautionary instruction was required. Turner v. State (Alas.), 515 P. 2d 384. We think this was the correct rule in this case. There was nothing to indicate that Dillon had any greater direct personal interest in supplying evidence against the defendant than any other public officer. We find no error in refusing the requested instruction.

The third requested instruction related to the testimony of an accomplice. It had no relevance to any testimony in the case and was properly refused.

The defendant is approximately 34 years of age. He has a lengthy arrest record and has been convicted of second offense joyriding and possession of narcotic drugs. In view of his past record and the serious nature

of the offense, there was no abuse of discretion. The sentences imposed were not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

A reading of the record in this case establishes a systematic attempt by the special prosecutor to inflame the jury against the defendant by the use or attempted introduction of evidence which was inadmissible or had only remote, if any, relevance to the charge against the defendant. In several instances the misconduct by the prosecutor consisted of asking improper questions of several witnesses in succession, after the trial court had advised counsel for both parties that such evidence was not admissible and that the particular questions asked were objectionable, and had stated that the court would sustain any objection that might be made to such questions. In spite of that admonition, the special prosecutor asked the same questions in one form or another on at least 10 subsequent occasions and of at least 5 different defense witnesses. Objections were sustained on each occasion but apparently the special prosecutor was not admonished. The questions were inquiries about the witnesses' opinions of the Nebraska laws prohibiting delivery or distribution of marijuana. The questions were clearly objectionable, as the court had advised, and the only purpose such questions could have had was to discredit the defendant and his witnesses.

Typical of the extraneous material dragged in by the special prosecutor with the assistance of the chief witness for the State was the testimony that the defendant kept a handgun in his residence. The gun was referred to as a "Saturday Night Special" by the chief witness for the prosecution. Objections to that line of questioning were sustained but had to be repeated on three subsequent occasions when the special prosecutor continued with the subject. Obviously, the fact that the defendant kept a handgun in his residence had absolutely no

relevance to a charge of possession of marijuana with intent to deliver. The testimony could have been injected for no other purpose than to prejudice the defendant in the eyes of the jury.

The defendant was charged with two counts of possession of marijuana with intent to distribute, one on March 10, 1974, and the other on the evening of March 13, 1974. The chief witness for the prosecution, who purchased marijuana from the defendant on both occasions, testified in full as to each incident. In addition, the same witness was permitted to testify, over objection, as to acts constituting other separate drug crimes upon the theory that they were offered to prove intent and knowledge. At least three crimes other than the two counts charged were testified to at length by the chief witness for the prosecution. The most blatant of the three was testimony that the defendant had given a lighted marijuana cigarette to the 4-year-old son of the woman with whom the defendant was living. The incident occurred at about noon on March 13, 1974, and was in no way connected to the subsequent sale of marijuana by the defendant several hours later.

The special prosecutor at the time of impaneling the jury announced to the panel his intention to prove that the defendant had given marijuana to a 4-year-old child. The defendant made a motion for mistrial prior to the impaneling of the jury based upon the statements of the special prosecutor. Motion for mistrial was renewed during the testimony of the chief witness for the State. That motion again was grounded upon the remarks of counsel to the jury panel and also upon the introduction of the evidence as to the handgun or Saturday Night Special. A motion for mistrial was again made when the defendant's objections to the evidence involving the giving of marijuana to the 4-year-old child had been overruled. Each motion for mistrial was overruled. The failure to sustain the motion for mistrial was error.

The general rule is that testimony concerning other

crimes is not admissible. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210. There are exceptions where the elements of motive or a particular criminal intent are relevant. See State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87.

The majority opinion of this court acknowledges that testimony as to other crimes, and particularly that involving a 4-year-old child, tends to be highly prejudicial and ordinarily should be excluded. The majority, however, find that it was marginally admissible and was not prejudicial error in this particular case. It is difficult to understand how much of the testimony admitted here could have been anything but prejudicial. "A trial court, in exercising its discretion to admit or exclude evidence of a prior crime, is required to balance its tendency to unduly prejudice the accused against its tendency to prove a material fact * * *.

"If the proffered evidence does not have substantial relevance outweighing its potentially unduly prejudicial effect, its admission is an abuse of discretion." United States v. Phillips, 401 F. 2d 301 (7th Cir., 1968).

As a general rule, evidence of marginally relevant prior or contemporaneous criminal conduct of an accused is not admissible in a trial of the accused because of its tendency to prejudice and inflame the jury and possibly deprive the accused of a fair trial on the substantive crime for which he is charged. United States v. Gebhart, 441 F. 2d 1261, cert. den. 404 U. S. 855, 92 S. Ct. 97, 30 L. Ed. 2d 96.

The Eighth Circuit has laid down a four-point test which must be met before evidence of unrelated crimes can be admitted. It must be shown that "(1) an issue on which other crime evidence may be received is raised; (2) that the proffered evidence is relevant to that issue; (3) that the evidence is clear and convincing; and (4) that the probative worth outweighs the probable prejudicial impact." United States v. Clemons, 503 F. 2d 486 (8th Cir., 1974).

As this court said in State v. Casados, 188 Neb. 91,

195 N. W. 2d 210: "It is a fundamental concept of our criminal law that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one. A prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice."

Standard 5.6(b), ABA Standards Relating to the Prosecution Function, provides: "It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury."

The basic reason for the rule excluding evidence of other crimes is that such evidence is apt to result in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged. In the context of the record here, there can be little doubt that the trial was not conducted in such a manner as to be fair and impartial to the rights of the accused. A defendant is entitled to a fair trial, even if he is guilty. The right is not limited to a case in which an appellate court thinks the defendant is or might be innocent.

One other issue remains to be disposed of. The defendant requested that the jury be given the cautionary instruction, NJI No. 14.59: "In weighing the testimony of persons employed to find evidence against the accused, you should exercise greater care than in the case of a witness who is wholly disinterested." The majority opinion holds that where informers, detectives, or other persons are employed to hunt up testimony against the accused, and are called to testify against him, he is entitled to such an instruction; but that he is not entitled to such an instruction where the witnesses against him

are "regular" public law enforcement officers. It also holds that an informer paid a weekly salary and expenses to investigate and gather evidence of drug violations in a particular locality is, in effect, a "regular" law enforcement officer and the cautionary instruction is not required.

The informer here was designated a "special employee" of the state patrol and was paid from the patrol's drug fund. The evidence establishes that such special employees are not treated like other employees. They have none of the direct or fringe benefits of regular employees. They cannot make arrests. They are not to carry weapons. They are paid only so long as they are working, and in order to maintain the job, it is necessary for them to produce evidence and cases for prosecution. The informer here was sent to McCook by the patrol to conduct a drug investigation and was given a list of names and areas to investigate. The defendant's name was not on that list. It would be strange indeed if individuals whose names appeared on the list were entitled to have NJI No. 14.59 given while those who were not listed would not be entitled to the instruction. It is completely illusory to assume, when a person is employed especially to procure drug evidence in a particular local area and given a list of suspects, that he is not an informer as to anyone whose name is not on the list. It is wholly illogical to assume that a "special employee" under the facts here is somehow different from any other paid informer.

The reason for the rule requiring an instruction such as NJI No. 14.59 is almost as old as the State. It is " 'because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and to disregard everything which does not tend to support their preconceived opinions of the matter in which such person is engaged.' " Preuit v. People, 5 Neb. 377. The bias of the informer here is apparent from the record. The cau-

tionary instruction should have been given and the failure to give it only emphasized the prejudice created by the prosecutorial misconduct referred to.

While each case must be determined on its own facts, the record and circumstances here are more than sufficient to establish that the defendant did not receive a fair trial. The judgment should be reversed and the cause remanded.

KUNS, Retired District Judge, joins in this dissent.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. RUTH MITCHELL ET AL., APPELLANTS.
234 N. W. 2d 220

Filed October 30, 1975. No. 40016.

Appeal and Error: Time. The statutory requirement that the transcript be filed in the District Court within 30 days from the entry of judgment in the lower court is mandatory, and unless the appellant was prevented from complying with the statute by some default of the lower court, the District Court acquires no jurisdiction of the appeal if the filing was out of time.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. On motion to dismiss appeal. Appeal dismissed.

Ronald J. Palagi of Shrout, Caporale, Krieger, Christian & Nestle, for appellants.

Robert C. Doyle of Morsman, Fike, Davis & Polack, for appellee.

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

BOSLAUGH, J.

This is an appeal in an action for forcible entry and detainer which was commenced in the municipal court

of the City of Omaha, Nebraska, on October 9, 1973. A judgment in favor of the plaintiff was entered on December 5, 1973. The defendants filed a notice of appeal and an appeal bond in the municipal court and a transcript of the proceedings in the District Court on January 7, 1974.

The plaintiff, who is the appellee in this court, has moved to dismiss the appeal on the ground that the District Court did not acquire jurisdiction because the transcript was not filed in that court within the time required by statute. If the District Court did not have jurisdiction of the appeal from the municipal court, then this court can not acquire jurisdiction. Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49.

Section 24-544, R. S. Supp., 1974, requires the transcript to be filed within 30 days from the entry of judgment in the lower court. Filing of the transcript constitutes filing of the appeal with the District Court. This requirement is mandatory and unless the appellant is prevented from complying with the statute because of some default of the lower court the District Court acquires no jurisdiction. See Lynde v. Wurtz, 147 Neb. 454, 23 N. W. 2d 703.

The last day for filing the transcript in the District Court in this case was January 4, 1974. There is no showing that the appellants were prevented from complying with the statute by any default of the court. The filing was out of time and the District Court acquired no jurisdiction of the appeal. The appeal to this court, must, therefore, be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE FRANKLIN, APPELLANT.

234 N. W. 2d 610

Filed October 30, 1975. No. 40044.

1. **Preliminary Hearing: Plea in Abatement: Evidence: Habeas Corpus.** The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court.
2. **Trial: Plea in Abatement: Evidence.** After trial and conviction in the District Court, any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
3. **Criminal Law: Searches and Seizures: Arrest.** Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
4. **Criminal Law: Evidence: Trial: Intent: Rape.** It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Evidence of similar crimes with third persons is not admissible.
5. **Criminal Law: Instructions: Evidence: Trial: New Trial.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.

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

Michael T. Levy, for appellant.

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

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

CLINTON, J.

The defendant was charged with kidnapping, rape, and sodomy in violation of sections 28-417 and 28-408, R. S. Supp., 1974, and section 28-919, R. R. S. 1943, respectively. He was found guilty by a jury and sentenced to confinement in the Nebraska Penal and Correctional Complex for a term of 3 to 5 years on the first charge, 7 to 10 years on the second charge, and 4 years on the third. All the charges involved the same victim and were part of one continuous transaction. The judgment provided that the terms should be served consecutively.

On this appeal the errors assigned are: (1) The trial court erred in overruling the defendant's plea in abatement before trial, which plea was founded upon the premise that the evidence at a preliminary hearing was insufficient to bind the defendant over for trial. (2) The court erred in overruling the defendant's motion to suppress evidence seized in a search of the defendant's automobile and in admitting such evidence at the trial. (3) The court erred in admitting over objection testimony that the defendant had, 3 weeks prior to the date of the alleged offense, committed or attempted to commit an act of sodomy with another person at about the same place where the rape and sodomy charged here are alleged to have occurred. We affirm.

A summary of the evidence introduced by the State, absent many details, will give the background necessary for a discussion of the errors assigned. On October 11, 1974, during the noon hour, the victim, a girl student, aged 16, whom we will hereafter refer to by the term victim, was waiting at a bus stop at 23rd and Burt Streets in Omaha, Nebraska, in the process of trans-

ferring from one bus to another. While she was waiting a black male, later identified as the defendant, Franklin, stopped his automobile, a 1965 brown Buick Riviera, and asked the victim if she wanted a ride. She declined. He repeated the invitation. When she again declined he drew a small caliber hand gun and ordered her into the car. She complied. He directed her to roll up the window and lock the door. He then drove to a nearby self-serve gas station. At that point he told her that if she created a disturbance or attempted to get away he would shoot her. He then got out of the car, placing the hand gun in his belt inside his coat, purchased some gasoline, and drove away with the victim still in the car.

The subsequent activities and journey, which meandered through northeast Omaha to Carter Lake and finally to Hummel Park, consumed about 4 hours. It was during this time that the various and repeated sexual attacks accompanied by violence and threats occurred. The last attack took place outside the car in the woods of Hummel Park. The victim testified that she resisted the defendant's attacks, but finally had to submit. She was frightened that he would shoot her. She had previously discussed with her mother the possibility of sexual attack and had been advised to kick, scream, and fight if the attacker had no weapon, but that if he had a gun, knife, or club she should attempt to talk the attacker out of his purpose. The victim testified that she did not attempt to run away because she was afraid she would be shot.

During some part of the journey, the defendant took from the victim a piece of paper on which she had written her name and telephone number for a school friend but which she had not used because the friend had not come to school that day. After the defendant obtained this paper, he dropped it and ordered her to give him another. She complied by writing on a second sheet of paper her first name and an old teen telephone number no longer used. As an afterthought she added

her correct number, thinking that if the defendant did in fact use it, it might lead to his identification. These two slips of paper were both later found in the search of the defendant's car.

During the journey the victim saw an automobile registration slip attached to the visor of the car. She noted and remembered the name Franklin and a portion of an address, 224 Pratt Street.

At about 4:30 p.m. the defendant drove the victim to a point near her home and while the car was still in motion she got out and ran. The defendant drove rapidly away. The victim then went into a nearby drugstore where she met a slight acquaintance who accompanied her to her home. There she told a younger sister (her parents were not yet home from work) what had happened. The sister immediately called the police. A policeman arrived a few minutes later just after her mother came home. The victim was crying and greatly upset. She was immediately taken to a hospital where she was examined and treated. The examination tended to verify her story of abuse although no male sperm was found upon examination and tests.

During the course of the police investigation which followed, it was discovered that a person who lived in the Hummel Park area had seen the defendants' car in Hummel Park about 4 o'clock p.m. It was then occupied by a black male and a long-haired female. At that time the male was striking the woman. When the car left at high speed the observer followed and obtained the license number, Nebraska 1-DD471. This information, plus the defendant's description and the other information furnished by the victim led to the arrest of the defendant on October 13, 1974, when his unoccupied car was found on 24th Street between Burdette and Grant Streets. The police waited there and when the defendant appeared and got into the car they asked for identification. It was furnished by the defendant and he was promptly placed under arrest. Later at the

police station the victim viewed Franklin in a lineup and promptly and positively identified him as the kidnapper and attacker.

The facts in connection with the search of the defendant's automobile will be summarized later when we discuss the search and seizure issue. Certain .22 caliber shells and the slips of paper bearing the victim's name and telephone numbers, which we earlier mentioned, were the subject of a motion to suppress and after a hearing thereon the motion was denied and the exhibits were received at trial over objection. Also received was the automobile registration slip found in the car at the time of the arrest. It bore, along with the other usual information, the name of the defendant, Willie Franklin, and the address 2224 Pratt Street.

The caretaker of Hummel Park was called to testify. He stated that on October 11, 1974, the date of the alleged crimes, he was patrolling a portion of Hummel Park on foot at about 3:30 or 4 o'clock p.m., even though it was an off-duty day for him. While so doing he came upon an unoccupied brown Buick Riviera at a place in the park referred to as South Point. He saw no one and did not go into the woods as he had his good clothes on. He looked into the car. There were some books in the front part of the car. (The victim had testified that she had her school books with her.) He noted the license number DD 471. He then testified that he had seen the same car at about the same location in the park 3 weeks earlier. On that occasion he heard some shouting, cussing, and arguing coming from the woods and he walked into the woods and saw a naked man. At that point in the trial, defense counsel made objection and bench discussion took place. The court overruled counsel's objection and the witness was permitted to continue describing what he saw. The substance of the additional testimony was that the man he then observed was the defendant and that he was engaged in or attempting an act of fellatio with a woman.

The caretaker ordered the persons out of the park and they complied.

Immediately after this testimony, defense counsel moved for a mistrial. The court denied the motion, but after an overnight recess and before further testimony was taken, the court, after identifying the testimony to which it was referring, told the jury that the court had erred in admitting the testimony, that it now sustained the objection made and was ordering the testimony stricken from the record, and stated: "And I must also, as I said before, advise and admonish and caution you solemnly and seriously to disregard all testimony stricken from the record, and I would particularly advise and caution you to disregard that testimony entirely."

After further prosecution testimony the State rested. The defendant presented no evidence in his own behalf and for his defense relied upon the presumption of his innocence, the burden of proof which rested upon the State, and attacks by cross-examination upon the credibility of the prosecutrix.

Prior to entry of his plea to the merits, the defendant filed a plea in abatement in which he asserted that the evidence adduced at preliminary hearing was insufficient to authorize the magistrate to bind him over for trial in District Court. This contention was decided adversely to the defendant by the trial court and his motion was overruled. On this appeal the defendant assigns the overruling of the motion as error. The State meets the assignment directly by asserting that the evidence at the preliminary hearing was sufficient. The assignment might be dealt with on appeal by again reviewing the sufficiency of the evidence. Deciding the matter in that way, however, could be misleading. If the evidence is determined to be sufficient no problem arises. However, if it were determined insufficient could we, after trial and conviction on evidence which was clearly sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt, reverse and order a new

trial because the evidence at a preliminary hearing was insufficient to show either that the crime was committed or that there was probable cause to believe the defendant committed it? The latter course would seem highly irrational.

In Kruger v. Brainard, 183 Neb. 455, 161 N. W. 2d 520, we adopted a rule of practice as follows: "The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the district court." Previous to our holding in Kruger, the sufficiency of the evidence to bind a defendant over for trial could be challenged either by a plea in abatement or by proceedings in habeas corpus. Jahnke v. State, 68 Neb. 154, 94 N. W. 158, reversed on other grounds, 68 Neb. 181, 104 N. W. 154; Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357; Kruger v. Brainard, *supra*. The usual practice had been to challenge the evidence by proceeding in habeas corpus. No doubt, the reason for that choice by those accused was so that there could be an appeal from an adverse ruling before defendant was forced to trial by a jury. The overruling of a plea in abatement is not a final order from the overruling of which there can be a direct appeal. Gartner v. State, 36 Neb. 280, 54 N. W. 516.

If the magistrate and the District Court have erred, the error is cured where sufficient evidence to convict is adduced at trial. The practical effect of our holding in Kruger v. Brainard, *supra,* may be to make a ruling against the defendant on the sufficiency of the evidence essentially unreviewable by this court after the trial court has on a plea in abatement reviewed the evidence and determined it to be sufficient. On appeal to this court the question then becomes, was the evidence sufficient to support the jury verdict?

Our decision in Kruger v. Brainard, *supra,* was not the result of inadvertence, but of mature consideration and designed to avoid the evils of delay, proliferation of litigation, and piecemeal review. These ends are ac-

complished without detriment to the right of the defendant not to be brought to trial where evidence is not sufficient to support the filing of an information. That objective is protected by giving the defendant a right, through an appropriate plea in abatement, to a review of the sufficiency of the evidence by the District Court before trial.

In Jahnke v. State, *supra,* we said: "We are disposed to the view that the true test [of probable cause] should be whether in fact there was a hearing as to the crime charged in form and substance as contemplated by the statute, *and whether the evidence introduced at such hearing is such as to invoke an honest exercise of judicial discretion, a bona-fide judgment or determination on the part of the examining magistrate* by weighing and considering such evidence in arriving at a conclusion as to the order or judgment to be entered; and if such is the case, then it can not be said that a preliminary examination, within the meaning of the statute, which will support the filing of an information in the district court, has not been had." (Emphasis supplied.) This test can be satisfied just as well through a hearing on a plea in abatement as by a proceeding in habeas corpus.

We know of no principle which would require this court to entertain a pretrial appeal of the trial court's review of the decision of the magistrate binding the defendant over after a preliminary hearing. It would appear that our statutory provisions for preliminary hearings and our rule of practice under which the trial court itself reviews the magistrate's determination are clearly sufficient to meet the constitutional mandates of the Fourth Amendment to the Constitution of the United States. See Gerstein v. Pugh, 420 U. S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54.

We reiterate our previously established rule that the sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the

criminal proceeding in the District Court. We further hold that after trial and conviction in the District Court any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.

The defendant next argues that the warrantless search of his automobile violated his constitutional rights and that therefore his motion to suppress the evidence found in the search should have been sustained.

We sustain the validity of the searches on the authority of State v. Agnew, 184 Neb. 700, 171 N. W. 2d 542 (1969); Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); and Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

In Cady v. Dombrowski, 413 U. S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), the Supreme Court of the United States said: ". . . the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." We will not attempt through detailed analysis of the above-cited opinions to make a seamless web from the authorities upon which we rely. We simply set forth what we believe are the pertinent, important circumstances surrounding the search and seizure in this case and quote or summarize from the authorities cited the facts and principles which, in our judgment, support the conclusion at which we arrive.

The defendant Franklin was arrested in his automobile on a public street 2 days after the crime occurred. That there was probable cause for the arrest is amply demonstrated by the facts we have earlier summarized. At the time of the defendant's arrest the police knew he had used that automobile as one of the instruments of his crime and that he had used, in the

course of his acts, a small hand gun which he had kept both on his person and in the automobile. The record does not demonstrate that the defendant had, up to the time of his arrest, any reason to believe that he had been identified by the police as the perpetrator. Therefore, it was not unreasonable to assume that the gun might still be on the person or in his vehicle. Immediately upon the arrest and at the scene the car was searched. At that time the .22 caliber shells were found. The record supports the conclusion that the officer in charge at the scene did not make as thorough a search as he would have liked and that he interrupted the search because of the apparently unfriendly crowd which had gathered. The search was completed after the car had been towed to the police lot and immediately after the officer had completed his written report of the arrest. At that time the slips of paper on which the victim had written her name and telephone numbers were found in the glove compartment of the car. Precise time of this search is not shown by the record, but a reasonable conclusion is that it occurred within an hour or two of the arrest and that it was accomplished without avoidable delay.

Let us now examine the authorities.

In Carroll v. United States, *supra,* federal undercover agents, who had probable cause to believe that a certain automobile was being used to transport illegal alcoholic liquors, acting without a warrant, stopped the car and searched it. They found contraband liquor. They then arrested the occupants. The Supreme Court of the United States held that the evidence was admissible and justified the search as reasonable on the ground that probable cause existed and that the mobility of the vehicle created an exigent circumstance.

In Chambers v. Maroney, *supra,* a gas station was robbed by two men. Two teenagers told the police they had seen a blue station wagon circling the block on which the station was located and saw the car speed

away immediately following the robbery. They saw one of the men in the car wearing a green sweater. The station attendant said one of the men who robbed him was wearing a green sweater. Within an hour the police stopped a car fitting the description. Defendant was in the car and was wearing a green sweater. The occupants of the car were arrested and apparently the police drove the station wagon to the station. The police later searched the car without a warrant and found evidence which was introduced at defendant's trial.

The Supreme Court of the United States found the evidence was admissible. The court there did not justify the search as incident to an arrest. Quoting from Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964), the court noted that: "'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.'" Then, after noting that probable cause for an initial arrest and search at the scene had existed, the court said: "The probable-cause factor still obtained at the station house and so did the mobility of the car . . . ." The court concluded that under the facts in Maroney, an immediate warrantless search or a later warrantless search following seizure of the automobile were equally permissible. It said: "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. . . . The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search

without a warrant and the car's immobilization until a warrant is obtained."

In Coolidge v. New Hampshire, *supra,* the Supreme Court of the United States considered a somewhat different set of facts. There the defendant was suspected of having murdered a young girl. Defendant took a lie detector test which was inconclusive. The police spent the next 2½ weeks gathering evidence of the crime. When they had ample evidence, the police applied to and received a warrant from the State Attorney General to search defendant's two cars which were located in the driveway of his residence. The police then arrested defendant at his home. Police would not let defendant's wife use either car because they had been "impounded." Two and one-half hours after defendant was taken into custody the cars were towed to the station and subsequently searched. Evidence was found and entered at defendant's trial. The Supreme Court found the warrant issued by the Attorney General was invalid, treated the search of the cars as a warrantless search, and held the evidence found in the search inadmissible. The court, however, approved both Carroll and Maroney, saying: "Since Carroll would not have justified a warrantless search of the Pontiac *at the time Coolidge was arrested,* the *later search* at the station house was *plainly illegal,* at least so far as the automobile exception is concerned." (Emphasis supplied.) The court then continued, stating: ". . . where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station. . . . It is true that the actual search of the automobile in Chambers was made at the police station many hours after the car had been stopped on the highway, when *the car was no longer movable, any 'exigent circumstances' had passed,* and, for all the record shows, there was a magistrate easily available. . . . The rationale of Chambers is that *given* a justified initial intrusion, there is little difference between a search on the open

highway and a later search at the station." (Emphasis supplied.)

State v. Agnew, *supra,* is on point in the case we have under consideration. In Agnew, a witness saw two men breaking into a service station in the early morning. The men put a cash register in the trunk of the car, a green Triumph convertible. The witness also noted the men were accompanied by a woman. A description of the car went out shortly after the robbery and the car was stopped within an hour near the scene of the crime. After the men were searched all three were arrested and taken down to the station and a policeman apparently drove the Triumph to the same place. After the arresting officers had processed the three, they searched the car without obtaining a warrant (about 20 minutes after arriving at the station). This court found the warrantless search was valid because it was "substantially contemporaneous with the arrest." The court also found that exigent circumstances justified a delay in the search. It was raining and the car and police vehicles were on a public highway, blocking traffic.

We hold that where, as here, there is probable cause for the arrest of an accused in his motor vehicle on a public highway, as well as probable cause for the search of the vehicle at that time, a search a short time later while the vehicle is still in police custody is not unreasonable even though made without a warrant and the fruits of such search need not be suppressed.

The defendant's third assignment relates to the admission of the park caretaker's testimony that the defendant had committed another act of sodomy with a different person 3 weeks prior to the act charged. It is the usual rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Brown, 190 Neb. 96, 206 N. W. 2d 331. An exception to the above rule is that evidence of similar offenses

is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. State v. Ray, 191 Neb. 702, 217 N. W. 2d 176; State v. Young, 190 Neb. 325, 208 N. W. 2d 267; State v. Rich, 183 Neb. 128, 158 N. W. 2d 533. The State concedes that no such motive, criminal intent, or guilty knowledge is an element of the crime here charged. Another exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Smith v. State, 127 Neb. 776, 257 N. W. 59. Evidence of similar crimes with third persons is not admissible. Henry v. State, 136 Neb. 454, 286 N. W. 338; Nickolizack v. State, 75 Neb. 27, 105 N. W. 895.

The State seems to acknowledge error, but argues that the error was, in this case, without prejudice and that the offering of the evidence by the prosecutor was not a deliberate or very careless attempt by the State to introduce inadmissible testimony and therefore granting a new trial is not justified. In State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274, we reversed a robbery conviction and remanded the cause for a new trial even though admissible evidence of guilt was strong because evidence of prior crimes was "deliberately" and by "very careless" procedures injected by the prosecution. The State urges that the prosecutor's offer of the testimony was not a deliberate and a very careless injection of evidence known to be inadmissible. It argues that the prosecutor could have concluded that our holdings in Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380; and Abbott v. State, on rehearing, 113 Neb. 524, 206 N. W. 153, made such evidence admissible. In Onstott v. State, *supra,* a prosecution for statutory rape, we stated that evidence of other criminal acts of the same sort, occurring shortly before or after the act charged, is admissible to explain the act charged or corroborate

the testimony of the prosecutrix. We there approved without comment the admission of testimony that the defendant had, at about the time and place of the offense charged, committed statutory rape with persons other than the prosecutrix. In Abbott v. State, *supra,* we said that in a prosecution for sodomy, former instances tending to show that the accused had indulged in such a depravity essential to an act like that charged may, in the discretion of the trial court, under exceptional circumstances, be admitted in evidence in connection with direct proof of his guilt. Onstott v. State, *supra,* of course has no direct application to the crimes here charged. Whether Abbott v. State, *supra,* should have application, we do not decide because it is clear that here the trial court itself concluded that it should not have admitted the testimony in question and that it had abused its discretion. It then attempted as best it could to correct what had been done. We are further persuaded that the prosecution did not deliberately attempt to introduce testimony which it clearly knew was inadmissible.

Although admission of the evidence may be deemed erroneous, reversal and a new trial are not required. The evidence of guilt in this case, both direct and corroborative, is very strong and practically conclusive. The statutes of this state direct: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, [finds] that no substantial miscarriage of justice has actually occurred." § 29-2308, R. R. S. 1943. See State v. Bartlett, *ante* p. 502, 233 N. W. 2d 904. We conclude upon an examination of the whole record that no substantial miscarriage of justice has actually occurred and will therefore not re-

verse the conviction even though the admission of the testimony was erroneous.

AFFIRMED.

WHITE, C. J., not participating.
NEWTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. CHARLES W. JAWORSKI, APPELLANT.

234 N. W. 2d 221

Filed October 30, 1975. No. 40048.

Probation and Parole: Records. At a probation revocation hearing in the District Court under the Nebraska Probation Administration Act, where a complete record of the evidence and testimony is made, the court is not required to specify which particular evidence, exhibits, or witnesses were relied upon for its written findings and judgment.

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

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

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

MCCOWN, J.

This is a probation revocation proceeding in which the District Court found the defendant guilty of violation of probation and sentenced him to 3 years imprisonment on the original charge of burglary. The defendant contends that the District Judge did not state in writing the reasons for his determination that the probation was to be revoked and did not state in writing the evidence relied upon in making the finding that a condition of probation had been violated.

The relevant facts here are that on October 24, 1974, after a plea of guilty to a charge of burglary, the defendant was sentenced to 3 years probation by the Douglas County District Court. The first condition of his probation was that he refrain from unlawful conduct. On November 7, 1974, the defendant was charged with violating that condition of his probation by receiving or buying stolen automobile stereo equipment on October 31, 1974, knowing it to have been stolen. On January 2, 1975, after written notice of that charge to the defendant, the District Court held a probation revocation hearing. The defendant was represented by counsel and evidence from both parties was introduced and received. The District Court made a written finding "by clear and convincing evidence that defendant is guilty of violation of probation," adjudged him guilty, and deferred sentence. On January 21, 1975, probation was revoked pursuant to the findings. Thereafter the defendant was sentenced to 3 years imprisonment on the original charge of burglary.

The defendant contends that the probation revocation proceedings, which were conducted under sections 29-2266 to 29-2268, R. S. Supp., 1974, fail to comply with the procedural 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. The basis for the contention is that the District Court did not make a written statement as to the evidence relied on and the reasons for revoking probation. The defendant tacitly concedes that all the other procedural and due process requirements laid down by the Supreme Court of the United States in Morrissey and Gagnon were met by the proceedings here under the Nebraska Probation Administration Act.

Morrissey and Gagnon were applied to a form of administrative hearing. They did not directly deal with judicial probation and judicial revocation as provided for in the Nebraska Probation Administration Act. They

were not intended to be applied as a constitutional straitjacket to "create an inflexible structure" for probation revocation procedures. They require that a probationer, before revocation, be afforded certain due process rights, one of which is "a written statement by the judicial officer conducting the final hearing as to the evidence relied on and the reasons for revoking probation." The Morrissey and Gagnon requirement of a written statement does not fit the pattern of a judicial hearing in a court of record where proceedings, findings, and judgments are recorded and subject to appellate review. The differences are further emphasized where a specific charge or information is filed by a prosecutor, and the defendant is represented by counsel. It would be strange indeed if the formal requirements of fact finding and determination of guilt were to be more strict at a probation revocation hearing than at an original criminal trial. Judicial opinions in other states support this view. See, People v. Scott, 34 Cal. App. 3d 702, 110 Cal. Rptr. 402; State v. Moreno, 21 Ariz. App. 462, 520 P. 2d 1139; Singletary v. State, 290 So. 2d 116 (Fla. App.).

The defendant attempts to rely upon the fact that the evidence in the record might support two additional charges of violation of probation. One involved a drug offense and the other involved an arrest on a felony charge which was later dismissed. The defendant overlooks the fact that only one charge of probation violation was made in the information and that charge involved the receiving of stolen property. Where there is only one specific charge of violation of probation in the motion or information to revoke, a proper finding of guilt can only be based upon that charge. It might have been more complete and accurate if the findings here had been that the defendant was guilty of the violation of probation "as charged," and that the violation was established by clear and convincing evidence in the record. Good practice under the Nebraska Probation

Administration Act dictates that the trial court's order of its findings, reasons, and conclusions should be reasonably detailed and precise. Nevertheless, the written findings and orders here complied with the spirit of Morrissey and Gagnon. The trial courts should take additional care with the written findings where there are multiple charges of acts constituting violations of conditions of probation in order to make sure that findings are made for each specific charge.

Neither the Nebraska Probation Administration Act nor Morrissey or Gagnon require the District Court to specify which exhibits or which witnesses were relied upon for its written findings. In its written findings and judgment in the record the court need only refer to the evidence in the record.

There was clear and convincing evidence in this record to establish that the defendant was guilty of receiving stolen property on October 31, 1974, which constituted a violation of probation as charged.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAMONT MITCHELL, APPELLANT.

234 N. W. 2d 619

Filed October 30, 1975. No. 40103.

1. **Criminal Law: Guilty Plea.** The criteria for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. **Criminal Law: Guilty Plea: Presentence Reports.** As to a factual basis for a plea of guilty, it is sufficient if the presentence investigation report which is before the court when sentence is pronounced discloses a factual basis for the plea.

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

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

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

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

WHITE, C. J.

The defendant was charged originally with breaking and entering an automobile, a felony. On arraignment in District Court, the charge was reduced to petit larceny, to which the defendant pled guilty. The sole issue presented on appeal is the validity of the plea of guilty to the reduced charge. We affirm the judgment and sentence of the District Court.

The record in this case affirmatively shows that the defendant was represented by counsel, both at the arraignment and at his sentencing; it shows that at the arraignment the trial court specifically asked the defendant if he wished to change his plea to guilty to the amended charge of petit larceny; it further shows that the penalty for petit larceny was explained to the defendant and he was asked if he understood the penalty; that he was asked if he understood that by entering a plea of guilty that he waived his "right to a trial with all the incidents that go with that"; and that he was asked if his plea was voluntary and whether any promises or inducements had been made to him in return for his plea of guilty. His responses, without reciting them herein verbatim, were clear, direct, and unequivocal, and there is no claim or allegation that he was overreached by the court, by counsel, or by any misunderstanding of the arraignment proceedings. As to the factual basis for the plea, the presentence investigation reveals that immediately following the statement of the official version of the crime in the report, the defendant stated he did not wish to make a statement other than to say that he committed the crime.

This statement, of course, was made after the arraignment and the plea of guilty as recited above, and before the defendant appeared with counsel before the court for sentencing.

The criteria for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. As to a factual basis for the plea, it is sufficient if the presentence investigation report which is before the court when sentence is pronounced discloses a factual basis for the plea. State v. LeGear, 187 Neb. 763, 193 N. W. 2d 763; State v. Leger, 190 Neb. 352, 208 N. W. 2d 276.

The record also reveals that the defendant's problem arose out of the use of drugs. His arrest record is lengthy, dating back to April 1968, and his convictions include unlawful attempt to obtain a depressant or stimulant drug, trespassing, violation of probation, and petit larceny. One of the offenses was committed while he was out on bond on another charge.

It is apparent that his plea was voluntarily and intelligently made, and that his contention as to violation of his constitutional rights is without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN VAN ACKEREN, APPELLANT.

235 N. W. 2d 210

Filed November 6, 1975. No. 39864.

1. **Constitutional Law: Searches and Seizures: Standing.** In order to have standing to raise Fourth Amendment rights the individual must show he has been injured by the search or

seizure (invasion of property or privacy rights), not merely by use of the evidence.

2. ———: ———: ———. A defendant in a criminal case has no standing to assert Fourth Amendment claims merely because evidence may have been obtained as the product of the invalid arrest of a third person.

3. ———: ———: ———. A person against whom a search is directed and whose property is seized in a search has standing to challenge the validity of the search under the Fourth Amendment where the prosecution case against him depends upon the defendant's possession of the goods.

4. **Searches and Seizures: Evidence: Trial.** The determination of whether a consent to search is voluntarily given is a question of fact.

5. ———: ———: ———. The burden of proving the voluntariness of the consent is upon the prosecutor.

6. ———: ———: ———. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it.

7. **Searches and Seizures: Evidence: Trial: Arrest.** In determining the voluntariness of the consent to search, the fact that a person is in custody when the consent is given is one of the circumstances to be considered.

8. **Searches and Seizures: Trial: Evidence.** The applicable standard of review of the District Court's determination of the voluntariness of a consent to search is: The findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence.

9. ———: ———: ———. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

10. **Criminal Law: Judgments: Trial: Instructions: Evidence.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the

entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.

11. **Trial: Evidence.** Where an offer consists of several statements tendered as a unit, e.g., a letter, a conversation, or a transcript of testimony, and parts are admissible and parts are not, objection should be made only to the improper parts and not to the offer as a whole. The general objection cannot avail the defendant on appeal to this court.

12. ———: ———. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis.

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

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

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

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

CLINTON, J.

Defendant was found guilty by a jury on a charge of receiving stolen property and sentenced to a term of 7 years in the Nebraska Penal and Correctional Complex. He appeals and assigns as error: (1) The overruling of a motion to suppress evidence seized in the search of an automobile belonging to Susan Humphrey, a companion of the defendant Van Ackeren. (2) The denial of defendant's motion for a mistrial, the ground for which is a claimed violation of a pretrial order of the court directing the prosecuting witnesses not to describe the defendant as a known burglar or thief. or use other adjectives which might so imply. (3) The introduction over objection of a taped telephone conversation between the defendant and a police officer without first screening the tape in camera to eliminate irrelevant portions. (4) The denial of a motion for mistrial founded upon alleged prosecution misconduct in permitting the jury to

see an exhibit, to wit, a money bag which was never offered in evidence. We affirm.

We treat the assignments in the order listed and will recite or summarize evidence as necessary in connection with each assignment.

The first assignment has several facets. The defendant first contends that the search of the automobile of Susan Humphrey and the luggage therein was the fruit or product of Susan's arrest which was made without probable cause and therefore the motion to suppress the stolen property found in the search should have been granted. He cites, among other cases, Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441. This issue must be decided against the defendant on the basis of his lack of standing to challenge Susan's arrest. He cites no authority which requires exclusion of evidence procured by means of the illegal arrest of a third person. The general rule on standing is: "In order to have standing to raise fourth amendment rights the individual must show he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence." Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo. L. Rev. 1 (1975). See, also, Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176. The above position has been adopted by this court. State v. Waechter, 189 Neb. 433, 203 N. W. 2d 104; State v. McCune, 189 Neb. 165, 201 N. W. 2d 852; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

An application of the general rule as it applies to the claimed invalid arrest of a third party is found in Wong Sun v. United States, *supra*. Wong Sun contended that, since the discovery of the heroin was based on Toy's statements resulting from an invalid arrest of Toy, the heroin was inadmissible against him (Wong Sun). The United States Supreme Court disagreed, saying: "Our

holding . . . that this ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." See, also, United States v. Galvez, 465 F. 2d 681 (10th Cir., 1972). It is clear that the arrest of Susan Humphrey did not invade any constitutional or statutory rights of the defendant. We need not pass upon the validity of the arrest.

Van Ackeren also lacks standing to challenge the search of the automobile. The automobile searched was the property of and in the sole possession of Susan Humphrey when the search was made. Under the general rule the defendant has no standing to challenge that search. See Brown v. United States, 411 U. S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (search of a premises in which the defendants had no proprietary or possessory interest).

As to the warrantless seizure of the contents of the suitcase, the defendant would, under the language of our statute, be a person aggrieved by the search and seizure and therefore have standing on this issue. § 29-822, R. R. S. 1943. The search was directed at him and the State's case against him depended upon Van Ackeren's possession of the stolen goods. See, Jones v. United States, *supra*; Brown v. United States, *supra*.

Defendant challenges the warrantless search and subsequent seizure of items from the suitcase, contending that Susan Humphrey's consent to search it was not validly obtained. The legal effectiveness of the consent depends upon two factors: (1) Was Susan Humphrey's consent voluntary, and (2) if it was, did her consent bind the defendant? We will, for the purpose of determining these questions, assume that Susan was in

custody at the time the consent was given although that such was the fact is not clear from the record before us.

With respect to the voluntariness of Susan's consent, the evidence shows that she executed at police request a consent to search her automobile and "to remove from my . . . motor vehicle whatever documents, articles, or other items of property whatsoever, which they deem pertinent to their investigation, with the understanding, of course, that these officers will give me a receipt for whatever they remove." The written consent also stated: "I AM GIVING THIS WRITTEN PERMISSION to these police officers, freely and voluntarily, without any threats or promises having been made to me and after having been informed by these officers that I have the right to refuse to permit this search and seizure and that any property seized may be used against me in the event of prosecution." Defendant contends that Susan's written consent was involuntary because she was coerced into giving it by the police.

At this point, a recital of some of the evidence pertaining to the point in question is pertinent. At about 2 o'clock p.m., on February 21, 1974, the residence occupied by Susan Humphrey and the defendant was under surveillance because the defendant was suspected of being a receiver of stolen property. At that hour four persons were seen loading luggage into the Humphrey automobile and then driving away. These persons included Susan Humphrey and the defendant, Van Ackeren, who was the driver. The officer who was conducting the surveillance knew that the motor vehicle operator's license of Van Ackeren was currently under suspension. This officer directed uniformed officers to stop Van Ackeren which was done. Van Ackeren failed to produce a valid Nebraska operator's license and was placed under arrest and taken to the police station in a patrol car. Susan and the others were not arrested. They drove to the police station in Susan's car with the in-

tention of picking up the defendant after he had made bond, and then continuing to Eppley Air Field where they had planned to take a flight to Denver, Colorado. While the defendant was making bond, Susan and the others waited in the lobby of the police station. Defendant made bond and left the premises without the departure being known to his companions. Susan was asked by a police officer if they might search her car. The evidence is conflicting thereafter. The substance of Susan's testimony was to the effect that she initially refused to allow a search and then signed the consent form later only because of threats of imprisonment and mental and emotional confusion on her part, arising from the fact that this was her first arrest. The officer testified that Susan initially consented orally and then withdrew the consent when a male companion objected. The officer testified that he then told the parties that he would get a search warrant. This officer then consulted a superior. Susan then either accompanied or was taken by the officer to an interrogation room. There, further explanations were made by another officer and a consent was obtained and the search thereafter made. Both officers denied making threats of any kind and testified that after Susan read the consent she stated she understood it and then signed it. It appears that this was Susan's first encounter with the police and that she was nervous, anxious, and had tears in her eyes. There is evidence that later, after her arrest was announced to her and she called the home of her sister, she was then crying a great deal and having difficulty making herself understood.

Susan testified, among other things, that before she signed the consent the county attorney appeared and told her that Van Ackeren had gotten away before but that they would get him this time. She construed this as a threat. The county attorney was called by the prosecutor and testified flatly that he had never seen Susan Humphrey previous to the suppression hearing,

did not know her, and was not at the police station at the time and place in question and had never talked to the witness at any time.

This court and the Supreme Court of the United States have both held that the determination of whether a consent to search is voluntarily given is a question of fact. State v. Skonberg, *ante* p. 550, 233 N. W. 2d 919; Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854. The burden of proving the voluntariness of the consent is upon the prosecutor. Schneckloth v. Bustamonte, *supra*. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. Schneckloth v. Bustamonte, *supra*. The fact that a person is in custody when the consent is given is one of the circumstances to be considered. United States v. Townsend, 510 F. 2d 1145. Applying these criteria to the evidence before us we have no difficulty in finding that the trial court was correct in its ruling. The determination turns almost wholly upon the relative credibility of Susan Humphrey and the two police officers involved. The applicable standard of review by this court, we believe, should be the same as applied in other similar types of cases. The findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence. See State v. Crenshaw, 183 Neb. 449, 161 N. W. 2d 502 (post conviction).

Was the consent binding upon the defendant? When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. United States v. Matlock, 415 U. S.

164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (room jointly occupied by the defendant and the woman with whom he was living); Frazier v. Cupp., 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (duffel bag jointly used by the defendant and his cousin and left in the cousin's home). The evidence in this case clearly establishes common control and use of the property in question. It was apparently defendant's contention that the suitcase in which the stolen property was found belonged to him, thereby precluding Susan's consent to search it from binding him. The defendant, however, did not choose to testify at the suppression hearing and the only testimony there adduced as to the ownership of the suitcase in question is the testimony of a police officer that Susan Humphrey stated that the luggage was hers. Her own testimony at the suppression hearing appears to be that a certain blue suitcase was hers.

The evidence at trial showed without contradiction that the suitcase in question was being used by both Susan Humphrey and Van Ackeren. The defendant testified that he had instructed Susan to pack the suitcase. The two were living together at the time in Susan's apartment. The suitcase in question contained clothing belonging to both, packed expressly for a trip which they expected to take together, as well as the items identified as stolen. Susan's voluntary consent to search the suitcase was binding on defendant.

We now turn to the defendant's second assignment. Previous to commencement of trial, counsel for the defendant moved the court to order the prosecutor "not to introduce evidence to the effect that the defendant is a known burglar, and that the prosecutor be told to tell his witnesses not to be bringing up and introducing evidence that he is a known burglar and thief, or any other adjectives to describe the same." The court granted the motion saying: "The prosecutor is ordered prior to calling any of his witnesses to the stand to admonish and order the witnesses not to describe the de-

fendant in the terms and words which the attorney for the defendant just described, or by the use of any other adjectives which their imagination may embellish."

Shortly after the second prosecution witness began his testimony, he was asked: "Q. Do you know why the car was initially stopped, Officer Swiercek? A. Yes. Q. Tell us why? MR. WATTS: Objected to as conjecture and suspicion. A. We believed that the automobile was loaded with stolen merchandise and was going to be taken out of town and sold to a fence." Motion was made to strike and for a mistrial. The court overruled the motion for a mistrial and told the jurors that it had sustained the objection and admonished them to disregard the witness' statement as to the reason for stopping the car.

The witness' statement does not appear to be a literal violation of the court's order. Likewise it appears that this was not the answer which the prosecutor anticipated. However, wholly apart from the order of the court on the motion, the objection was obviously a good one for the reasons stated in the objection and others, including lack of appropriate foundation and immateriality. However, the error was not such as to require a new trial. The suspicion of the officer was proved by subsequent competent evidence to be true. The mere statement of the suspicion of the officer can hardly have added any weight to the later direct evidence. This will be apparent when we discuss the next assignment of error. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.

Some background material is necessary in considering the third assignment. Late in the afternoon or early

in the evening on the day of the defendant's arrest, after he had made bond and departed, he called the police station and asked to speak to a detective sergeant with whom he was apparently acquainted. After a brief conversation, which for some reason was apparently interrupted, the defendant gave the detective a telephone number to call when he was again free. This was a Denver, Colorado, number. A few minutes later the sergeant called the number, but the defendant did not answer and a female voice stated that she would deliver the message to Van Ackeren. A short time later the sergeant received a call from the defendant and on this occasion the sergeant recorded the conversation. Although the defendant purportedly was seeking information, what really occurred was that he made damaging admissions. The substance of the admissions was that he was no longer a burglar but had risen one step above that and was now a "fence." It was less risky. Also, he was apparently attempting to gain official favor by offering to give information on a more important "fence" which would help clear up a burglary in which much valuable property had been taken. At trial, when the defendant took the stand in his own defense, he admitted the conversation but attempted to explain it in a rather vague way, the substance of which was that he did not intend to be taken literally and that he was merely making the statements in order to attempt to get information. He further stated that he had had no information on the important "fence" to give. The conversation was clearly voluntary and volunteered. The defendant was not in custody and the statements were admissible as admissions against interest. As will be seen from the quotation from the telephone conversation the admissions were subject to the construction that they related to property which was the subject of the present charge against the defendant.

The basis of the defendant's claim of error is that the admission of the tapes violated the pretrial order direct-

ing the prosecution witnesses not to characterize the defendant in the manner previously mentioned. Defendant also contends that the tapes should have been screened in camera and irrelevant portions omitted. Before the tapes were played to the jury the defendant objected to the tapes in their entirety upon grounds of lack of foundation and immateriality and irrelevance. The objection on the ground of lack of foundation is not well taken. Proper foundation was laid and the defendant later admitted the conversation as well. The defendant's objection on the ground of immateriality is too broad. Where an offer consists of several statements tendered as a unit, e.g., a letter, a conversation, or a transcript of testimony, and parts are admissible and parts are not, objection should be made only to the improper parts and not to the offer as a whole. The general objection cannot avail the defendant on appeal to this court. O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

The limiting order was obviously not directed to preventing witnesses from testifying as to admissions against interest made by the defendant. It was directed to preventing witnesses from giving their opinion about the defendant or disclosing supposed past conduct. There was no violation of the pretrial order in this respect.

In dealing with the fourth and last assignment, some reference to the record is necessary. Property found in the suitcase was identified by four different witnesses as property stolen in burglaries of their respective homes. Money (coins and currency) was also stolen in the various burglaries but was not identified at trial and no attempt was made to do so. Coins and currency seldom have any distinctive markings. However, in the suitcase with the property identified as stolen and other property which could not be identified, was the money bag and contents. These were identified at trial as having been found in the suitcase. The defendant made several premature objections to the identification of the money bag and contents. These were overruled. No subse-

quent offer of the exhibit was ever made. The defendant argues that this was prosecutorial misconduct which warrants reversal and a new trial. The defendant cites ABA Standards Relating to the Prosecution Function, §§ 5.6(c) and (d), and our opinion in State v. Casados, 188 Neb. 91, 195 N. W. 2d 210, which characterizes these standards as being appropriate and proper. The standards mentioned are indeed appropriate and should be observed by prosecutors. We do not believe that there was any deliberate violation in this case. The record was sufficient to show that property found in the suitcase, although not specifically identified, was nonetheless probably stolen property. To demonstrate this it is necessary again to refer to the tape-recorded conversation between the sergeant and the defendant. During the course of that conversation, the sergeant asked defendant about certain property found in the search of Susan Humphrey's apartment, including two television sets. Defendant responded that Susan had had those sets for a long time. The sergeant then countered with the statement that defendant had said he knew all about the stuff. The conversation was then as follows: "MR. VAN ACKEREN: I know about the stuff I had in my suitcase. SERGEANT SZALEWSKI: Like what stuff? MR. VAN ACKEREN: My money. SERGEANT SZALEWSKI: What else? MR. VAN ACKEREN: And, let's see. I had some money and a couple gold rings, about three gold rings. SERGEANT SZALEWSKI: And you had about twenty some gold rings. MR. VAN ACKEREN: How many? SERGEANT SZALEWSKI: About twenty some gold rings. MR. VAN ACKEREN: Twenty rings? SERGEANT SZALEWSKI: A couple watches. A couple of those things have been made too, Steve. I'm just being honest with you. What do you want to say about those? MR. VAN ACKEREN: Suppose I brought a guy in and said — suppose I brought a guy in with me when I came down there that I bought them - that I say I bought them from and he agreed to it. SERGEANT

SZALEWSKI: Then he'd get stuck, wouldn't he? MR. VAN ACKEREN: Yeah, right. Okay, and that's all there is to it? SERGEANT SZALEWSKI: Well, if you got somebody that'll take the rap for you. Is that what you want? MR. VAN ACKEREN: Well, that's — I — I can prove where I got them at."

At the trial the defendant attempted to explain the presence of the rings by saying that Susan Humphrey had put them in without his knowledge and that he had later learned that they were obtained from one Killeen, who in turn had obtained the stuff from one Stolp. Stolp was called as a rebuttal witness. He denied this transaction with Killeen.

It appears to us that the presence of the money, along with the other property proved to be stolen and for the presence of which in his suitcase the defendant had no adequate explanation, was sufficient to make the money admissible. Why the bag and contents were not offered we do not know. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. In any event, we find beyond a reasonable doubt that the mere display of the money bag did not affect the result in this case.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH CHARLES SVOBODA, APPELLANT.

234 N. W. 2d 901

Filed November 6, 1975. Nos. 39876, 39877, 39878.

1. **New Trial: Appeal and Error.** Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed by this court.
2. **Criminal Law: New Trial: Appeal and Error.** 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.

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

Joseph Charles Svoboda, pro se, and Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

SPENCER, J.

This is an appeal from judgments entered on pleas of nolo contendere to two charges of burglary and one charge of failure to appear. Defendant was sentenced to a term of 3 to 10 years in the Nebraska Penal and Correctional Complex on one burglary charge, 6 years on the other, and 1 year on the failure to appear, the sentences to run consecutively. Defendant, who was represented by private counsel in the District Court proceedings, appears here by the Douglas County public defender. He has also filed a pro se brief.

Defendant's counsel assigns as error the trial court's participation in plea bargaining discussions undermining the defendant's ability to make a voluntary and intelligent choice among alternative courses of action. Defendant's pro se brief alleges that defendant's pleas were obtained by coercion and were not voluntary and further that counsel representing defendant was ineffective, inadequate, prejudicial, and unethical, denying defendant effective assistance of counsel. We affirm.

Defendant filed notices of appeal in the three cases involved herein. He neglected, however, to file motions for a new trial. Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed

by this court. Hall v. State (1922), 109 Neb. 273, 190 N. W. 898. We have repeatedly held that errors of the trial court must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. See State v. Seger (1974), 191 Neb. 760, 217 N. W. 2d 828. See, also, State v. Fauth (1974), 192 Neb. 502, 222 N. W. 2d 561, in which we held: "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."

The trial in case No. 39876 was interrupted when defendant wished to disqualify his counsel because he had suggested a plea bargain. After discussion, the defendant who had an extensive criminal record, including at least four previous commitments, accepted a plea bargain to plead guilty to the three counts covered in these appeals if the State would dismiss two habitual criminal charges and drop the charge of being a felon in possession of a firearm. If there were any irregularities in the proceedings of the court, it was necessary that they be called to the attention of the trial judge by a motion for a new trial. No motion for new trial under section 29-2101, R. R. S. 1943, was ever filed, and no final order was ever entered with reference to the alleged errors assigned herein. They are not properly presented to us for a decision and will not be considered.

The judgments are affirmed.

AFFIRMED.

McCOWN and CLINTON, JJ., concur in the result only.

CENTER BANK, A CORPORATION, APPELLEE, V. MID-CONTINENT MEATS, INC., A CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH AARON CORPORATION, A CORPORATION, ET AL., APPELLEES.

234 N. W. 2d 902

Filed November 6, 1975. No. 39896.

1. **Bills and Notes: Signatures: Pleading: Trial.** Unless specif-

ically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense.

2. **Bills and Notes: Signatures: Pleading.** When signatures are admitted, the burden is upon the defendant to plead and prove a defense.
3. **Bills and Notes: Pleading.** The plea nil debet puts in issue no fact and cannot be regarded as a defense.
4. **Bills and Notes: Signatures: Pleading.** When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented.
5. **Affidavits: Evidence: Trial.** Affidavits not offered and received in evidence will not be considered on appeal.

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

Thomas J. Walsh of Walsh, Walentine & Miles, for appellants.

Steven J. Riekes of Beber, Richards, Riekes & Brown, for appellee Center Bank.

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

NEWTON, J.

This is an action on two promissory notes payable on demand. Defendants pleaded a general denial and denied being indebted on the notes. Summary judgment was entered for plaintiff. We affirm the judgment of the District Court.

The notes are dated May 5, 1971, and February 15, 1972, respectively. They are payable on demand and suit was instituted on October 1, 1973. The deposition of Guy Hibbs, a defendant who was also president of the defendant Mid-Continent Meats, Inc., and who appears with Mid-Continent Meats, Inc., as a maker of the notes, concedes the execution and delivery of the notes. The answer does not specifically deny the signatures. Under such circumstances the signatures are admitted

and the holder of the notes is entitled to recover on them unless the defendants establish a defense. See, § 3-307, U. C. C.; Adair v. Adair, 192 Neb. 571, 222 N. W. 2d 908. The burden is upon the defendants to plead and prove such defense. They have not done so. In alleging that they are not indebted on the notes, they have not pleaded a defense as required. " 'The plea nil debet under our system puts in issue no fact and cannot be regarded as a defense.' " Thompson v. Wall, 112 Neb. 196, 199 N. W. 114. They have not pleaded a lack or failure of consideration, payment, or any other pertinent defense, and such defenses must be affirmatively pleaded. See, Poland v. Gibson, 190 Neb. 696, 211 N. W. 2d 900; Hilton v. Correa, 193 N. Y. Supp. 2d 543; Rosenberry v. Clark, 85 Idaho 317, 379 P. 2d 638.

Defendants' contention that an issue of fact existed in regard to the amount due must fail. Plaintiff's petition set out the notes and sums claimed to be due thereon. In an action on a promissory note it is sufficient to set out a copy of the note with the credits and endorsements thereon and to state the amount claimed to be due. See, § 25-837, R. R. S. 1943; Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 454, 289 N. W. 866. This was done in the present instance and the defendants failed, as above mentioned, to challenge the allegation pertaining to the amount due by pleading an affirmative defense in regard to it. The fact that plaintiff took judgment for a lesser amount than that demanded in its petition does not indicate that an issue of fact was presented by this record. Entry of judgment for a lesser amount than that originally prayed for simply corrected an error in a manner beneficial to defendants.

Neither affidavit mentioned in the briefs can be considered. The one submitted by plaintiff was not introduced into evidence. Filing the affidavit is not sufficient. See Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257. The affidavit submitted

by defendants was never received in evidence and was not submitted prior to the day of hearing as required by section 25-1332, R. R. S. 1943.

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

AFFIRMED.

BRODKEY, J., not participating.

THEODORE SCHWEITZ, DOING BUSINESS AS SCHWEITZ EQUIPMENT COMPANY, FULLERTON, NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. PLIN ROBATHAM, APPELLEE AND CROSS-APPELLANT, B & D CONSTRUCTION, INC., AND CHIEF INDUSTRIES, INC., THIRD PARTY APPELLEES AND CROSS-APPELLEES.

234 N. W. 2d 834

Filed November 6, 1975. No. 39908.

1. **Insurance: Parties: Contracts: Actions.** If the loss exceeds the amount of insurance paid, an action may be brought in the name of the insured for the entire loss.
2. **Parties: Contracts: Actions.** A party cannot maintain an action on a contract without a prior substantial compliance on his part. If there has been a substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance.
3. **Parties: Pleadings.** A third party petition must allege facts showing why the third party defendant is liable to the third party plaintiff for all or any part of the claim made against the third party plaintiff.
4. **Judgments: Interest.** Interest on damages for breach of a building contract, where the amount of the claim is not known or determinable, runs from the date of the judgment.
5. **Judgments: Verdicts: Damages: Trial.** A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law.

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

Philip T. Morgan, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellee Robatham.

Roback & Geshell and Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating, for appellees B & D Constr., Inc., et al.

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

BOSLAUGH, J.

This case arises out of a controversy concerning a contract for the construction of a dairy barn and milking parlor on the property of Plin Robatham near Marquette, Nebraska. The plaintiff, Theodore Schweitz, is in the dairy equipment business. As a part of this business he constructs buildings.

In 1970 the plaintiff entered into an oral contract to construct a dairy barn and milking parlor for Robatham. The amount due the plaintiff under this contract was $24,322.13. The plaintiff did part of the construction work himself and subcontracted the rest of his work. He contracted with B & D Construction, Inc., to do the block work, and with Chief Industries, Inc., to furnish and install a steel roof.

The work to be done by the plaintiff and his subcontractors had been completed on February 17, 1971. During a storm on March 18, 1971, the roof of the building blew off and there was considerable damage to other parts of the building. On April 14, Farm Bureau Insurance Company of Nebraska notified the plaintiff that it was the insurance carrier for Robatham and would repair the building and proceed against the plaintiff unless he elected to repair the building. The plaintiff refused to repair the building so Robatham arranged for

the repairs to be completed by another contractor at an expense of $10,061.04.

This action was commenced by the plaintiff to recover the balance due on the original contract. Robatham filed a counterclaim for the expense of repairing the building plus the cost of cleaning up the premises and loss of profits. B & D Construction, Inc., and Chief Industries, Inc., were third party defendants joined on the petition of the plaintiff.

A jury was waived and the trial court found that Robatham was entitled to recover $10,061.04 on his cross-petition subject to a set-off in the amount of $6,332.13, the balance due the plaintiff for work performed under the original contract. The third party defendants were dismissed from the action.

The plaintiff has appealed and the defendant has cross-appealed.

The plaintiff's principal complaint relates to his contention that Robatham was not the real party in interest on the cross-petition. This matter was not properly raised in the pleadings, and during the trial the plaintiff unsuccessfully attempted to amend his answer to the cross-petition to allege that Robatham was not the real party in interest.

The facts were not fully developed in the record, but Robatham admitted he had been reimbursed by the insurance company for the cost of repairing the building. Since Robatham claimed other damages in addition to the cost of repairs, he was a real party in interest. The rule is well established in this state that if the loss exceeds the amount of insurance paid, the action may be brought in the name of the insured for the entire loss. Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 169 N. W. 2d 601. See, also, Schmidt v. Henke, 192 Neb. 408, 222 N. W. 2d 114. The plaintiff's contention that Robatham was not a real party in interest was without merit.

The plaintiff also contends that Robatham could not

recover on his cross-petition because he had failed to perform the original contract by paying the balance due the plaintiff.

Robatham contends that the plaintiff breached the contract by failing to construct the building in a sound and workmanlike manner. The evidence showed that the plaintiff had failed to properly or adequately attach the roof base plates to the pilasters in the walls of the building, and, as a result, the roof blew off in the storm.

A party cannot maintain an action on a contract without a prior substantial compliance on his part. If there has been a substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Rickertsen v. Carskadon, 172 Neb. 46, 108 N. W. 2d 392.

In this case there had been substantial performance by both parties but less than full and complete performance by either party. Robatham had paid $18,000 to the plaintiff which represented about 75 percent of the amount due under the original contract. The plaintiff had completed the work he was to perform but the work was partially defective. In this situation either party could bring an action on the contract to determine the rights of the parties, and Robatham was not required to pay the balance due the plaintiff on the original contract before filing a cross-petition to recover his damages resulting from the defective work performed by the plaintiff.

The third party petitions filed by the plaintiff merely recited that the cross-petition filed against the plaintiff alleged the building had been damaged as the result of improper and negligent construction, that the third party defendants had been subcontractors, and that they should be held primarily liable for any amount due Robatham. There was no allegation that any of the work performed by the subcontractors was defective.

It was incumbent upon the plaintiff to allege facts

showing why the subcontractors were liable to him for any part of Robatham's claim against the plaintiff. 67 C. J. S., Parties, § 82(2), p. 1071; State of North Dakota v. Przybylski, 98 F. Supp. 21; Green v. Shepherd Construction Co., 46 F. R. D. 434. The third party petitions failed to state a cause of action against either third party defendant and were subject to demurrer. Furthermore, the evidence showed that employees of the plaintiff attached the base plates to the pilasters and the loss was not due to any defect in the work performed by the subcontractors. The order dismissing the third party defendants is fully sustained by the record.

By the cross-appeal, Robatham contends he was entitled to recover damages for the expense of cleaning up the premises, the expense of additional labor required and loss of profits while the building was being repaired, and interest from March 18, 1971.

So far as interest is concerned, the amount due Robatham, if any, was an unliquidated amount. Interest on damages for breach of a building contract, where the amount of the claim is not known or determinable, runs from the date of the judgment. School Dist. No. 65R v. Universal Surety Co., 178 Neb. 746, 135 N. W. 2d 232.

So far as the other items of damages claimed by Robatham are concerned, the finding by the trial court on the cross-petition was a general finding. There were no special findings as to each item of damage claimed. The finding made was not so inadequate or disproportionate to the injury proved as to require that it be set aside.

A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law. Cover v. Platte

Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL SHEPARDSON, APPELLANT.

235 N. W. 2d 218

Filed November 6, 1975. No. 39929.

1. **Motor Vehicles: Licenses and Permits: Officers: Stop and Check.** Section 60-435, R. R. S. 1943, is constitutional and it authorizes officers of the law to conduct routine stops for the purpose of checking motor vehicle registrations and operators' licenses, even though there exists no probable cause or reasonable grounds for the officer to believe that a violation of law has occurred or is occurring.
2. **Criminal Law: Miranda Rule.** The Miranda rule requires only that a suspect be advised of his constitutional rights before a custodial interrogation occurs; and general on-the-scene questioning as to circumstances surrounding criminal activity or other general questioning of citizens in the fact-finding process is not proscribed by that decision.
3. **Criminal Law: Miranda Rule: Searches and Seizures: Constitutional Law.** The Miranda rule is not applicable to searches and seizures under the Fourth Amendment.
4. **Criminal Law: Searches and Seizures: Trial.** Contraband objects falling in plain view of a peace officer who has a lawful right to be in the position from which he makes his observation are subject to seizure and may be introduced into evidence.

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

Bruce A. Pauley, for appellant.

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

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

WHITE, C. J.

The defendant was charged with possession of a controlled substance, LSD. The defendant pled not guilty. Prior to his trial, the defendant moved to suppress evidence obtained from him during a search of his vehicle. After a hearing, the defendant's motion was overruled. The case was tried to the court which found the defendant guilty and sentenced him to 2 years probation. The defendant appeals his conviction, alleging as errors the overruling of his motion to suppress, the failure of the court in not directing a verdict of not guilty at the close of the State's case, and the overruling of his motion for a new trial. We affirm the judgment of the District Court.

The defendant was operating a motor vehicle, a red van pulling a U-Haul trailer, during the afternoon of December 30, 1973, proceeding in an easterly direction on Interstate 80, in Keith County, Nebraska. Trooper Hollis Compton of the Nebraska State Patrol was proceeding in a westerly direction on Interstate 80, in his patrol car and in official uniform. The defendant and his vehicle attracted the attention of Officer Compton. Trooper Compton testified that the defendant "just didn't look like he belonged in the vehicle." Officer Compton turned his vehicle around, intending to stop the defendant for the purpose of checking his driver's license and vehicle registration papers. It was not necessary for Officer Compton to stop the defendant because when he caught up to the defendant he found the defendant already stopped at a service station at the Ogallala exit.

Officer Compton pulled his vehicle into the service station where the defendant was stopped and asked the defendant if he could see his driver's license, vehicle registration, and U-Haul trailer rental agreement. After

checking the license and the rental agreement, Officer Compton proceeded to check the vehicle information number (v.i.n.) against the vehicle registration. While examining the v.i.n. plate, Compton noticed numerous seeds on the threshold of the door of the van and in front of the driver's seat, which he believed to be marijuana seeds.

Officer Compton then asked the defendant if he had any marijuana seeds in his vehicle. The defendant replied "no." Compton asked the defendant if he knew what marijuana seeds looked like, showing him some of the seeds he had found. The defendant did not reply. Compton then asked what was in the trailer, to which the defendant replied "nothing." Compton asked if he could look. The defendant and Officer Compton walked to the rear of the trailer, where the defendant removed a coat hanger which was twisted through the hook of the lock of the trailer to secure it. The defendant opened the door for Officer Compton who then searched the trailer, finding nothing.

The two walked back to the door on the driver's side of the van. Again Officer Compton asked the defendant if he had any marijuana. This time the defendant reached into the van and pulled out a plastic bag from between the driver's and the passenger's seat and gave it to Compton. The bag contained a green, leafy substance believed by Compton to be marijuana.

At this point Officer Compton placed the defendant under arrest and read to him the Miranda warnings. When this was done, Officer Compton searched the van, finding a green ceramic smoking pipe, and a metal canister of the type usually used to hold camera film. Inside the canister was a substance which Officer Compton believed to be LSD.

The defendant's primary contention on appeal is that the actions of Officer Compton subjected him to an unreasonable search and seizure in violation of his Fourth

Amendment constitutional rights. We find no such violation.

State v. Holmberg, *ante* p. 337, 231 N. W. 2d 672 (1975), involved an almost identical situation. In that case the *sole* reason for initially stopping the defendant was to check his operator's license, vehicle registration, and vehicle information number. The court held this was sufficient justification for the initial stop: "As the trial court found, the only reason for the stop was to check the operator's license of the defendant, the motor vehicle registration, and its identification number. This is permissible under our law. No constitutional violation was involved." Under section 60-435(4), R. R. S. 1943, Officer Compton had the right to temporarily stop the defendant. That section provides that: "* * * all members of the Nebraska State Patrol * * * shall have the power * * * (4) when in uniform, to require the driver thereof to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration card thereon * * *."

Officer Compton testified that the defendant "didn't seem to fit his vehicle." The thought occurred to Officer Compton that the vehicle might be stolen. This, together with the authority given Officer Compton under section 60-435(4), R. R. S. 1943, to make "random" and "spot" checks for proper vehicle and registration papers, was sufficient justification for Officer Compton to approach the defendant's vehicle, which was already stopped at a service station, and to make the initial inquiries that he did. This court has recognized that the rule for probable cause when a person is merely stopped and questioned is not the same as when a person is arrested. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129 (1967).

In State v. Holmberg, *supra*, the court cautioned: "We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in

saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. We further hold that when the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when, as here, the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning."

There is no evidence in the record that Officer Compton was not acting in good faith or using his powers under section 60-435, R. R. S. 1943, as a pretext to search the defendant's vehicle. Mere allegations that the officer was using his authority as a pretext for a general search will not lead this court to label the stopping of a motor vehicle by a law enforcement officer arbitrary and unreasonable. When Officer Compton approached the defendant he proceeded to check his license and vehicle registration. Only while checking the v.i.n., when he spotted what he believed to be marijuana seeds, did Officer Compton begin to make other inquiries of the defendant. Compton testified that after the license and registration check, the defendant could have asked for and received his license and registration papers back and would have been allowed to drive off. As Officer Compton was checking the v.i.n. plate he noticed what he believed to be marijuana seeds in the defendant's van. He had a right to be in the position he was when he made the observation. The seeds were in plain view from that position. State v. Dillwood, 183 Neb. 360, 160 N. W. 2d 195 (1968). Having thus observed the seeds, Officer Compton became aware of the reasonable probability of a law violation and could de-

tain the defendant for further questioning. State v. Holmberg, *supra.*

After he observed the seeds the defendant was asked by Officer Compton if he had any marijuana. He said he did not. Compton showed him some of the seeds and asked him if he knew what marijuana seeds looked like. The defendant did not reply. Compton with the defendant's consent and cooperation then searched the U-Haul trailer. The defendant testified that he cooperated with Officer Compton because he felt Compton would search anyway. A similar contention was raised by the defendant and rejected by the court in State v. Forney, 181 Neb. 757, 150 N. W. 2d 915 (1967). The court wrote: "Defendant does not deny he gave consent to the search. He merely implies he did so because he felt it would do no good to object. Even if this is not a mere afterthought, it is not of itself sufficient to indicate coercion under the circumstances in light of the defendant's background and experience. The defendant does not even suggest that he was threatened or intimidated in any manner, and, as previously noted, contact with police officers was not a new experience for him. However, there is much more than mere acquiescence in the defendant's conduct herein. Affirmative consent may be established by acts entirely aside from the use of words. People v. Guyette, 41 Cal. Rptr. 875, 231 Cal. App. 2d 460. On three different occasions the defendant gave his consent and additionally he opened his automobile trunk for inspection."

After he had searched the U-Haul, Officer Compton again asked the defendant if he had any marijuana. This time the defendant voluntarily produced and surrendered a plastic bag which Officer Compton believed contained marijuana. It was at this point that the defendant was arrested and advised of his Miranda rights.

The defendant contends that he should have been given his Miranda warnings at the time Officer Compton first noticed the seeds. In Miranda v. Arizona, 384 U. S.

436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the court held: "Our decision is not intended to hamper the traditional function of police officers in investigating crimes. * * * General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."

In Lowe v. United States, 407 F. 2d 1391 (9th Cir., 1969), a deputy sheriff in Arizona stopped a car which had been traveling in an erratic manner. After the car was stopped the deputy proceeded to ask numerous questions of the defendant. The defendant was thereafter arrested. A motion was made to suppress the statements made to the deputy on the ground that the defendant had not been given his Miranda warnings prior to this questioning. The Ninth Circuit upheld the overruling of the motion to suppress and affirmed the defendant's conviction. The court held: "The questions asked by Deputy Dunham at the shoulder of Route 66 in the presence of a passenger certainly do not create a 'compelling atmosphere.' When a law enforcement officer stops a car and asks the driver for identification, a vehicle registration slip, and upon receiving unsatisfactory answers further asks the driver's destination and business, no 'in custody' interrogation, as discussed in Miranda, takes place. This general on the scene questioning is a well accepted police practice; it is difficult to imagine the police warning every person they encounter of his Miranda rights. This is why the opinion in Miranda expressly excluded 'on-the-scene questioning' from the warning requirements. The statements made by appellant Lowe were a product of 'general on-the-scene questioning' which is not subject to the warning requirements of Miranda."

The questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a "police dominated" situation or as "incommunicado" in nature. Lowe v. United States, *supra.*

In Arnold v. United States, 382 F. 2d 4 (9th Cir., 1967), it was held that questions, which relate directly to a suspected crime after the officer's suspicion has been aroused, may be permissible as on-the-scene inquiries.

In this case, Officer Compton's observation of what he believed to be marijuana seeds led him to suspect a crime. All questions up to the time that the defendant was actually arrested fall within the "on-the-scene questioning" exception to Miranda. No Miranda warnings were necessary until the defendant's actual arrest. Once the defendant was placed under arrest, Officer Compton promptly and properly delivered the Miranda warnings. The LSD, the possession of which the defendant was ultimately charged for, was discovered in the subsequent search incidental to the lawful arrest.

We conclude that the actions of Officer Compton did not deprive the defendant of any of his constitutional rights. This being the case, there was no error by the District Court in overruling the defendant's motion to suppress.

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

AFFIRMED.

McCOWN, J., dissenting.

I maintain the position set out in my dissent in State v. Holmberg, *ante* p. 337, 231 N. W. 2d 672.

ROBERTA DAWN KLABUNDE, APPELLEE, v. WILLIAM E. KLABUNDE, APPELLANT.

234 N. W. 2d 837

Filed November 6, 1975. No. 39950.

1. **Divorce: Contracts: Property.** Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.
2. **Divorce: Time.** A refusal by the trial court to set aside a decree within the 6-month period will not be reversed on appeal in the absence of an affirmative showing of an abuse of discretion.
3. **Motions, Rules, and Orders: Trial: Evidence.** A party cannot retry the issues in the original proceeding upon a motion to vacate.

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

James R. Welsh of Riedmann & Welsh, for appellant.

Albert L. Feldman of Stern, Harris, Feldman, Becker & Thompson, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under section 42-372, R. R. S. 1943, to vacate and modify the decree in an action for dissolution of a marriage.

The decree which was entered on June 25, 1974, dissolved the marriage between the parties; awarded the custody of the minor children to the petitioner; and approved a property settlement agreement which the parties had entered into. The trial court divided the property and fixed the child support in accordance with the property settlement agreement. The respondent ap-

peals from an order denying his application to vacate the decree.

The application alleged that the property settlement agreement was unconscionable and oppressive in that the petitioner was given a grossly excessive portion of the property; that the division of the property was inequitable; that unfair advantage was taken of the respondent in making the agreement; and that the agreement did not represent his intention or understanding.

The parties were married in 1968. At the time the action was commenced the petitioner was 32 years of age and the respondent 30 years of age. The parties had two minor children who were 3 years of age and 1 year of age. The respondent operated a lawnmower and small engine sales and service business. The petitioner had assisted in the operation of the business during the marriage. The income tax returns which are in the record show the parties had an adjusted gross income of $6,647.66 in 1971, $17,129.45 in 1972, and $16,188.70 in 1973.

Under the property settlement agreement the petitioner was awarded the residence property, the household belongings, a 1965 Oldsmobile, and $4,000. The respondent was awarded the business including real estate and inventory, two automobiles, securities having a value of $1,000, and other miscellaneous property. The property awarded to the petitioner had a value of approximately $34,250. The property awarded to the respondent had a value of approximately $35,250. Child support was fixed at $300 per month and the respondent was required to maintain health and accident policies for the children.

The residence property which was valued at $27,000 was subject to a mortgage indebtedness of approximately $18,000. As a part of the property settlement the respondent agreed to liquidate this indebtedness by making the scheduled monthly payments or by prepayment of the principal. The respondent was also required to

pay the real estate taxes and maintain fire, hazard, and comprehensive insurance on the property, and maintain a term insurance policy on his life equal to the unpaid principal amount of the mortgage.

Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Foust v. Foust, 185 Neb. 656, 178 N. W. 2d 284. A refusal by the trial court to set aside a decree within the 6-month period will not be reversed on appeal in the absence of an affirmative showing of an abuse of discretion. Miller v. Miller, 190 Neb. 816, 212 N. W. 2d 646.

The evidence in this case consisted of the testimony of the respondent and the correspondence between counsel during negotiations for a settlement. The evidence does not support the allegation that unfair advantage was taken of the respondent in making the agreement or that the agreement which he signed did not represent his intention or understanding. The respondent was represented by counsel in the dissolution proceeding and the property settlement agreement was the result of negotiation between the parties and their counsel through a series of offers and counteroffers.

Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790, cited by the respondent, involved a divorce action in which the defendant had not been represented by counsel. The plaintiff there had received substantially all the property plus $50 per month for the rest of her life or until remarriage. The defendant had a yearly income of $2,400. This court found the plaintiff had obtained an unconscionable advantage by reason of the ignorance of the defendant.

The property division which was made in this case was approximately equal except for the requirement

that the respondent discharge the mortgage indebtedness on the residence property. This was an obligation which the respondent voluntarily assumed.

There is a suggestion in the record that the petitioner would have accepted a fixed amount, payable in installments, which would have amounted to about one-half of the obligation assumed by the respondent if he pays the mortgage by making the scheduled monthly payments. On cross-examination the respondent was asked if he had rejected such a proposal against the advice of both counsel. His answer was not responsive except he admitted recalling the conversation. Later he was asked if he was willing to pay a property settlement of $5,000 in cash plus $200 a month for 100 months, but an objection by the respondent's counsel was sustained.

A party cannot retry the issues in the original proceeding upon a motion to vacate. Miller v. Miller, *supra*. The record fails to show the refusal to vacate the decree was an abuse of discretion. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK L. CHANEY, APPELLANT.

234 N. W. 2d 620

Filed November 6, 1975. No. 40142.

Appeal from the District Court for Otoe County: BETTY PETERSON SHARP, Judge. Affirmed.

John J. Horan, for appellant.

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

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

SPENCER, J.

Defendant, following a plea bargain resulting in the amendment of a burglary charge to one of grand larceny, pled guilty. He appeals a sentence of 2 years in the Penal and Correctional Complex as excessive. Defendant had a previous felony conviction from which he was paroled in 1972, and discharged in 1974. The appeal is frivolous, and the judgment is affirmed.

See Rule 20. See, also, State v. Orner (1974), 192 Neb. 523, 222 N. W. 2d 819, in which we held: "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."

AFFIRMED.

ANDREW GRECO ET AL., APPELLEES, V. SHIRLEY BONACCI ET AL., APPELLEES, IMPLEADED WITH YANO S. CANIGLIA, APPELLANT.

234 N. W. 2d 904

Filed November 13, 1975. No. 39870.

Intoxicating Liquors: Licenses and Permits: Contracts: Lessor and Lessee. An agreement between a lessor and a lessee that the lessee will apply to the Nebraska Liquor Control Commission for a license for the premises, and will not seek permission to transfer the license to a different location, and upon expiration of the lease will assist the lessor in obtaining a license for the premises is not void as against public policy.

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

Tom Kelley and Michael Lehan of Kelley & Kelley, for appellant.

Abrahams, Kaslow & Cassman, for appellees Greco et al.

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

BOSLAUGH, J.

This was an action to recover liquidated damages under a contract between the parties. The trial court found for the plaintiffs and the defendant Caniglia has appealed.

The plaintiffs are the owners of the property located at 4501-3 Center Street in Omaha, Nebraska, and formerly operated a cocktail lounge on the premises. In 1969 the plaintiffs sold the cocktail lounge business to Shirley Bonacci, Yano S. Caniglia, and 7059 Building, Inc., a corporation owned and controlled by Bonacci and Caniglia. The plaintiffs leased the premises to the corporation and the purchasers agreed to apply for a Class C liquor license for the premises. The purchasers agreed to maintain the license in good standing, not transfer it to any other location, and at the expiration of the lease do all acts necessary to cause the license to be "transferred to and reissued" in the names of the plaintiffs. The contract contained a provision for liquidated damages in the amount of $10,000 if the purchasers failed to perform and the license was revoked, canceled, or not renewed or the plaintiffs were denied the license.

In 1970 Bonacci and Caniglia sold the business to Frank Paladino. A release was executed by all parties to the original lease and the plaintiffs executed a new lease to Paladino. A new agreement was executed by the plaintiffs, Bonacci, Caniglia, the corporation, and Paladino in which Paladino agreed to apply for a Class C license and maintain it in good standing, not transfer it, and at the expiration of the lease to do all acts necessary to cause the license to be transferred to and reissued to the plaintiffs. The agreement also contained a liquidated damage provision similar to the first agreement which was binding, jointly and severally, upon Bonacci, Caniglia, the corporation, and Paladino.

The license obtained by Paladino was revoked on December 15, 1971. In 1972 demand was made on Bonacci and Caniglia for payment of the liquidated damages.

This action was commenced in 1973. A default judgment was obtained against Bonacci on May 23, 1973. After trial to the court, judgment was entered against Caniglia on July 12, 1974.

Caniglia, the appellant, contends the agreement was void as against public policy, that the release executed in 1970 discharged him from the 1969 contract, and that the plaintiffs could not recover because they failed to apply for a license after 1971. The appellant relies upon the provisions in the Nebraska Liquor Control Act that a license is a personal privilege, not alienable or transferable. § 53-149, R. R. S. 1943. The appellant argues that the contract was void because it amounted to an attempt by the plaintiffs to rent a license.

Under the Nebraska Liquor Control Act a license applies only to particular premises which are described in the license, but a licensee may obtain permission to transfer the license to a different location. § 53-129, R. R. S. 1943. The only way the owner of property can make sure that a license will be available for his property is to require the lessee to agree not to transfer a license obtained by the lessee to another location, and to assist the owner in obtaining a license in the owner's name upon expiration of the lease. Agreements of this nature are generally held valid and enforceable. See, A. D. Jones & Co. v. Parsons, 136 Colo. 434, 319 P. 2d 480; Ritz v. Rafail, 366 Pa. 274, 77 A. 2d 411; 45 Am. Jur. 2d, Intoxicating Liquors, § 177, p. 611.

Under the Nebraska Liquor Control Act licenses as such are not transferred from one licensee to another. The procedure is to surrender the old license and apply for a new license to be issued to the new licensee. The agreement in this case recognized the authority of the Liquor Control Commission and in effect it merely provided the licensee would not request permission to transfer his license to a different location and would assist the owner of the property to obtain a new license for the premises upon expiration of the lease.

So far as the release executed in 1970 is concerned, it only released the parties from obligations under the 1969 lease. The 1970 agreement contained a liquidated damage provision which was binding upon Bonacci, Caniglia, the corporation, and Paladino.

The agreement further provided that the plaintiffs were entitled to the liquidated damages if Paladino failed to perform, or if the license was revoked, canceled, or not renewed, or if the plaintiffs were denied a license. The plaintiffs were entitled to damages if any of these events occurred. Denial of a license was not a condition precedent to the plaintiffs' right to recover.

The judgment of the District Court is affirmed.

AFFIRMED.

DUDLEY H. CHASE, APPELLEE, V. BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

235 N. W. 2d 223

Filed November 13, 1975. No. 39931.

1. **Colleges and Universities: Administrative Law: Parliamentary Law: Statutes.** Section 79-1254.02, R. S. Supp., 1974, is applicable to the Board of Trustees of the Nebraska State Colleges.
2. **Parliamentary Law: Statutes: Administrative Law.** In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body.
3. ———: ———: ———. Section 79-1254.02, R. S. Supp., 1974, requires the affirmative vote of a majority of all members of the board to amend or terminate the contract of a member of the teaching staff.
4. ———: ———: ———. In the absence of a contrary statute or rule, at a meeting of an administrative body where a quorum is present, a vote which is insufficient and ineffective to constitute any official action of the board does not deprive the board of power and jurisdiction to make an effective and final determination on the issue at a subsequent meeting of the board.

5. **Constitutional Law: Hearings: Administrative Law.** The demands of due process do not require a hearing in the initial stage, or at any particular point, or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.

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

William A. Harding of Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

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

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

MCCOWN, J.

This is a declaratory judgment action to determine whether the action of the defendant Board of Trustees of the Nebraska State Colleges was effective to terminate the employment of the plaintiff as a tenured professor at Chadron State College. The District Court for Lancaster County determined that the action of the defendant did not result in termination of the plaintiff's teaching employment and that plaintiff continues to be employed by the defendant as a tenured teacher. The defendant board of trustees has appealed.

The essential facts in this case have been stipulated by the parties. The plaintiff was a tenured instructor at Chadron State College, assigned to teach foreign languages. In December 1973, plaintiff was notified that his employment would be terminated at the end of the 1973-74 term for the reason that Chadron State College would no longer offer foreign language courses. Pursuant to the rights granted to plaintiff by the tenure provisions applicable to the administration of the Nebraska State Colleges, a hearing was held before a special faculty committee on January 24, 1974, for the purpose of making a record for submission to the trustees

of the defendant board, who are the only persons empowered to terminate plaintiff's employment. Pursuant to call, and after due notice to the plaintiff, a special meeting of the defendant board of trustees was held in Lincoln, Nebraska, on May 24, 1974, for the purpose of considering the termination of plaintiff's position as a tenured instructor at Chadron State College. At the meeting of May 24, 1974, four of the seven members of the board of trustees were present. The plaintiff and the administration of Chadron State College offered evidence, including the record made at the January 24, 1974, faculty hearing, for consideration by the board of trustees in making its determination. At the close of the hearing, and after consideration, a motion that plaintiff's employment be terminated was made and seconded. Three of the four members of the board of trustees present voted "aye" and one voted "no."

On June 8, 1974, a regular meeting of the board of trustees was held at which the matter of the termination of plaintiff's employment was again considered, based upon the transcript of the May 24, 1974, meeting. Notice of the June 8, 1974, meeting was given in accordance with section 84-1402, R. S. Supp., 1974, and consideration of plaintiff's termination was placed on the agenda of that meeting in accordance with that section, but the plaintiff was not specifically notified that the matter of his termination, based upon the transcript of the May 24, 1974, hearing, would be considered at the meeting of June 8, 1974. At the June 8, 1974, meeting a motion that plaintiff's employment be terminated was made and seconded. Six members of the board of trustees were present. Five members voted "aye" and one member voted "no." On June 18, 1974, counsel for the plaintiff was given official notice of the action of the board on June 8, 1974, with respect to the termination of plaintiff's contract. This action was filed on June 20, 1974.

The District Court found that section 79-1254.02, R. S. Supp., 1974, is not ambiguous and applies to the defend-

ant board; that an action to terminate a teaching contract requires the affirmative vote of a majority of the members of the board; that the vote of May 24, 1974, was the final action of the defendant board of trustees, was not effective to terminate plaintiff's employment; and that the vote of June 8, 1974, was void and of no effect. The District Court therefore ruled that plaintiff's teaching employment had not been terminated and that plaintiff continued to be employed as a tenured teacher at Chadron State College.

A major issue on appeal is whether or not section 79-1254.02, R. S. Supp., 1974, applies to the defendant Board of Trustees of the Nebraska State Colleges. That section provides: "The contracts of the teaching staff employed by the governing board of any state technical community college, educational service unit, or any educational program administered by the State Department of Education, the Department of Public Institutions, or any political subdivision of the state, shall require the sanction of a majority of the members of such governing board. Each such contract shall be deemed renewed and in force and effect until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract. The secretary of the board shall notify each teacher in writing at least ninety days before the close of the contract period of any conditions of unsatisfactory performance or a reduction in teaching staff that the board considers may be cause to either amend or terminate the contract for the ensuing year. Any teacher so notified shall have the right to file within five days of receipt of such notice a written request with the board 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. At the hearing, evidence shall be presented in support of the reasons given for considering amendment or termination of the contract,

and the teacher shall be permitted to produce evidence related thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing."

It should be noted at this point that the stipulation of facts includes the stipulation that "The Board of Trustees of the Nebraska State Colleges is a political subdivision of the State of Nebraska."

The defendant contends that the Legislature did not intend section 79-1254.02, R. S. Supp., 1974, to cover the defendant Board of Trustees of the Nebraska State Colleges. This court has consistently held that where a statute is unambiguous, there is no room for construction. See Rudder v. American Standard Ins. Co. of Wisconsin, 187 Neb. 778, 194 N. W. 2d 175. In view of the fact stipulation here, there can be no doubt that the defendant is a political subdivision of the state and that it is administering an educational program. The language of section 79-1254.02, R. S. Supp., 1974, is not ambiguous and is applicable to actions by the defendant in terminating plaintiff's contract as an instructor at Chadron State College. The determination of the District Court on this issue was correct.

The defendant next contends that section 79-1254.02, R. S. Supp., 1974, requires only the votes of a majority of a quorum of the board to terminate a contract, and that the action of the board at the meeting of May 24, 1974, was therefore sufficient in itself to constitute an effective and legal termination.

In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body. See Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N. W. 2d 621. The Houser case involved a statutory provision for the termination of a teacher's contract, and the language involved was "a majority of the members of the board." We held that "a majority of the members of the board" meant a majority of all mem-

bers of the board and not merely a majority of a quorum. In section 79-1254.02, R. S. Supp., 1974, original contracts of teaching staff require the sanction "of a majority of the members of such governing board." The next sentence, however, provides that such a contract shall remain in effect "until a majority of the board" votes to amend or terminate it. The latter language is the language with which we are concerned here. In the context of section 79-1254.02, R. S. Supp., 1974, however, we believe the Legislature intended "a majority of the board" to require a majority of all members of the board and not merely a majority of a quorum. The determination of the District Court on this issue was correct.

The crucial issue here is whether or not the vote of a quorum of the board on May 24, 1974, constituted a final action of the board which could not be considered thereafter without a new notice to plaintiff and a new hearing. The sole basis for plaintiff's challenge here rests on the fact that only three of the four members constituting the quorum at the meeting of May 24, 1974, voted for termination. Plaintiff wishes to treat the vote as though it were a final and effective decision by the board to retain plaintiff simply because the statute provides that his contract shall be deemed to be in effect until a majority of the board votes to terminate it. Plaintiff also argues that the vote was a final action to retain him and is not subject to reconsideration and action by the full board later without a new notice and a new hearing. We disagree.

Section 79-1254.02, R. S. Supp., 1974, does not set any time limit after the hearing within which the board shall vote or render its decision, but requires only that the decision be based on the evidence produced at the hearing. The stipulation of facts establishes that the action of the board of trustees at the meeting on June 8, 1974, was based upon the evidence at the May 24 hearing.

As a general rule, administrative determinations are not final when they are interlocutory, incomplete, provisional, or not yet effective. See 2 Am. Jur. 2d, Administrative Law, § 522, p. 331. If there was any determination or decison made by the three-to-one vote on May 24, 1974, it was a determination to terminate plaintiff's contract, but that decision was not effective because it did not receive the requisite vote required by statute. An agency determination obviously cannot be final if it is not an effective determination, much less if it is no determination at all. It should be noted at this point that the fact stipulation is completely silent as to what official declaration, if any, was made by the chairman after the three-to-one vote for termination at the May 24, 1974, meeting. It is notable also that the stipulation does not indicate there was any notice to the plaintiff of any action by the board until after the June 8, 1974, meeting. The implication is that the vote at the May 24, 1974, meeting was regarded as ineffective to constitute any official action of the board.

In Hadlock v. Nebraska Liquor Control Comm., 193 Neb. 721, 228 N. W. 2d 887, this court considered a similar issue as to the effectiveness of a vote of the governing body of a first class city. In that case the statute required the local governing body to hold a hearing, after notice, and after the hearing, to enter in the minute record of its proceedings a resolution recommending either issuance or refusal of a liquor license. Applicable statutes required a majority vote of all members elected to the city council to pass any measure. After the hearing, a resolution that the city council recommend denial of the license involved was moved and seconded. There were five elected members of the council. On the rollcall vote, two council members voted "aye," one voted "nay," one councilman did not vote, and one councilman was absent. The summary of the council minutes was forwarded to the Liquor Control Commission and referred to as "council action relative to hearing." The Liquor

Control Commission found that the city council had recommended denial of the application and based its own decision on that assumed fact. This court reversed and said: "The vote here was clearly ineffective to constitute any official action of the governing body. It did not constitute a recommendation of denial from the city * * *." Obviously it did not constitute a recommendation of approval either. The same principle can and should be applied here.

In the absence of a contrary statute or rule, at a meeting of an administrative body where a quorum is present, a vote which is insufficient and ineffective to constitute any official action of the board does not deprive the board of power and jurisdiction to make an effective final determination on the issue at a subsequent meeting of the board. The three-to-one vote of May 24, 1974, was ineffective to constitute any official action of the Board of Trustees of the Nebraska State Colleges. Being a nullity and ineffective, it was not a final determination, nor did it divest the board of trustees of all jurisdiction and power to make a determination at a later meeting which would be final and effective.

The record establishes that the action of the board in rendering its decision to terminate plaintiff's contract on June 8, 1974, was based on the evidence produced at the hearing on May 24, 1974. Unless due process demands a new notice to the plaintiff and a new hearing, the decision by the full board at its meeting on June 8, 1974, was a final decision which complied with all requirements of section 79-1254.02, R. S. Supp., 1974, and was effective to terminate plaintiff's contract.

In general, due process requirements grafted to a hearing before an administrative agency have greater flexibility than when applied to a judicial tribunal. That flexibility is reflected in the general rule that: " 'The demands of due process do not require a hearing at the initial stage, or at any particular point, or at more than one point in an administrative proceeding

so long as the requisite hearing is held before the final order becomes effective.'" Forkosch, A Treatise on Administrative Law, § 58, p. 70. See, also, Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624; 2 Am. Jur. 2d, Administrative Law, § 406, p. 214. The notice and hearing here fully met the requirements of due process, and the final determination by the board on June 8, 1974, was based on the evidence produced at that hearing.

The findings of the District Court that the vote on May 24, 1974, was the final action of the board, and that the vote of June 8, 1974, was void, were incorrect. The vote of June 8, 1974, was a valid and final action of the board of trustees and was effective to terminate plaintiff's employment as a tenured teacher at Chadron State College.

The judgment of the District Court is reversed.

REVERSED.

VISTRON CORPORATION, A CORPORATION, APPELLEE, V. SCOULAR-BISHOP GRAIN COMPANY, A CORPORATION, APPELLANT.

234 N. W. 2d 906

Filed November 13, 1975. No. 39936.

Trial: Instructions. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.

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

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

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

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

CLINTON, J.

This action was commenced by the plaintiff, Vistron Corporation, to recover from the defendant, Scoular-Bishop Grain Company, the purchase price of a carload of urea fertilizer sold by Vistron to Scoular-Bishop. Scoular-Bishop counterclaimed for damages caused when cattle belonging to it died from eating the fertilizer which was being spread in the pasture where the cattle were kept. The sale and delivery of the fertilizer, sales price, and nonpayment were stipulated by the parties and the case proceeded to trial before a jury on the counterclaim. The court directed a verdict for Vistron on its petition and the jury found against Scoular-Bishop on its counterclaim. Scoular-Bishop appeals from the dismissal of the counterclaim. The sole assignment of error is the refusal of the trial court to give the following instruction requested by Scoular-Bishop: "The jury is instructed that a manufacturer of fertilizer has a duty to give a reasonable warning as to any dangers inherent or reasonably foreseeable in the normal use of such fertilizer."

Whether Scoular-Bishop was entitled to the instruction depends upon whether it pled and presented evidence tending to prove a cause of action founded upon a negligent violation of a duty to warn. Accordingly, we examine the pleadings and evidence contained in the bill of exceptions with a view to determining whether or not such a theory of recovery was pled and proved. It is not disputed that the counterclaim pled and Scoular-Bishop presented evidence sufficient to present a jury question on the theory of breach of an express warranty, and on that theory no complaint is made that the jury was not properly instructed.

The counterclaim is in part as follows "The defendant, having no knowledge or experience in the use of

this particular fertilizer, specifically inquired of plaintiff's sales representative and agent whether this product would be proper for use on such pasture land and whether the fertilizer could be harmful in any way to the cattle grazing thereon. The plaintiff's sales representative and agent expressly represented that such fertilizer was suitable for defendant's purposes and could not possibly cause any harm or hazard to the cattle. That the defendant believed said representations to be true and in reliance thereon purchased one hopper car . . . [of fertilizer].

"2. That the plaintiff delivered said fertilizer to the defendant in bulk form without any label, description or writing containing any warning or limitation concerning the use of such fertilizer. The fertilizer was then unloaded in bulk into a spreader and transported to the pasture where defendant's cattle were located.

"3. That such cattle consumed a portion of such fertilizer which, contrary to plaintiff's representation, was highly toxic and harmful to cattle. As a direct result thereof, defendant's cattle became ill and twenty-two (22) yearling steers died. . . .

"4. By reason of the misrepresentation of the plaintiff as aforesaid, the defendant has been damaged in the sum of $6,500.00." The counterclaim also appropriately alleged: ". . . prompt oral and written notice to the plaintiff of the breach of said expressed and implied warranty."

Scoular-Bishop's evidence consisted of the testimony of its officer and agent who gave the purchase order to the salesman for Vistron and of a farmer who was hired to and did spread the fertilizer. That the death and illness of cattle was caused by the ingestion of the fertilizer was stipulated. Scoular-Bishop's officer testified that he had specifically asked the salesman if there "was any danger or risk to our cattle from this urea fertilizer," and that he had been assured "absolutely there was no risk or danger to our cattle," and that he

relied upon that representation when the fertilizer was purchased and used. The salesman, called as a witness on behalf of Vistron, denied having made the representations in question, or being informed of the specific use that was being made of the fertilizer. He stated that he knew from his sales training that the fertilizer could be poisonous to animals if ingested.

The evidence further showed that, during the course of the spreading of the fertilizer, the spreader was left overnight in the pasture with the cattle, that its exterior was covered with fertilizer dust, and that the cattle ingested the fertilizer by licking the machine. It appears that they may have also ingested the fertilizer from small piles which had accumulated at points where the spreader was turned around in the course of the spreading. Without reciting details, it may be said that some of the evidence in support of the counterclaim, such as the Scoular-Bishop officer's ignorance of the possibly harmful potential of the fertilizer, would be material whether the theory of recovery was an express or implied warranty, or negligent failure to warn.

It is to be noted, however, that the defendant neither pled nor proved any facts from which a duty to warn would reasonably arise, such as that Vistron knew, or in the exercise of reasonable care ought to have known, the dangerous character of the material in the use to which it knew it was to be put. As previously noted, the counterclaim alleges that Scoular-Bishop was damaged "by reason of the misrepresentation." There is no allegation of negligence by reason of a failure to warn.

During the course of the presentation of its case-in-chief, Scoular-Bishop offered a letter written by its attorney to Vistron after the loss. Objection was sustained, but the following stipulation was entered into in lieu thereof: "MR. CASSMAN: And it is stipulated by and between the parties hereto that reasonable notice was given to the Vistron Corporation of the alleged breach of warranty. MR. DOUGLAS: So stipulated."

It seems apparent to us, as it did to the trial court, that Scoular-Bishop was proceeding in contract and not in tort. This must have seemed apparent also to Vistron's counsel since he made no attempt either to plead contributory negligence or to present any evidence thereon.

It might further be well to note that if Scoular-Bishop was relying upon alternate causes of action or theories of recovery, it would have been proper to separately state and number them. § 25-805, R. R. S. 1943.

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Schmidt v. Johnson, 184 Neb. 643, 171 N. W. 2d 64. The trial court did not err in refusing to give requested instruction No. 4.

AFFIRMED.

UNIVERSITY PRODUCTS OF NEBRASKA, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. GREGORY G. JENSEN, APPELLANT AND CROSS-APPELLEE.

235 N. W. 2d 229

Filed November 13, 1975. No. 39938.

Contracts. If a party by his contract creates a duty or imposes a charge upon himself, he must ordinarily substantially comply with the undertaking.

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

Stowell & Jensen, for appellant.

Charles L. Titus and Jeffrey A. Silver of Bradford & Bloch, for appellee.

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

NEWTON, J.

This is an action to recover the amount due on a contract. Defendant, as a defense, has pleaded commercial frustration. The District Court entered judgment for plaintiff. We affirm the judgment of the District Court.

Plaintiff owned and operated a photography business. It operated under a contract, denominated a franchise, from University Products, Inc., an Oklahoma corporation, hereinafter referred to as Uniprod. Uniprod supplied certain materials and training of employees. The franchisee was to obtain photofinishing and inventory requirements from Uniprod and was required to pay an initial sum of $3,000, $500 of which was paid down, and the balance payable monthly on the basis of 5 percent of gross sales.

On February 28, 1971, plaintiff sold its business, cameras, etc., to defendant and assigned its Uniprod franchise. Defendant contracted to pay $7,444.46. This included $1,500 for personal assets and $5,944.46 for the business franchise rights in Lancaster County. The sum of $2,000 was paid down and the balance was payable in monthly installments as follows: $1,444.46 on the basis of 5 percent of gross sales and $4,000 on the basis of $100 per month or a sum equal to each monthly gross profit, whichever was greater. Installments paid on the $1,444.46 item were to be used by plaintiff-seller to pay the balance of the initial amount due on the franchise. Plaintiff retained a security agreement on all assets and, in the event of default by defendant, the entire amount became due and would draw interest. Defendant-buyer was to maintain the business as a going concern in accordance with good business practices.

Defendant's last payment was on July 21, 1972. The balance unpaid amounted to $2,487.38. Uniprod furnished all services required by it until about September 1972. Uniprod, following a name change, was declared bankrupt in November 1972.

Defendant contends that the bankruptcy of Uniprod

constituted a supervening circumstance rendering it difficult or impossible to perform the contract and amounted to commercial frustration. We do not agree that the circumstances fall within that class of situations giving rise to a defense of commercial frustration.

The business and the franchise subsisted at the time the contract was entered into and for many months thereafter. This was an unconditional sale with assignment of the franchise to defendant. Even after the franchise became valueless, defendant could have still carried on the business. Insofar as the contract between plaintiff and defendant is concerned, by way of performance, defendant had only to pay the sum contracted for. The demise of the franchise in no way prevented this. The situation is completely at variance with the usual frustration situation as where a man contracts to sell a horse and the horse dies before delivery; or, the owner of a building contracts for repairs and the building burns down; or, performance is prevented by law, etc. The situation is akin to a deal whereby a commercial trucker buys a truck on a time-payment basis and the truck is stolen or wrecked; true, both parties were aware that it was to be used in the commercial trucking business and that it cannot now be so used. Although the purpose of the purchase has been frustrated, this does not release the purchaser from paying the debt incurred. Such risks are assumed by the purchaser. In the present case plaintiff sold its business and rights under the franchise. There is no indication in the contract that either party understood plaintiff was to guarantee the continued existence of the franchise or the services to be performed under it. "If a party by his contract creates a duty or imposes a charge upon himself, he must under any and all conditions substantially comply with the undertaking." Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657. The same situation prevails with reference to the question of failure of consideration.

The contract provided for a usurious rate of interest in the event of default. In view of this situation, plaintiff's cross-appeal for interest is disallowed.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. HELEN FRASIER, APPELLANT, V. PHILLIP A. WHALEY ET AL., APPELLEES.

234 N. W. 2d 909

Filed November 13, 1975. No. 39958.

1. **Mandamus: Trial.** Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong.
2. **Domicile: Schools and School Districts: Infants.** It is the rule at common law that the domicile of a minor is the same as the domicile of the parent with whom he lives.
3. **Domicile: Parent and Child: Divorce: Infants.** Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce.

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

Curtis & Curtis, for appellant.

Murphy, Pederson & Piccolo and LeRoy Anderson, 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 for Chase County denying the application of Helen Frasier, relator and mother of Tammy Maddux, age 15, for a peremptory writ of mandamus to compel the respondents, the superintendent and members of the school board of the Chase County high school district, to admit

Tammy as a student at Chase County high school without payment of nonresident tuition as required by section 79-445, R. S. Supp., 1972. We affirm the order of the District Court.

The underlying issue is whether Tammy Maddux is a resident of the Chase County high school district. Residence, for the purposes of section 79-445, R. S. Supp., 1972, has long been interpreted by this court to mean domicile or legal residence, i.e., one's established home and the place to which one intends to return when absent therefrom. State ex rel. Vale v. School District of City of Superior, 55 Neb. 317, 75 N. W. 855; State ex rel. Rittenhouse v. Newman, 189 Neb. 657, 204 N. W. 2d 372.

The evidence before the District Court consisted principally of a stipulation of facts and the testimony of the relator. There is little conflict in the evidence. We summarize such of the evidence as we believe material. Helen Maddux and Thomas Maddux, the mother and father of Tammy, were divorced on March 31, 1972, and custody of Tammy was awarded to Helen with reasonable rights of visitation granted to Thomas. The decree was later amended to make specific the times and places of visitation. Visitation periods included a 10-day vacation period with the father and provided for a pro rata reduction in child support during the 10-day period. At the time of the divorce Helen, Thomas, and their children were domiciled and actual residents of Chase County and of the Chase County high school district, and had been residents of the district for many years. Tammy had always attended schools in the district. This included attendance by her at Chase County high school. After the divorce and until her later remarriage Helen and the children for a period of time lived in a residence in the town of Imperial, Chase County. Previously they had lived on the ranch of Helen and Thomas. The decree of divorce divided between Helen and Thomas the real estate and other property of the parties. The real estate is located in the Chase County high school district.

This property included the town residence previously mentioned.

On May 27, 1973, Helen was married to Merle Frasier. Almost immediately thereafter she moved with Tammy and another daughter to the farm home of Merle Frasier in Dundy County. Shortly before that she sold the Imperial residence.

Helen owns 480 acres of farmland in the Chase County high school district. Thomas Maddux owns approximately 4,000 acres in the district. The ranch upon which Helen and her present husband reside is partly in Dundy County and partly in Chase County high school district. However, as already noted, the residence thereon is located in Dundy County.

After the move to Dundy County, Tammy continued to attend Chase County high school. In 1974 the respondents, acting on behalf of the Chase County high school district, notified the Frasiers that nonresident tuition would have to be paid on behalf of Tammy if she were to be allowed to continue as a student. Helen paid tuition for 1 year "under protest." At one point in an attempt to avoid confrontation on the tuition issue, Tammy attended, at the beginning of the school year for a short time, Benkelman high school in Dundy County. However, Thomas Maddux protested and Tammy returned to Chase County high school. Thomas, who continues as a resident of the Chase County high school district, has continued to pay child support for Tammy as required by the decree of divorce.

When Helen took the stand as a witness on her own behalf, inquiry was made of her as to her intention with reference to her legal residence when she moved from Chase County to the ranch home of her new husband in Dundy County. Her answer was: "I changed my abode to my husband's farm, but I had no intentions of changing my legal residence from this [Chase] county, because I do all of my trading here—." She then went on to give reasons for her intention, namely, her children

go to school there, she trades in the district, her family lives there, and she intended to vote there.

The trial court found: "The Court finds that the relator has established a domicile outside of the Chase County School District. . . . The Court further finds that the primary custody of the minor child involved has been granted by the District Court of Chase County, Nebraska, to the Relator herein. In the absence of additional facts, the domicile of the minor follows that of the parent having been awarded custody."

As is indicated by State ex rel. Vale v. School District of City of Superior, *supra*; State ex rel. Rittenhouse v. Newman, *supra*; and many intervening cases as shown by the reports of this court, the problem here presented, or problems very similar, are recurring ones over a long period of time and the Legislature has never, no doubt for very good reasons, seen fit to change the applicable rules.

In State ex rel. Rittenhouse v. Newman, *supra,* we said: "It is fundamental that mandamus is a law action and that conflicts in evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong." It is evident the trial court found the actions of relator in selling her residence in Imperial and moving with her children to the home of her new husband in Dundy County indicated more accurately her intention with reference to establishing her permanent home than did the intention to which she testified at trial and which apparently had previously been unexpressed. On the record before us, we cannot say that the trial court's determination of the relator's intention was clearly wrong.

It is the rule at common law that the domicile of a minor is the same as the domicile of the parent with whom he lives. Restatement, Conflict of Laws 2d, § 22, p. 88. Normally the domicile of the father is determinative. 25 Am. Jur. 2d, Domicil, § 63, p. 45; State ex rel. Vale v. School District of City of Superior, *supra*;

Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388. Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce. Restatement, Conflict of Laws 2d, § 22, Comment d, p. 89; 25 Am. Jur. 2d, Domicil, § 66, p. 48; State ex rel. Brito v. Warrick, 176 Neb. 211, 125 N. W. 2d 545; Hanson v. Hanson, *supra*; 13 A. L. R. 2d 313.

In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885, upon which the relator relies in part, is not applicable. The principal point decided in the case was that when the mother to whom custody had been awarded died, the domicile of the child then became that of the father where he had not for some reason forfeited his natural right to custody. Other authorities cited by the relator have been examined and found inapplicable.

AFFIRMED.

DONALD B. MACKEY, APPELLANT, V. DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

235 N. W. 2d 394

Filed November 20, 1975. No. 39885.

1. **Appeal and Error: Implied Consent Law.** On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo.
2. **Intoxicating Liquors: Motor Vehicles: Licenses and Permits: Trial.** On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal.
3. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles.** Where blood, breath, or urine tests were available to a motor-

ist under arrest for operating a motor vehicle while under the influence of alcoholic liquors, his inability to provide, within a reasonable time, a urine sample for a chemical test, which he elected to take, and his unwillingness to submit to either blood or breath tests offered to him in the alternative constitute a refusal to permit chemical testing as provided for in the implied consent statute.

4. **Intoxicating Liquors: Implied Consent Law.** Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08, R. R. S. 1943, and the test may be given. § 39-669.10, R. R. S. 1943.

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

William W. Lyons of Russell, Colfer, Lyons & Wood, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

CLINTON, J.

This is an appeal under the provisions of section 60-420, R. R. S. 1943, from an order of the District Court for Red Willow County affirming an order of the Director of the Department of Motor Vehicles made under the provisions of section 39-669.16, R. R. S. 1943, revoking the motor vehicle operator's license of the plaintiff-appellant Mackey for refusal to give a blood sample for chemical testing under the provisions of the implied consent law. § 39-669.08, R. R. S. 1943.

In this appeal plaintiff asserts: (1) The evidence was insufficient to permit the trial court to find that the arresting officer had reasonable ground to believe that Mackey was driving a motor vehicle while under the influence of intoxicating liquor. (2) The evidence was insufficient to show that Mackey refused to give a body fluid specimen for testing. (3) The evidence shows that

because of the effect of injuries, Mackey was mentally incapable of refusing to give a sample. (4) The evidence is insufficient to show that the arresting officer advised Mackey of the consequence of refusal as required by section 39-669.08(5), R. R. S. 1943. We affirm.

We summarize the evidence before the trial court as follows: Mackey, at about midnight on December 2, 1973, was at a tavern in McCook, Nebraska. He left the tavern at about 1 o'clock a.m. to go home. After he entered his automobile he encountered an acquaintance, one Keene, who had come upon a friend, Jimenez, who was too intoxicated to drive. Keene proposed to drive Jimenez to his home 3 miles east of McCook. Keene asked Mackey if he would follow in his car and bring Keene back to town. Mackey agreed. Jimenez was delivered to his home uneventfully. As Mackey backed his auto onto the highway from the Jimenez driveway and turned to drive west, he and Keene observed a car coming from the west which they described as swerving on the highway. It was very foggy at the time. The oncoming car struck the Mackey automobile near the left rear fender and wheel. Another car came along and passed safely. A third vehicle then collided with the left front of the Mackey car. Mackey suffered head injuries. It is unclear from the evidence whether these injuries were incurred in the first or the second collision. The Nebraska State Patrol was summoned. When the officer arrived he observed Mackey being supported by Keene and the driver of the third vehicle. It was the import of the testimony of Mackey, Keene, and the driver of the third vehicle that this support was required because Mackey was dazed and groggy from his injuries and that they did not want to let Mackey rest on the wet, cold, snow-covered ground. The officer testified that when he arrived at the scene the Mackey car was astraddle the centerline of the highway. He made inquiry as to ownership of that car and was advised that Mackey was the owner. The officer did not

at that time speak to Mackey, but observed his features with the aid of a flashlight. The officer testified that Mackey's eyes were bloodshot and that he detected the faint odor of beer on Mackey's breath, and he observed a small stream of blood coming down his face. An ambulance was called and Mackey was taken to a hospital where he received treatment, including the suturing of the head wound. The officer arrived at the hospital while treatment was being administered. He observed and heard Mackey's conversation with the treating physician. He described Mackey's conversation as incoherent and difficult to understand. Mackey testified that he remembered very little of what happened after the collision until after the request for a body fluid specimen. The officer testified that as soon as the doctor finished his treatment the officer advised Mackey that he was under arrest for driving while intoxicated. He then asked Mackey to give a urine sample. Mackey agreed, but was unable to urinate. After futile attempts for about 15 minutes, the officer then asked Mackey to give him a breath or blood sample. Mackey then told the officer that he did not think that he would do that. Another request was made and then the officer advised Mackey of the consequence of refusal by reading to him from an "advisement" form. The officer testified he did not read the entire form. He left out paragraph one and part of paragraph five. The advisement form was identified, but never offered or received in evidence. The part of paragraph five which the officer testified was included in his warning to Mackey was read into the record as follows: " 'You may choose whether the test so required shall be a chemical test of your blood, breath or urine.' " The record does not show specifically what the balance of the warnings given were, but does affirmatively show that Miranda warnings were not given or commingled with advice on consequence of refusal. See Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906. The officer further testified that after Mackey declined to give a

blood or breath specimen Mackey told the officer, " 'Go ahead and turn it over to the Motor Vehicle Department', or something to that affect (sic)." The officer also testified that after he again asked Mackey if he would rather give a blood or breath test he stated, " 'Just go ahead and turn it over to the Motor Vehicle Department.' " Hospital personnel who may have observed Mackey at the time of his treatment and arrest were not called as witnesses.

On appeal from a revocation of a motor vehicle operator's license under the implied consent statute this court reviews the finding of the trial court de novo. Wiseman v. Sullivan, *supra.* It is important to our consideration of the issues that we first determine upon which party rests the burden of proof. In Lutjemeyer v. Dennis, 186 Neb. 46, 180 N. W. 2d 679, we held that in an appeal under the provisions of section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the points statute, former section 39-7,129, R. R. S. 1943, the burden is upon the plaintiff to prove the facts upon which he relies to establish that the revocation was unlawful. Plaintiff cites Metschke v. Department of Motor Vehicles, 186 Neb. 197, 181 N. W. 2d 843, as authority for the proposition that upon appeal to the District Court the burden is upon the State to show that the arresting officer had reasonable grounds to believe that the person arrested was driving a motor vehicle while under the influence of intoxicating liquor. Metschke was decided shortly after Lutjemeyer. Are the holdings in the two cases reconcilable? We believe they are. In Metschke it was conceded that the plaintiff had refused to give the requested sample. However, whether the officer had reasonable grounds for arrest as prescribed by statute was an issue. The opinion in Metschke says: "On the trial in the district court, Metschke testified in his own behalf and rested his case. The State moved to dismiss the appeal on the ground

that Metschke had not shown that his refusal to take the test was reasonable. The motion was overruled and the State thereupon rested its case. The court then entered judgment for Metschke. . . . In this case, there is no evidence that reasonable grounds for the arrest existed. . . ." The court cited former section 39-727.03, R. R. S. 1943 (now section 39-669.08, R. R. S. 1943), not for the purpose of determining the burden of proof upon appeal, but simply for the purpose of showing that reasonable grounds for arrest and arrest are conditions precedent to a valid denial of a body fluid sample. Syllabus 1 in Metschke goes further than the opinion and would appear to put the burden of proof on the State in the District Court. Is there any reason for applying a different rule on burden of proof as to revocations under the implied consent statute from that applicable in point revocations? After a careful examination of our statutes and the case law of other jurisdictions, we conclude there is not and that, insofar as the first syllabus in Metschke appears to hold otherwise, it is disapproved.

Section 39-669.15, R. R. S. 1943, by prescribing the contents of the affidavit which the arresting officer must file with the Director of the Department of Motor Vehicles after a person refuses to submit to a sobriety test, places the burden upon the State to make a prima facie case for revocation before the Director. Section 39-669.16, R. R. S. 1943, provides for notice to the person and an opportunity to be heard prior to revocation, and provides in part: "After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license. . . ." Section 39-669.18, R. R. S. 1943, makes the appeal procedures provided for in section 60-420, R. R. S. 1943, applicable to implied consent revocations. Section 60-420, R. R. S. 1943, provides in part: "The district court shall

hear the appeal as in equity and without a jury, and determine anew all questions raised before the director; . . . ."

Other jurisdictions with similar statutory schemes are divided on the question of burden of proof. The following cases place the burden upon the plaintiff: Buda v. Fulton, 261 Iowa 981, 157 N. W. 2d 336; Lira v. Billings, 196 Kan. 726, 414 P. 2d 13; Hoban v. Rice, 25 Ohio St. 2d 111, 267 N. E. 2d 311; Burbage v. Department of Motor Vehicles, 252 Ore. 486, 450 P. 2d 775. Cases to the contrary are Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685; and Chmelka v. Smith, 81 S. D. 40, 130 N. W. 2d 423.

The rationale of the Iowa court set forth in Buda v. Fulton, *supra,* is persuasive and we refer the reader to that opinion. We hold that on appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal. Our statutory scheme seems to contemplate that an order of the Director shall have prima facie validity if the necessary affidavit is filed with the Department of Motor Vehicles and therefore places upon the appealing licensee the burden of pleading and proving the specific grounds upon which he relies to establish his claim of invalidity.

Based upon our reading of the record de novo, but taking into consideration the advantage the trial court had of observing the witnesses, we conclude the plaintiff has not established that the arresting officer had no reasonable grounds to believe Mackey was driving a motor vehicle while under the influence of intoxicating liquor, or that the arresting officer failed to advise Mackey of the consequence of refusal as required by section 39-669.08(5), R. R. S. 1943.

The second and third assignments require some fur-

ther discussion. With reference to assignment (2), it is clear the plaintiff agreed to give and attempted to give a urine sample. He could not do so. He then declined to give either a breath or a blood specimen. This constitutes a refusal within the meaning of the implied consent statute. See, State, Department of Highways v. Lauseng, 289 Minn. 344, 183 N. W. 2d 926; Quesada v. Orr, 14 Cal. App. 3d 866, 92 Cal. Rptr. 640; Cahall v. Department of Motor Vehicles, 16 Cal. App. 3d 491, 94 Cal. Rptr. 182. We hold, as did the Minnesota court, that where blood, breath, or urine tests were available to a motorist under arrest for operating a motor vehicle while under the influence of alcoholic liquors, his inability to provide, within a reasonable time, a urine sample for a chemical test, which he elected to take, and his unwillingness to submit to either blood or breath tests offered to him in the alternative constitute a refusal to permit chemical testing as provided for in the implied consent statute.

Assignment (3) upon which the plaintiff relies does not allege a legally viable ground to set aside the revocation. Section 39-669.10, R. R. S. 1943, provides: "Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08 and the test may be given." Where a person is incapable of refusal, the sample may be taken provided the other conditions of section 39-669.08, R. R. S. 1943, are met. See State v. Howard, 193 Neb. 45, 225 N. W. 2d 391.

The judgment of the District Court should be affirmed.

AFFIRMED.

INDOOR RECREATION ENTERPRISES, INC., A CORPORATION, ET AL., APPELLANTS, V. PAUL L. DOUGLAS, COUNTY ATTORNEY OF LANCASTER COUNTY, APPELLEE.

235 N. W. 2d 398

Filed November 20, 1975. No. 39897.

1. **Gambling: Words and Phrases.** A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.
2. **Gambling.** The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.
3. ———. The test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not to be measured by the standards of experts or any limited class of players, but by that of the average skill of a majority of players likely to play the game.
4. **Judicial Notice.** A court must be reasonably certain of everything of which it takes judicial notice, that is, the certainty that the fact is uniform and fixed, and if there is any doubt whatever either as to the fact itself or as to its being established or a matter of common knowledge, evidence must be required to support a finding of fact based upon it.

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

Friedman & Berry, for appellants.

Ronald D. Lahners and Robert R. Gibson, for appellee.

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

WHITE, C. J.

The appellants brought this action seeking a declaratory judgment that poker, bridge, chess, and checkers were games of skill and that "the playing of said games or the operation of a place where such games are played shall not be considered a violation of the gambling laws

of the State of Nebraska, Sections 28-941 through 28-947 inclusive, Nebraska R R S 1943," and for an injunction restraining the appellee, the county attorney of Lancaster County, from prosecuting the appellants under these sections of the statute. The District Court denied the relief prayed for and dismissed the appellants' petition. This appeal followed.

Appellant Long is the president, and along with his wife, the sole stockholder of Indoor Recreation Enterprises, Inc. They operate an establishment in Lincoln, Nebraska, called the Golden Cue Recreation Center. In June 1973, Long set aside a separate area in the Golden Cue, calling it the Checkmate Club. Located in this portion of appellants' establishment were several tables and chairs. At the main desk where the cash register was located, Long kept decks of cards, checker and chess sets, poker chips, and other gaming paraphernalia. In order to utilize the facilities of the Club, one was required to file an application for membership and pay a membership fee of $1. In addition, 75 cents per person per hour was charged for the use of the facilities. It is not disputed that members were allowed to wager on the games they played. Long admitted that there was "unquestionably" in his mind gambling upon the games of poker played at the Club.

We summarize the assignments of error for purposes of consideration in this court. Essentially, the appellants contend that the District Court was in error in finding that poker and bridge were games of chance and not games of skill. The appellants assert that the undisputed testimony of Long and their expert witness, Mr. Oswald Jacoby, who gave their opinions that poker and bridge were games of skill and not games of chance, must be accepted by the trial court. There was no other testimony on this point.

We examine our decisions that have passed upon the question of distinguishing games of skill from games of chance. In Baedaro v. Caldwell, 156 Neb. 489, 56 N. W.

2d 706 (1953), this court stated as follows: "The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game. * * * A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player."

In Annotation, Games of Chance or Skill, 135 A. L. R. 104 (1941), the authors state: "* * * games of cards are games of chance even though the element of skill is more or less involved, since the element of chance predominates."

In State v. Taylor, 111 N. C. 680, 16 S. E. 168 (1892), the following observation was made on games played with cards: "It is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamesters engaging in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results."

In State v. Prevo, 44 Hawaii 665, 361 P. 2d 1044 (1961), the court held: "* * * the test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is *not* to be measured by the *standard of experts or any limited class of players,* but by that of the *average skill of a majority of players likely to play the game,* * * *." (Emphasis supplied.)

During cross-examination of the appellants' expert witness, Mr. Jacoby, the following exchanges took place:

"Q- Now I take it, if they played 100 hands and the good player had lost — had lost each of the first 99 games, what is the chance of the expert player winning the next hand?

"A- The same as his chance of winning the first hand.

"Q- Which is even?

"A- Yes. Probably less than even because the good player tends to throw away bad hands and, so, probably, in a 100 hands between an expert and a bad player, the bad player would win more hands and the expert would win more money.

"Q- So, that in 100 hands, the winner and the loser is going to be determined upon the deal of the cards.

"A- That's correct.

"Q- Which is what?

"A- Luck."

Mr. Jacoby also testified on cross-examination:

"Q- Now, what about in poker, in any one deal, I take it, the chance of getting any one of the two or three million hands would be called luck?

"A- Correct.

"Q- That would apply, — the initial deal in the draw poker game would be luck?

"A- Correct.

"Q- All right. The initial deal in a bridge game is also luck?

"A- Sure.

"Q- Which, I take it, then — let's go on. What about stud poker, would the initial deal be luck?

"A- The initial two cards would be luck.

"Q- And after that, after the initial two cards and the betting commences, the particular cards that are dealt next, would that be luck?

"A- Yes.

"Q- And the next card?

"A- Yes.

"Q- And the next card?

"A- Yes. * * *."

The above colloquy demonstrates that there was sufficient factual basis in the record to support the District Court's conclusion that the predominate purpose of the games in issue was chance. The opinion conclusion of the expert witness is not required to be taken, by the court, even though uncontroverted. A trier of fact is not required to take the opinions of experts as binding upon him. Swartz v. Hess, Inc., 188 Neb. 542, 198 N. W. 2d 64 (1972). There is no merit to this assignment of error.

The appellants next boldly assert that it was error for the court not to take judicial notice "of the fact that poker and bridge are played as a matter of course throughout the City of Lincoln by residents in clubs and residences and played for the wagering of money." Section 27-201 (2), R. S. Supp., 1975, of the recently adopted Nebraska Rules of Evidence, which comports with the preexisting case law on judicial notice states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

For a fact to be judically noticed, it is not enough that it rests upon conjecture or suspicion, on gossip or rumor, or that it be commonly asserted, if that be true. The general rule is that in order that a fact may properly be the subject of judicial notice, it must be "*known*" - that is, well *established* and *authoritatively settled*, without qualification or contention. A court must be reasonably certain of everything of which it takes judicial notice, that is, the certainty that the fact is uniform and fixed, and if there is any doubt whatever either as to the fact itself or as to its being established or a matter of common knowledge, evidence must be required to support a finding of fact based upon it. See 29 Am. Jur. 2d, Evidence, § 24, p. 61. It is obvious that the allegation

in the appellant's petition that there is wide-spread gambling in Lincoln, Nebraska, is not authoritatively settled, without qualification or contention. Nor can we perceive any readily available sources from which such a fact could be ascertained, assuming it was subject to proof. There is no merit to this contention.

Other assignments of error have been examined and are without merit. They are either disposed of by what we have already said in this opinion, or are unnecessary to discuss.

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

AFFIRMED.

CLINTON, J., concurs in the result only.

DOROTHY K. HERMANCE, APPELLEE, V. LYLE H. HERMANCE, APPELLANT.

235 N. W. 2d 231

Filed November 20, 1975. No. 39914.

1. **Parent and Child: Infants.** Visitation rights granted a parent need not be the same for all children and there is no abuse of discretion in providing different conditions where a child of tender years is concerned.
2. **Divorce: Alimony: Appeal and Error.** An award of alimony or distribution of property may be altered on appeal where the record reflects good cause.
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 attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion.

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

Donald R. Hays, for appellant.

Phillips & Murphy, for appellee.

Robert M. O'Gara, guardian ad litem.

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

BRODKEY, J.

Lyle H. Hermance has appealed to this court from a decree entered by the District Court for Lancaster County, in an action commenced by Dorothy K. Hermance, his wife, for a dissolution of the marriage of the parties. The trial court appointed Robert M. O'Gara as attorney for the minor children of the parties under section 42-358, R. S. Supp., 1974, and he participated both in the trial of the action in the District Court and also on appeal to this court. In this appeal, Lyle H. Hermance, the husband, assigns as error the action of the trial court in awarding custody of their three children to the wife, Dorothy K. Hermance, the provisions in the decree with reference to the husband's right of visitation, and the amount of the property settlement, alimony, and child support. No issue is raised in this appeal with reference to the finding of the trial court that the marriage of the parties was irretrievably broken. We affirm the judgment of the trial court as hereinafter modified. We shall discuss each of the foregoing assignments of error.

All parties conceded in their oral argument before this court that the trial court properly awarded custody of the children to their mother, and we therefore dispose of this assignment of error without the necessity of extended discussion in this opinion.

By way of background to a discussion of the propriety of the visitation rights awarded the father, it appears that at the time of the filing of the petition in this action, the parties resided on an acreage near Waverly, Nebraska, where Lyle taught vocational-agriculture

courses in the Waverly school system. Some time after the filing of the petition, Dorothy moved from the acreage and is now purchasing a home of her own. At the time of the trial Lane Alan Hermance, their oldest child, was 10 years of age; their daughter, Lori Ann, was 8 years of age, and the baby, Russell Joel, was 1 year old. Under the provisions of the decree entered by the trial court, the father was given rights of visitation with Lane and Lori, the older children, every other weekend, and rights of visitation with Russell, the youngest child every fourth weekend. It is further provided that beginning in June of each year, the father may have the two older children for a 10-week period; but he may have summer visitation rights with Russell, the youngest child, for a 1-week period during the summer of 1975, for a 2-week period during 1976, said term to increase by 1 week each summer thereafter until the visitation period is 10 weeks. The decree also provides that, during their summer visitation with the father, the mother shall have visitation rights every other weekend with the two older children and with the youngest child commencing in 1976. Mr. Hermance contends that the provisions for visitation should grant equal time for visitation for both parents, and that the provisions contained in the decree are unfair both to him and to Russell because Russell will be 11 years old before he is entitled to spend 10 weeks with his father each summer.

We conclude that while there may be some inconsistency and unequal treatment inherent in the above provision, the visitation schedule does not reveal an abuse of discretion. The issue is whether the provision for Russell is in his best interests. In view of Russell's age, it is necessary that he receive more attention, skill, and care than the two older children until he is older and more able to cope with longer separations from his normal environment. It is also possible that the presence of Russell as a small child during the 10 weeks that the older children are on the acreage with their father

would also restrict the enjoyment of the father and the older children. It should also be remembered that because of the father's occupation as a teacher, the amount of free time available to him during the summer months is limited. The court's decree clearly recognized the problems attending visitation rights with the youngest child and there was no abuse of discretion by the trial court in prescribing different conditions which were necessitated by the age of the youngest child, Russell.

We now turn to a discussion of the provisions of the decree pertaining to the property division and the alimony to Mrs. Hermance. At the outset, we wish to point out that the evidence with reference to the value of various items of property, both real estate and personal, is often conflicting and is less than satisfactory for the purpose of making an accurate determination as to the fairness of the division and award by the trial court. It appears from the record that the court awarded Mr. Hermance the acreage and home near Waverly, Nebraska, subject to a $12,500 mortgage, certain livestock and farm equipment, a Chevrolet pickup truck, certain furniture and household effects in his possession, and life insurance policies on his and the childrens' lives. It also appears that the court awarded to Mr. Hermance "any and all payments from the estates of respondent's parents," but it is not clear whether it was the intention of the court to include the approximately $6,000 he had already received during the marriage from those estates, or whether the court intended to award him only future payments of about $2,000 to be received from those estates.

Mrs. Hermance was awarded household goods in her possession, a 1960 Oldsmobile sedan, life insurance policies on her life, and also $14,400 awarded by the court in lieu of her share of real estate and other property awarded to Mr. Hermance. Under the terms of the decree the $14,400 is to be paid at the rate of $200 monthly for a period of 72 months. The court also awarded ali-

mony to Mrs. Hermance in the sum of $9,600, also payable at the rate of $200 per month commencing in November of 1980, at which time the property division award of $14,400 will have been paid off. While it is difficult, if not impossible, to determine accurately from the record the values of the property awarded to the respective parties, it would seem that the court intended the additional award of alimony to be considered as part of the total adjustment between the parties since the court provided that alimony payments should not commence until payment of the property award was concluded. If we consider only the amount of the respective property awards to the parties, we believe that Mr. Hermance received a substantially greater amount than did Mrs. Hermance. However, if we include the alimony award, it appears that Mrs. Hermance received an amount substantially in excess of 50 percent of the total estate.

The most important problem, as we see it, is whether the income of the father is sufficient to carry out the intention and the desires of the court as expressed in its decree which also reflected the wishes of the father and, to some extent, those of the mother that the children should be raised in a rural environment. Much testimony was adduced about the desirability of raising the children on the acreage, and of having access to the acreage for their activities in organizations such as the 4-H Club. Mrs. Hermance recognized the desirability of a farm atmosphere for her children, but preferred that it be provided in some way other than visits to the acreage in question.

It is apparent that a great deal of careful thought went into the court's determination, particularly in attempting to preserve the real estate intact, not forcing its sale, and yet enabling the husband to make payment to the wife for her share of the personal and real property and for the alimony. The court specifically provided in its decree that the two oldest children should

have the option, if they desire, to go to their father's rural acreage to care for livestock owned by them when involved in 4-H or similar programs. In addition, the court's action in providing that the property division and alimony sums to be paid consecutively rather than concurrently indicates both a desire that the husband retain the acreage, and an effort to arrange the payments by the husband to accomplish that purpose.

However, a résumé of the monthly payments required by the husband under the terms of the decree, and of other necessary expenses, reveals that the husband will have to sell the property to make such payments. While it appears from the record that Mr. Hermance' wages as a school teacher amount to $1,132 per month, or approximately $14,000 annually, his net take-home pay amounts to only $830.68 because of deductions from gross wages for taxes, insurance, retirement, and professional dues. Out of the $830 received by him as take-home pay, he is required each month to make payments of $375 representing child support at the rate of $125 per child, $200 as payment on the property division award, a $121 mortgage payment on the acreage, a $94 car payment, and utilities payments which he estimates to be in the neighborhood of $35. These items alone total $825 per month, leaving, as a matter of simple mathematics, a sum of $5 per month which is presumably free to squander in any way he wishes. The above figures do not include any amounts for food, clothing, other insurance, etc. It seems obvious that on a tight budget such as that set out above, even assuming that it is only an approximation, Mr. Hermance would have to sell the acreage, to the detriment of the children.

The law is well settled that an award of alimony or distribution of property will not be altered on appeal unless good cause is shown. Reisig v. Reisig, 191 Neb. 612, 216 N. W. 2d 731 (1974); Newton v. Newton, 188 Neb. 242, 196 N. W. 2d 116 (1972). We believe that the facts of this case, as recited above, constitute good

cause for modifying the decree of the trial court in order to accomplish the objective sought by the court and the parties. It seems clear to us that Mr. Hermance will have to have substantially more income to retain the acreage. Although, in the final argument of this case before this court, counsel for both the husband and the wife conceded that since the trial of this matter the husband had received an increase in salary which was estimated to be between $400 and $500 a year, this small increase would be insufficient to enable the husband to meet all his obligations and avoid selling the acreage. Since the avowed purpose of retaining the acreage is clearly for the good and welfare of the children involved, we think that both of the parents must cooperate to accomplish this purpose, even though the result may well be a decrease in the amount of various allowances made by the court. A summary of Mrs. Hermance' income and expenses reveals that under the terms of the decree she would be receiving $375 per month as child support and $200 per month on the property and/or alimony award. She also has monthly income of approximately $138 to $200 for work performed by her in the home where she is able to supervise the children. Her total projected income would be approximately $713 per month, most of which would be nontaxable. Her monthly expenses include a $167 mortgage payment on the home she is buying, utilities estimated at $25, food for herself and the children estimated at $150, car expenses of $44, and school lunch costs of $16, or a total monthly expense of approximately $402, leaving a balance available for other expenditures of approximately $311. Medical coverage for the children, excluding checkups and dental work, is provided in the insurance policy for which deductions are made from their father's paycheck. Although there are other expenses to be taken into consideration, including clothing for the children, it would seem that Mrs. Hermance can live quite comfortably on the income itemized above,

while the husband, to survive, would have to sell the acreage as a matter of economics.

In order to provide some measure of relief to the husband, we feel that the property award to the wife of $14,400 payable at the rate of $200 per month over a period of 72 months should be reduced to $8,640 payable at the rate of $120 per month over a period of 72 months. This modification would hopefully give Mr. Hermance extra funds for his expenses and allow him to keep the acreage.

Mr. Hermance also challenges the $9,600 alimony award to Mrs. Hermance claiming that it is excessive. We point out, however, that Mrs. Hermance did support the family while Mr. Hermance finished school. In the earlier years of her marriage, Mrs. Hermance was able to work outside the home at a salary substantially exceeding the income she is able to derive from doing work in her home updating telephone books. The record reveals that during a period of about 5 years when she was employed outside the home she was able to earn approximately $23,000 which presumably was used for the support of her husband and children during the time he was attending school. Although her two older children are at present attending school, the youngest child will not attend school full time for about 4 more years, and will require her continued presence in the home. In light of her contributions to the family during the 13 years of marriage, and considering the circumstances and abilities of the parties, we feel that the award of the court of alimony in the sum of $9,600, payable at the rate of $200 per month commencing in November 1980, is not excessive and no modification of the award is required.

Mr. Hermance also challenges the amount of child support awarded by the court. The court ordered Mr. Hermance to pay the sum of $125 per month for each child or a total of $375 monthly, with the specific provision that the obligation is suspended during the sum-

mer periods while the children visit their father. He claims that the amount is excessive and improper because the trial court failed to consider the earning capacity of each parent, as required by section 42-364(3), R. S. Supp., 1974. This court has held that in determining the amount of child support to be awarded, the status, character, and situation of the parties and 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. Connolly v. Connolly, *ante* p. 241, 231 N. W. 2d 337 (1975); Schwaninger v. Schwaninger, 192 Neb. 681, 223 N. W. 2d 829 (1974). A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Sommers v. Sommers, 191 Neb. 361, 215 N. W. 2d 84 (1974). A survey of child support awards in other cases is of little or no help in deciding the amount to be awarded in this case, as it is difficult, if not impossible, to colormatch the facts of each case. While it appears that the amount of child support allowed in this case may possibly be a little on the high side, we are not prepared to say that the court abused its discretion in setting the amount of such award and are not disposed to modify the award of the District Court in that regard.

Robert M. O'Gara, counsel for the minor children in this appeal, is awarded the sum of $200 for his services in this court, to be taxed as costs to the appellant herein.

AFFIRMED AS MODIFIED.

KRISTINE THERKILDSEN, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, BERG THERKILDSEN, APPELLANT, v. JAMES E. GOTTSCH, APPELLEE.

235 N. W. 2d 622

Filed November 20, 1975. No. 39927.

1. **Motor Vehicles: Crosswalks: Pedestrians.** The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within a crosswalk. § 39-754.05(1), R. S. Supp., 1972.
2. **Highways: Words and Phrases.** Intersection shall mean: (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if there are no lateral curb lines, then the lateral boundary lines of the roadways of two highways, which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict. (b) Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection. § 39-741(17) (a), (b), R. S. Supp., 1972.
3. **Highways: Crosswalks: Words and Phrases.** Crosswalk shall mean: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edge of the traversable roadway; or (b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface. § 39-741(10) (a), (b), R. S. Supp., 1972.
4. **Highways: Sidewalks: Words and Phrases.** Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians. § 39-741(44), R. S. Supp., 1972.
5. **Streets: Words and Phrases.** Street shall mean the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. § 39-741(49), R. S. Supp., 1972.

6. **Highways: Pedestrians.** No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic-control devices pertaining to such crossing movements. § 39-754.06(4), R. S. Supp., 1972.
7. **Highways: Words and Phrases.** Roadway shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term roadway shall refer to any such roadway separately but not to all such roadways collectively. § 39-741(39), R. S. Supp., 1972.

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

Michael McCormack of McCormack, Cooney & Mooney, for appellant.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

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

CLINTON, J.

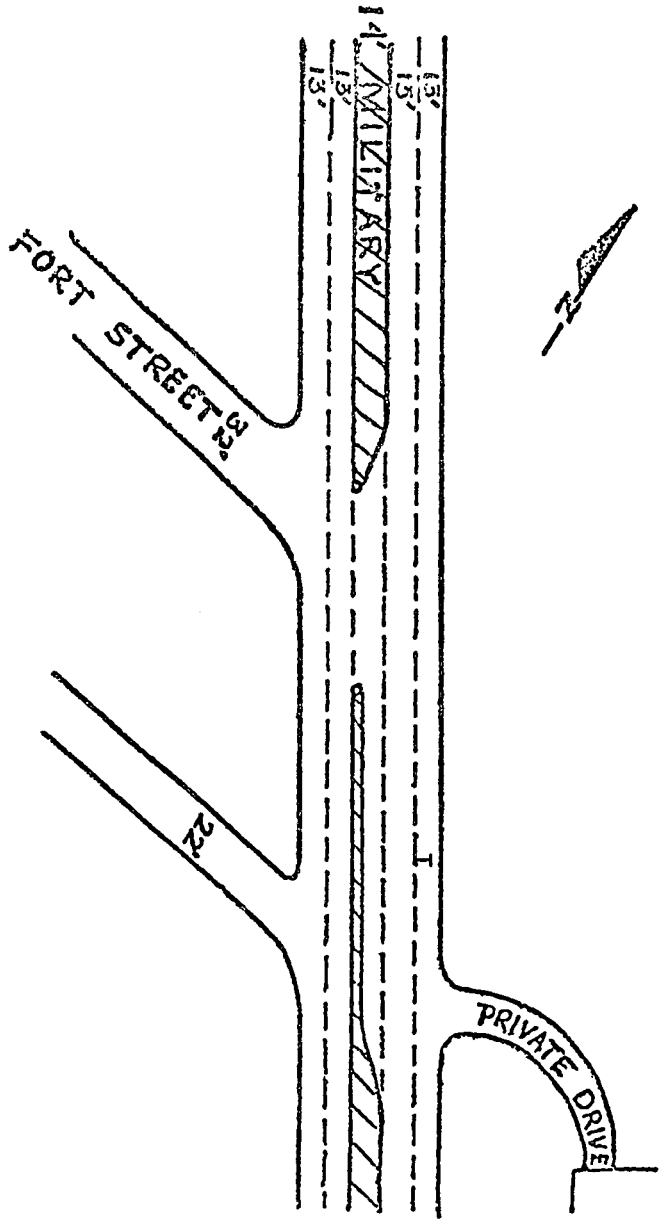
This appeal arises from a car-pedestrian accident which occurred on January 20, 1973, at about 12:45 a.m., near the intersection of Military Avenue and Fort Street in Douglas County, Nebraska. The plaintiff, aged 15, and two youthful companions were crossing Military Avenue on foot when they were struck by a west-bound automobile. The plaintiff's companions were killed. The plaintiff suffered serious personal injuries. The trial court submitted the issues of negligence and contributory negligence to the jury, which found for the defendant driver. The plaintiff appeals and makes several assignments of error relating to instructions given by the court. The merit of all the assignments, however, depends upon the determination of the basic question of whether the plaintiff adduced evidence which en-

titled her to claim the benefits of section 39-754.05(1), R. S. Supp., 1972, which provides in part: ". . . the driver of a vehicle shall yield the right-of-way . . . to a pedestrian crossing the roadway within a crosswalk," and so became entitled to an instruction which would have permitted the jury to find that the plaintiff had the right-of-way over the defendant. In this opinion all statutory references are to the statutes as they appear in the 1972 Cumulative Supplement, as these were the statutes applicable at the time of the accident. Since then the statutes have been renumbered and, to some extent, amended.

We find that the plaintiff's assignments are not meritorious and affirm the judgment of dismissal.

The general arrangement of the streets where the accident occurred is shown on the diagram which is included in this opinion. Military Avenue runs from the northwest to the southeast and is a paved, four-lane, controlled access highway divided by a concrete median which has an intersection break at Fort Street. Access from Fort Street to Military Avenue was controlled by a stop sign. Parallel to and approximately 100 feet easterly of Fort Street is an unnamed 22-foot street, alley, or roadway (originating out of Fort Street about a block from its intersection with Military Avenue), which, as the diagram indicates, intersects Military Avenue at the same angle as does Fort Street. It will be noted there is no median break opposite the entry of this street to Military Avenue and vehicular traffic from it can enter only the eastbound lanes of Military Avenue. There are no paved sidewalks adjacent to this 22-foot street. There are no marked crosswalks crossing Military Avenue either on a prolongation of the lateral lines of the 22-foot street, or at right angles to the direction of Military Avenue.

The plaintiff's contention apparently is that all of Military Avenue which would be included within the area bounded by a prolongation across Military Avenue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of the north line of Fort Street and a like prolongation of the south line of the 22-foot street is an intersection, that the plaintiff and her companions were crossing at that intersection when struck, and consequently that the jury was entitled to find that the plaintiff had the right-of-way in preference to the defendant driver.

The record establishes that when the accident occurred the plaintiff and her companions were crossing Military Avenue in a northerly direction from a point near the juncture of the southerly curb of Military Avenue and the south line of the 22-foot street to the point where the collision occurred (marked by the letter I on the diagram) in the westbound lane nearest the curb. This route of travel took the plaintiff diagonally through what she claims would be the intersection.

There is a considerable discussion in the briefs about the nature of the 22-foot street, whether it is an alley or some type of service road. The trial court viewed it as a service or access road and therefore concluded its juncture with Military Avenue did not create an intersection within the meaning of the statute. The record shows that this street served as access to a dental clinic located south of the street and near its juncture with Military Avenue. However, as we interpret the pertinent statutes, it is not necessary for us to pass on the exact nature of the street which was publicly owned and maintained.

An accurate perspective of the issue and its proper determination require consideration of numerous provisions of the statutes regulating the use of public roads. Clarity will be best served if we first quote the pertinent sections which must be considered.

In addition to section 39-754.05(1) already cited, the pertinent sections are as follows: "Intersection shall mean: (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if there are no lateral curb lines, then the lateral boundary lines of the roadways of two highways, which join one another

at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict; . . . (b) Where a highway includes two roadways thirty feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways thirty feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection; . . . ." § 39-741(17)(a), (b).

"Crosswalk shall mean: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edge of the traversable roadway; or . . . (b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface." § 39-741(10)(a), (b).

It should first be noted that there was no marked crosswalk at the location in question and so that part of the crosswalk definition has no application in this case. Hereafter when we use the term crosswalk we will be referring to that term as defined in subsection (10)(a) of section 39-741.

"Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians." § 39-741(44).

"Street shall mean the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." § 39-741(49).

"No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and, when authorized to cross diagonally, pedes-

trians shall cross only in accordance with the official traffic-control devices pertaining to such crossing movements." § 39-745.06(4).

"Roadway shall mean that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term roadway shall refer to any such roadway separately but not to all such roadways collectively." § 39-741(39).

Insofar as the rights and duties of a pedestrian are concerned under the evidence before us, the statutory definition of an intersection is important only as it relates and is necessary to the statutory definition of crosswalks and the determination of whether crosswalks existed across Military Avenue at the point in question. If we examine section 39-741(17), it will be noted that the term intersection is defined in terms of the portions of the street used for vehicular traffic rather than pedestrian traffic. The definition of crosswalks is then tied to the definitions of intersection, section 39-741(10), and roadway, section 39-741(39). Under these definitions it is clear that the crosswalk is not part of the intersection, but where crosswalk exists it is a prolongation of the "sidewalk," i.e., the part of the street between the "curb lines, or lateral lines of a roadway" and the "adjacent property lines" intended for pedestrian travel. If we examine the definition of the term intersection it is clear that there may be intersections which do not cross the entire intersecting roadway. The latter part of section 39-741(17)(a) clearly indicates this. It says: "the area within which vehicles traveling upon different highways joining at any other angle *may come in conflict.*" (Emphasis supplied.) This part of the definition would cover the juncture of the 22-foot street (if we assume it is a highway) and the eastbound lanes of Military Avenue, for it is only the vehicles entering Military Avenue from the 22-foot street and those on the eastbound traffic lanes which may conflict. This

is so because not only does the 22-foot street not extend beyond Military Avenue, but also because of the dividing median. It seems clear to us that the legislative definitions do not necessarily imply there are crosswalks at every intersection. They do import that where, as here, the 22-foot street does not cross Military Avenue and the traffic on Military Avenue flowing in different directions is separated by a median that the intersection ends at the median. It seems clear also that in such situations the Legislature did not intend that a crosswalk lie adjacent to such half street intersections. It would seem that where statutory definitions do not fit, the Legislature has left it to those charged with the duty of regulating traffic to make use of the marked crosswalk provisions where they deem it necessary. We hold, therefore, as a matter of law that no crosswalk existed across Military Avenue on a prolongation of the "sidewalk" adjacent to the 22-foot street.

Even if we were to adopt the plaintiff's claims as to the area included within the intersection, it is clear from the evidence that the plaintiff and her companions were crossing that "intersection" in a diagonal direction. This she was not entitled to do for there were no traffic-control devices at this location which permitted such movement. § 39-754.06. It is also clear from the evidence that, even if crosswalks were assumed to be projected across Military Avenue, the plaintiff was not using such a crosswalk when the accident occurred.

The plaintiff's claim that all of Military Avenue between the prolongation of the north line of Fort Street and the south line of the 22-foot street is an intersection does not bear scrutiny. The reason is that the evidence shows that Fort Street and the 22-foot street are not "one highway" consisting of "two roadways." See §§ 39-741(17)(a) and 39-741(39). Military Avenue would fit within portions of those definitions, but not the other two streets with which we are concerned.

There was no error in the jury instructions of which the plaintiff complains.

AFFIRMED.

LESTER R. HYLAND, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES OF STATE OF NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

235 N. W. 2d 236

Filed November 20, 1975. No. 39955.

1. **Courts: Records.** Under section 39-669.22, R. R. S. 1943, every court in this state shall make complete records, including the judgment of conviction, of every case in which a person is charged with the violation of traffic regulations specified in that section.
2. **Courts: Records: Motor Vehicles: Licenses and Permits.** Under section 39-669.24, R. R. S. 1943, a certified abstract for conviction report forwarded by the trial court to the Director of Motor Vehicles must include a judgment of conviction to authorize the Director of Motor Vehicles to revoke or suspend a motor vehicle operator's license on the basis of that conviction.

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

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellants.

Baskins & Rowlands, for appellee.

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

McCOWN, J.

This is an appeal from a judgment of the District Court reversing and holding for naught an order of the Department of Motor Vehicles revoking the driver's license of plaintiff under the point system. The State has appealed.

Five traffic violations and five abstract for conviction reports were involved. On July 15, 1972, the plaintiff appeared in justice of the peace court in Ogallala, Nebraska, and entered a plea of guilty to a complaint of speeding. The court found the plaintiff guilty and entered a judgment of conviction assessing a fine and costs, which were paid. The abstract for conviction was forwarded to the Department of Motor Vehicles and the department assessed three points against the record of the plaintiff.

On September 24, 1972, the plaintiff was charged with violation of a flashing red stop light. He appeared in the police court in North Platte, Nebraska, entered a plea of guilty, was found guilty as charged, and paid the fine and costs assessed in the judgment of conviction. On that abstract the Department of Motor Vehicles assessed two points.

The last three violations occurred on January 15, 1973, July 13, 1973, and April 20, 1974. In each case a complaint was filed in the county court of Lincoln County, Nebraska. Each case charged speeding at a specified rate of speed. In each case an appearance waiver and plea of guilty was signed by the plaintiff or his counsel, and in each case plaintiff paid a specified fine and court costs. The waiver forms do not show the date of the violation nor the offense with which the plaintiff had been charged. The record and abstract in each of the three cases do not show an acceptance of the plea of guilty nor the entry of any judgment of conviction.

The Department of Motor Vehicles assessed three points for each of the two 1973 violations and one point for the violation of April 20, 1974. On April 29, 1974, based upon the points accumulated, the Department of Motor Vehicles entered its order revoking the driver's license of plaintiff for a period of 1 year.

Copies of all the records of the courts pertaining to the traffic violations involved here were introduced and

received in evidence, and the parties stipulated that those records were complete and constituted all the records of the particular court pertaining to the violations. The District Court found that the three alleged convictions from the county court of Lincoln County, Nebraska, were not supported by a judgment of conviction as required by section 39-669.22, R. R. S. 1943, and did not constitute convictions upon which points can be assessed against the driver's license of plaintiff, and reversed the order of revocation of the Department of Motor Vehicles and held it for naught.

Section 39-669.22, R. R. S. 1943, requires that: "Every court in this state shall make complete records, including the judgment of conviction * * *" in every case in which a person is charged with violation of traffic regulations. It also provides in part that: "In the event that such person is convicted, * * * a certified abstract of such judgment as provided in section 39-669.24 shall be sent forthwith by the court to the Director of Motor Vehicles; * * *."

Section 39-669.24, R. R. S. 1943, requires that the abstract for conviction report "shall include all necessary information as to the parties to the case, the nature of the offense, the date of hearing, the plea, the judgment, and the amount of the fine or forfeiture, as the case may be. Every such abstract shall be certified by the judge or clerk of any court of record as a true abstract of the record of the court." That section also provides: "The Director of Motor Vehicles shall have authority to revoke or suspend operators' licenses only when positively directed to do so by the terms of the certified abstract *of the judgment of conviction* forwarded to him by the trial court, except as otherwise provided * * *." (Emphasis ours.)

The State tacitly concedes that the records and the abstract here do not show any judgment of conviction by the court as to the three violations in the county court of Lincoln County. The State, however, contends

that a waiver of appearance and plea of guilty signed by the person charged should be treated as a "judgment of conviction," at least when accompanied by the payment of some amount shown to be a fine and costs. We find no authority to support that position where there is no acceptance of the guilty plea and no record of a conviction or judgment of conviction by the court.

Only two possibilities are present here. Either the court accepted the guilty plea and made a judgment of conviction, and by error, oversight, or omission that judgment of conviction was never entered and recorded; or no judgment of conviction was ever made. In the first case, the situation may be remedied by the entry of a nunc pro tunc order. In the second case, the matter is still pending before the court and judgment of conviction may be entered at any time. In either case, the records of the court, until they are corrected, are insufficient to support the abstracts of conviction and the order of revocation here.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD R. MOSLEY, ALSO KNOWN AS RAY WILSON, APPELLANT.

235 N. W. 2d 402

Filed November 20, 1975. No. 40020.

1. **Probation and Parole: Appeal and Error.** An appeal from an order revoking probation will lie even though no motion for new trial is filed.
2. **Probation and Parole: Hearings.** In a hearing under section 29-2267, R. S. Supp., 1974, a defendant must be allowed to confront and cross-examine adverse witnesses unless the trial court specifically finds good cause for not allowing confrontation.

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

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

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from an order revoking probation and imposing a sentence of imprisonment upon Edward R. Mosley, the appellant.

The contention is made by the State that the appeal should be dismissed because the appellant failed to file a motion for new trial, and that this court does not have jurisdiction to consider the appeal. From the record, it appears that the trial court accepted a plea of guilty to a charge of receiving stolen property and on October 15, 1974, placed appellant on probation for the period of 2 years. Later, a motion was filed for the revocation of probation for the reason that appellant had violated the terms of the probation by performing an illegal act on the 31st of October 1974, at the Kwik Shop at 6505 Maple, Omaha, Nebraska. Notice was given of a preliminary hearing. Appellant waived this hearing and a final evidentiary hearing was held on December 19, 1974. The trial court found that a violation had been shown by clear and convincing evidence and entered an order revoking probation and sentencing appellant to imprisonment on January 2, 1975. No motion for a new trial was filed and this appeal was taken immediately.

A motion for new trial must be filed within 10 days after conviction. § 29-2103, R. R. S. 1943. A determination of guilt of the crime charged and the imposition of a sentence constitute a conviction. State ex rel. Hunter v. Jurgensen, 135 Neb. 136, 280 N. W. 886 (1938).

Since the enactment of Laws 1971, L. B. 680, section 15 (4), now section 29-2260 (4), R. S. Supp., 1974, an order granting probation is a sentence. A motion for new trial made within 10 days and a ruling thereon would have been required before appellant could have taken an appeal from the order of October 15, 1974.

The motion for revocation was heard under the provisions of section 29-2267, R. S. Supp., 1974. The order entered was not an order of conviction and section 29-2101, R. R. S. 1943, is not applicable to it. This court does have jurisdiction to consider the appeal.

At the revocation hearing, evidence on behalf of the State consisted of the testimony of the investigating officer who related the statements of the clerk of the shop alleged to have been robbed, including his description of the robbers and a suggestion that one of the robbers might have left a fingerprint on a freezer door. He stated further that a technician had lifted a fingerprint from that door. The investigating officer did not testify to personal observation of any fact or circumstance tending to identify the appellant as a participant in the offense. Another witness identified the fingerprint lifted with known fingerprints of the appellant. No other evidence was given to show violation of any other conditions of the probation granted October 15, 1974.

The appellant denied his participation in the robbery and claimed that he might have left a fingerprint on the freezer door at a time previous to the robbery. At the conclusion of the hearing, the trial court found that a violation of the conditions of probation had been established by clear and convincing evidence and that the probation should be revoked.

The appellant assigns two errors: (1) The admission of hearsay evidence and its use as the sole basis for an adverse finding, and (2) the failure of the court to state in writing the evidence relied upon and its reasons for revocation.

The United States Supreme Court in Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), declared the minimum requirements of due process in procedure for the revocation of parole, as follows: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Later these requirements were made applicable to proceedings to revoke probation. Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). This court recognized and applied these requirements to proceedings for the revocation of probation in State v. Kartman, 192 Neb. 803, 224 N. W. 2d 753 (1975). In this case, the assignments of error are based upon objections made to hearsay evidence and claiming the right of confrontation and cross-examination stated in requirement (d), *supra,* and the right to a written statement of the reasons for revocation and the evidence relied on stated in requirement (f), *supra.*

The record shows that upon the filing of the motion to revoke probation, notice was given of a preliminary hearing, including the following statement: "You may appear and speak on your own behalf, bring document, affidavits, or individuals on your behalf, and may request that adverse witnesses be made available for questioning at the discretion of the hearing officer. Such request must be made in advance." The appellant waived the preliminary hearing and thus dispensed with all evidentiary requirements leading up to a final hearing. No further notice of the final hearing was re-

quired or given. The State contends that the failure of appellant to make an advance request waived his right of confrontation and cross-examination completely. This contention is not well taken; the waiver applied only to the preliminary hearing, if one had been held. The Morrissey requirement (d) reserves to the defendant the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. In State v. Kartman, *supra,* this court stated: "Persons who have given adverse information should be available for questioning unless the hearing officer determines that they would be subjected to risk of harm if their identity were disclosed." In the instant case, the identity of the informant was disclosed, but when the objection was made that the statement of the informant to the investigating officer was hearsay and that the defendant claimed the right of confrontation, the trial court stated: "Overruled. This isn't a trial for robbery. This is a hearing on revocation of probation."

There was no showing of possible risk to the informant or other good cause why confrontation should not be allowed; the trial court made no determination whether good cause had been shown. The judgment must be reversed and the cause remanded for further hearing, with instructions that the right of confrontation be allowed unless the trial court specifically finds good cause shown for a denial.

Consideration of the second assignment of error thus becomes unnecessary.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, PLAINTIFF, V. JANICE L. GRADWOHL ET AL., DEFENDANTS.

235 N. W. 2d 854

Filed November 26, 1975. No. 40250.

1. **Constitutional Law: Legislature: Statutes.** The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another.
2. ———: ———: ———. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification.
3. **Constitutional Law: Statutes.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.
4. ———: ———. The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter.
5. ———: ———. Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication, modify or repeal prior acts or parts thereof.
6. ———: ———. If an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other statutes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified.
7. **Constitutional Law: Statutes: Costs.** The provision of Article III, section 14, of the Constitution of Nebraska, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," is not violated by the failure to mention in the title of a punitive act an incidental provision of the act providing for the payment, or the exemption from payment, of the costs of prosecution, where the title itself appropriately describes the general subject of the legislation.

Original action. Judgment for defendants.

Paul L. Douglas, Attorney General, and Steven C. Smith, for plaintiff.

Edward F. Carter, Jr., of Barney & Carter, for defendants.

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

CLINTON, J.

This is an action for a declaratory judgment commenced in this court under the provisions of Article V, section 2, of the Constitution of Nebraska, giving this court original jurisdiction: ". . . in all cases relating to the revenue, civil cases in which the state is a party . . . ." It is commenced by the State of Nebraska on the relation of Paul L. Douglas, Attorney General. It involves the constitutionality of section 3 of L.B. 381, Eighty-fourth Session of the Nebraska Legislature, as that section exempts from assessment of court costs those convicted of exceeding the speed limit on the Interstate Highway by not more than 10 miles per hour. The defendants are judges of the municipal court of the city of Lincoln and the clerk of that court.

The petition, among other things, alleges: "4. That in actual cases which have arisen, the defendants have since May 23, 1975, are currently, and will continue in the future to proceed in accordance with Section 3 of Legislative Bill 381; specifically, that court costs have not been, are not now, nor will they be, imposed, charged or collected against violators convicted of exceeding the speed limit by not more than ten miles per hour on the National System of Interstate and Defense Highways.

"5. That the State of Nebraska seeks to enjoin the defendants from proceeding under the unconstitutional provision in the act for the reason that it has no other adequate remedy at law." The Attorney General acts in this case pursuant to a request of the Governor under

the provision of section 84-205(9), R. S. Supp., 1974.

The defendants admit the allegations of paragraph 4 of the petition and ask that the challenged section of the act be held constitutional.

L.B. 381, among other things, amends section 39-662(2), R. S. Supp., 1974, to provide for speed limits for highway travel as follows: "(c) Fifty-five miles per hour upon any freeway." §§ 39-662(2) (c), 39-666(1) (c), (2) (c), (4) (c), R. S. Supp., 1975. It also provides in section 3 that: "Any person convicted of exceeding by not more than ten miles per hour the speed limit on the National System of Interstate and Defense Highways shall be fined not more than ten dollars but no court costs shall be assessed against him." Section 3 is codified as section 39-662.02, R. S. Supp., 1975.

The plaintiff argues first that section 3 is a special law creating an unreasonable classification contrary to the following provisions of Article III, section 18, Constitution of Nebraska: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; . . . In all other cases where a general law can be made applicable, no special law shall be enacted." Plaintiff cites and relies upon the following authorities: City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74; Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862; Fougeron v. County of Seward, 174 Neb. 753, 119 N. W. 2d 298; Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232.

The plaintiff argues and we quote from its brief: "In effect, Section 39-662.02 creates two classes: (1) Those convicted of exceeding by not more than ten miles per hour the speed limit on the Interstate Highway; and (2) all others convicted of speeding violations enumerated in Sections 39-662 and 39-666, 1975 Supp.

"A more general characterization of the classes is as

follows: The language of Section 39-662.02 relating to costs creates an immunity from court costs for a particular class of persons convicted of traffic violations. Other than those within the scope of the privileged class, all other persons convicted of any public offense must pay court costs."

It is apparent that the plaintiff's claim is that the statute creates an arbitrary class of persons, viz, those who exceed the speed limits on the Interstate Highway by not more than 10 miles per hour, and another class consisting of all others convicted of various speeding violations. The plaintiff quotes from City of Scottsbluff v. Tiemann, *supra,* as follows: "'. . . The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. . . . some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.'"

Plaintiff, we believe, misses the point of the authorities which it cites. It assumes that the statute creates a class of persons. It does not. This section of the statute applies to all persons, whomever they may be, who happen to violate the statute in the manner specified. The point of both Tiemann and Omaha Parking, each of which involved legislation pertaining to municipalities, was that the statutes attacked in those cases constituted special legislation because the legislation pertained only to certain cities. In Tiemann the legislation was held to be special and therefore invalid because the statute by its terms could apply only to certain cities (those of a certain population at a certain time and therefore a closed class). In Omaha Parking the legislation was held not special because the class of cities was not closed. Section 3 of L.B. 381 does not create a class of persons any more than do the other sections of the statute which set various speed limits

for residential districts, business districts, unsurfaced roads, or surfaced roads other than the Interstate Highway. Other sections set speed limits depending upon the type of vehicle or the type of road. These classifications, like the one which the plaintiff challenges, are classifications of subject matter rather than of persons.

The real question in this case is whether the constitutional provision against special legislation somehow requires that costs be assessed against all violators of speed laws irrespective of what the particular violation may be. This, as we have already noted, clearly involves a classification of subject matter only.

The applicable principles which must guide us are: "The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another.

"The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification." Fougeron v. County of Seward, *supra*. See, also, Erwin v. City of Omaha, 118 Neb. 331, 224 N. W. 692. These general rules as to the validity of such classifications apply to classifications made under the police power. 16A C. J. S., Constitutional Law, § 493, p. 254. For example, we have held that penalties for crimes which are essentially similar except for differences of person, place, and/or circumstances may vary provided the reasons for the differences pass constitutional muster. See, State v. Holland, 183 Neb. 485, 161 N. W. 2d 862; State v. Eckstein, 188 Neb. 146, 195 N. W. 2d 194.

Plaintiff argues that because costs assessed are reimbursement for the expenses of prosecution, they must be assessed against the person convicted (except in cases of indigency) in every type of case, otherwise Article III, section 18, of the Nebraska Constitution, is violated.

The plaintiff, however, cites no case which so holds and we have found none.

If it is constitutional for the Legislature to vary penalties according to its judgment of the seriousness of the offense, it may clearly mitigate the burden of costs as well. It may be true that technically costs assessed are not part of the punishment or penalty for an offense. The plaintiff cites cases from other jurisdictions which so hold. However, it does not then necessarily follow that exempting a certain type or class of offense from the imposition of costs constitutes an unconstitutional classification. As a practical matter, court costs are a part of the burden which the loser must bear. Costs are assessed only against those convicted. See, §§ 29-2206 and 29-2705, R. S. Supp., 1974, and 29-2709, R. S. Supp., 1975.

Under the general principles we have earlier cited, it is not for this court to question the legislative judgment that exceeding by no more than 10 miles per hour the 55 miles per hour speed limit on the interstate four-lane divided highway, designed for speeds of 75 miles per hour, is a less serious offense than other categories and therefore ought to be relieved of the burden of costs.

The plaintiff's contention that section 3 of L.B. 381 violates Article III, section 18, of the Nebraska Constitution, is not meritorious.

We turn now to the plaintiff's contention that section 3 of L.B. 381 is unconstitutional because it violates Article III, section 14, of the Nebraska Constitution, which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." L.B. 381 is entitled as follows: "AN ACT to amend sections 39-662, 39-666, and 39-669.26, Revised Statutes Supplement, 1974, relating to rules of the road; to delete pro-

visions for termination of the fifty-five mile per hour speed limit; to provide a penalty; to change the assessment of points; to provide for expiration of speed limits; to provide severability; to repeal the original sections, and also section 39-662.01, Revised Statutes Supplement, 1974; and to declare an emergency."

The plaintiff asserts that the provisions of the act relating to exemption from costs amends the following sections of the Nebraska statutes relating to costs without repealing or amending those sections, viz, section 29-2207, R. R. S. 1943 (providing for assessment of cost against every person convicted of a felony or misdemeanor); section 33-124, R. R. S. 1943 (providing that in criminal cases the county judge collects fees of $6); section 26-112, R. S. Supp., 1974 (providing that the clerk of the municipal court collects costs of $6 in criminal matters); section 24-703(3), R. S. Supp., 1974 (providing for taxation of costs of $1 for the Nebraska Retirement Fund for Judges in each civil and criminal proceeding in the municipal, county, and district courts); and section 81-1429, R. S. Supp., 1974 (providing for taxation of costs of $1 for the Law Enforcement Improvement Fund in each criminal proceeding, including traffic violations). To the above list the plaintiff might have added section 29-2705, R. S. Supp., 1974. It may be that similar contentions can be made with reference to other sections relating to costs. Our research has not been exhaustive.

This court has had occasion to consider the applicability of Article III, section 14, of the Nebraska Constitution, on dozens of occasions from 1876 until the present day. To solve the present question we need refer to only two of those decisions for they contain the guidelines which enable us to decide this question properly.

In State v. Greenburg, 187 Neb. 149, 187 N. W. 2d 751, we said: "The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.

. . . The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter." In Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110, we held: "If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments set out in Article III, section 14."

In Greenburg the amendatory statute was held unconstitutional because the amendatory act was not complete in itself. It could not be understood or applied without reference to another act which it neither repealed, amended, incorporated, nor referred to.

In Bodenstedt the legislation was held not to have violated Article III, section 14. In that case the title of the act was: " 'An Act relating to schools; to prohibit the formation of new school districts except as prescribed; to provide for mergers and *prohibit them in certain cases;* to restrict contracting for instruction; and to declare an emergency.' (Emphasis supplied.)" We went on to say, quoting from prior opinions: " 'The modern rule is: "Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof." (Citing cases).

" 'As stated in 59 C. J. 871: "*If an act or statute is in itself complete* and *intelligible without reference to other legislation,* it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other statutes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified." ' (Emphasis supplied.)" The legislation in question in Bodenstedt prohibited the

merger of Class I school districts *in certain circumstances*. Other statutes provided the procedure to be used in case of merger. We there said: "We agree that if the legislation attacked is meaningless standing alone, or that it makes changes in existing law by adding new provisions and mingling the new with the old on the same subject in such a manner as to confuse the interpretation and the application of the whole legislation, then such legislation is purely amendatory in nature and falls within the prohibition of Article III, section 14, of the Constitution."

What was said in Bodenstedt applies here. L.B. 381 does, in fact, amend and repeal the original of the various sections of the statutes pertaining to rules of the road (speed limits) which are mentioned specifically in its title and which are the only statutes directly affected by the amendment. It therefore meets the requirements of Article III, section 14, insofar as the act pertains to the subject matter of speed limits. L.B. 381, considered together with other sections of the statutes not amended, such as those providing for general penalties, is a complete and independent act. The act is, within the meaning of Article III, section 14, as previously interpreted by this court, "complete and intelligible without reference to other legislation." It has only an incidental impact upon the various statutes relating to costs. Reference to those statutes for purposes of determining the duty of courts and administrators with reference to the assessment and collection of costs was necessary even before the enactment of L.B. 381. That situation has in no way been changed. Section 3 of L.B. 381 simply makes an exception to the cost statutes in a particular case. This is essentially the same circumstance dealt with in Bodenstedt.

Plaintiff also contends that L.B. 381 violates the provision of Article III, section 14, for the reason that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." It argues

in effect that court costs are a separate subject and since not specifically mentioned the Constitution is violated.

As already noted, the title indicates that the act relates "to rules of the road; . . . to provide a penalty; . . . ." The title of an act is not required to be a synopsis of the contents of the act. Hall v. Simpson, 184 Neb. 762, 171 N. W. 2d 805. As long ago as 1880 this court held that in an act, the title to which was, "An act to establish a criminal code," provision could be made for payment of the costs of prosecution without mentioning the matter of costs specifically in the title. Boggs v. Washington County, 10 Neb. 297, 4 N. W. 984. It would seem to follow that the matter of exemption from costs is sufficiently germane to the subject matter as not to require specific mention in the title.

The plaintiff's contention that section 3 of L.B. 381 violates Article III, section 14, of the Nebraska Constitution, is not meritorious. We therefore hold that section 3 of L.B. 381 violates none of the sections of the Constitution discussed.

JUDGMENT FOR DEFENDANTS.

BOSLAUGH, J., concurs in the result.

NEWTON, J., dissenting.

I respectfully dissent. In my judgment those portions of L.B. 381 providing separate and distinct penalties and assessments of costs for speeding violations on a freeway are discriminatory and violate the equal protection clause of the Fourteenth Amendment.

McCOWN, J., dissenting.

L.B. 381, Laws 1975, does not create any new offense nor does it materially change the nature of any existing offense. It is not complete in itself, nor is it original and independent legislation. Instead, it attempts to reduce the penalties for any speed limit violation which occurs on any part of "the National System of Interstate and Defense Highways" if the speed limit is violated by not more than 10 miles per hour. The bill

reduced penalties by limiting the fine to not more than $10, omitting court costs, and by providing that no points shall be assessed against the operator under the point system, but it also completely revamped the point system.

The designation of Interstate highway system is a new addition to statutory language involving speed limits, which is now introduced into a group of statutes which have used and still use the term "freeway" in imposing various speed limits, and define that word in section 39-602(29), R. S. Supp., 1975. That freeway definition has continuously applied to a divided arterial highway designed primarily for through traffic with full control of access and with grade separations, and the definition of freeway has not and does not contain any limitations or references to the Interstate system.

In attempting to change the point system to provide for the omission of penalty points for a speed limit violation on any part of the Interstate system, instead of simply omitting any points for a speeding violation of not more than 10 miles an hour on the Interstate, L.B. 381 completely revised the point system. Prior to L.B. 381, any speeding violation, no matter where or on what highway it occurred, was subject to the same point assessment. Not more than 5 miles per hour over the speed limit was 1 point; 5 to 10 miles over the speed limit was 2 points; and more than 10 miles per hour over the speed limit was 3 points. L.B. 381 continues that same identical point assessment for speeding on most highways but now makes new and different assessment for speeding violations on freeways, the state highway system, or any dustless surfaced highways. As to those highways, 1 point is assessed for speeding not more than 10 miles per hour over the speed limit; 2 points for 10 to 15 miles per hour over the limit; and 3 points for more than 15 miles per hour over the limit. L.B. 381 then provides that no points shall be assessed upon conviction of exceeding by not more than 10 miles

per hour the speed limit on any part of the Interstate system. Speed limits referred to and specifically included in L.B. 381 are all general statutory speed limits under sections 39-662 and 39-666, R. S. Supp., 1975, and 39-663, R. R. S. 1943. It should be noted that those speed limits include maximum speed limits established by the Department of Roads or local authorities for a particular place or part of any highway, and include maximum speed limits effective at different times of day or night.

Regardless of the intent of the Legislature in adopting L.B. 381, the result is constitutionally unsupportable. Although the issue of equal protection was not directly raised in this case, the requirements of reasonable classification were raised and must be met. The Legislature may make a reasonable classification of persons, corporations, and property for the purpose of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment; and to be valid, the law must operate uniformly and alike upon every member of the class so designated. See Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187.

Although L.B. 381 attempted to reduce the penalties for certain violators of the speed laws, it nevertheless imposed new and different penalties upon others and it must therefore still comply with constitutional provisions requiring uniformity, the inhibitions as to the enactment of special laws, and must also be nondiscriminatory under the equal protection clause.

Thorough analysis of L.B. 381 establishes the fact that there are literally no real differences in situation and circumstances in many, if not most, of the circumstances upon which it purports to operate. There is no logical nor rational justification for any distinction between speeding on a freeway which is a part of the Interstate system and speeding on a freeway which is

not. Neither is there any possible justification for imposing different penalties for an identical violation of the same speed limit law simply because it occurred at one place rather than another. The arbitrary nature of the distinctions L.B. 381 attempts to make are perhaps best illustrated by an example involving a 45-mile per hour speed limit established at a particular place or part of different highways by the Department of Roads or local authorities under section 39-663, R. R. S. 1943. Such speed limits are established upon the basis of an engineering and traffic investigation to determine what is reasonable and safe for that particular location and highway. Obviously in each case the maximum speed limit has been set with respect to the conditions on that particular highway. Under L.B. 381, if that 45-mile per hour speed limit is violated by 7 miles per hour, the result would be as follows: On the Interstate system, a fine of not more than $10, no court costs, and no points; on a freeway other than the Interstate, a fine of not more than $100 plus costs, and 1 point; on any part of the state highway system or on any dustless surfaced highway, the result would be the same as on a freeway; on a county road, the penalty would be a fine of not more than $100 plus costs, and the assessment of 2 points. In the event the same 45-mile per hour speed limit were violated by more than 10 miles per hour but less than 15, all violators would be assessed under the same fine and cost limitations. The drivers on the Interstate, freeway, and state highway systems would be assessed 2 points, while the driver on the county road would be assessed 3 points. It is only when the violation of that 45-mile per hour speed limit exceeds the limit by more than 15 miles per hour that all drivers are again subject to the same penalties.

While the power of classification rests with the Legislature, such classification must rest upon real and substantial differences which afford a rational basis for the classification. Those real and substantial differences

do not exist here, nor is there a rational basis which can logically justify the classifications made. The purposes and provisions of L.B. 381 are so intertwined and interconnected that it is impossible to separate those portions which are constitutionally permissible and those which are not. Therefore, the entire act should fall.

CLINTON, J., responding to the dissents of Newton and McCown, JJ.

We accepted jurisdiction in this case under the constitutional provision giving us optional original jurisdiction in cases "relating to the revenue" and because the State is a party to the action. The State is a party and has an interest only because of the claim that the revenue is affected. The State attacks only the portion of the statute relating to revenue, i.e., costs, and it does so only on the basis of Article III, section 18, of the Constitution, relating to special laws and prohibiting "any special or exclusive privilege, immunity . . . whatever . . . ."

It does not challenge the statute on the basis of denial of equal protection. The plaintiff's standing is founded on the claim that the state revenue is affected and it neither presents nor argues equal protection issues. The parties defendant have no equal protection claims and are not affected by the issues discussed in the dissents. Specifically, the matters raised in the dissent of McCown, J., are not argued or discussed in the briefs of the parties. Those questions are not justiciable issues as no party, plaintiff or defendant, is affected by them.

While we have been liberal in determining the standing of the Attorney General to sue in the name of the State, we have never granted standing except where either the State or the defendants had a direct interest in and were affected by the issues raised. See, State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609, 243 N. W. 264 (state revenue affected); State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N. W. 2d 738 (state revenue affected);

State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619 (party defendant was directly affected by the issues and the Attorney General acted on behalf of the general public). These cases all are exceptions to the general rule that a litigant can question a statute's unconstitutionality only when it is being applied to his disadvantage. Greene v. State, 83 Neb. 84, 119 N. W. 6; State ex rel. Ridgell v. Hall, 99 Neb. 89, 155 N. W. 228; State v. Brown, 191 Neb. 61, 213 N. W. 2d 712.

An opinion rendered on a matter where there is no controversy between interested parties is a mere advisory opinion. If we were to permit the Attorney General to raise general equal protection issues in cases where no party to the litigation is directly affected we place ourselves in the position of rendering an advisory opinion. This we have no power to do and ought not do.

IN RE DISCHARGE OF JOHN T. CUMMINGS.
JOHN T. CUMMINGS, APPELLANT, V. CITY OF FALLS CITY, NEBRASKA, ET AL., APPELLEES.
235 N. W. 2d 627

Filed December 4, 1975. No. 40022.

1. **Civil Service: Statutes: Municipal Corporations.** The Civil Service Act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in section 19-1807, R. R. S. 1943.
2. **Civil Service: Statutes: Administrative Law: Municipal Corporations.** The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission.
3. **Civil Service: Administrative Law: Municipal Corporations.** If the evidence in the District Court on appeal is sufficient to show that the order of the civil service commission suspending or discharging an employee was made in good faith for cause, then the order of the commission must be affirmed.

4. **Civil Service: Evidence: Administrative Law: Trial.** One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality.

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

Weaver & Beekman, for appellant.

Richard L. Halbert, for appellees.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and WINDRUM, District Judge.

WINDRUM, District Judge.

Cummings has appealed from a judgment of the District Court affirming the action of the civil service commission of the City of Falls City, Nebraska, in suspending Cummings from his duties as a police officer, without pay, from October 16, 1974, through November 30, 1974.

On October 15, 1974, written charges against said officer Cummings were prepared at the home of Jim Baker, assistant chief of police of Falls City. Said charges were addressed to Ivan Bieck, chief of police, Falls City, Nebraska. At the meeting at the home of Jim Baker, which lasted approximately 1½ hours, there were in attendance various police officers, Donald Laney, who was a member of the civil service commission of Falls City, and a Mr. Don Ankrom, who was not otherwise identified in the record. The written complaint that was composed as a result of said meeting was signed by six fellow police officers of Cummings. The complaint was delivered to the chief of police who thereafter filed the same with the civil service commission. Since appellant does not claim any error or prejudice in any matter of procedure had before the civil service commission except that Donald Laney was present at the meeting of the officers where the charges were dis-

cussed, nothing would be gained to recite the entire procedural steps taken except to relate that on November 11, 1974, as a result of hearings held before the civil service commission on November 5 and 6, 1974, the civil service commission ordered that John T. Cummings be suspended without pay from October 16, 1974, through November 30, 1974, and placed on probation from December 1, 1974, through May 31, 1975, based upon the following findings:

"* * * that John T. Cummings has conducted himself in such a manner as to be guilty of Incompetency, Inefficiency, Inattention to or Dereliction of Duty within the meaning of Section 19-1808(1) (sic) of the Revised Statutes of the State of Nebraska.

"* * * that John T. Cummings had been insubordinate, discourteous to the public and to fellow employees, tending to injure the public service within the meaning of Section 19-1808(2) (sic) of Nebraska Statutes.

"* * * that John T. Cummings had been guilty of other acts or failures to act which, in the judgment of the Civil Service Commission, are sufficient to show him to be an unsuitable or unfit person to be employed in the public service within the meaning of 19-1808(7) (sic) of the Nebraska Statutes."

From this order Cummings appealed to the District Court for Richardson County, Nebraska. Under date of January 2, 1975, the District Court for Richardson County found that the civil service commission of the City of Falls City did act in good faith for cause in suspending the officer as above related, but that said commission did not have authority to include as a part of the discipline imposed a period of probation. This appeal followed.

Cummings' basic contention is that there was insufficient evidence to establish that his dismissal was made in good faith for cause. The Civil Service Act regulates the hiring, suspension, and discharge of certain employees of the fire and police departments in the cities where

it is applicable. It prohibits the suspension or discharge of employees for political or religious reasons, but provides that employees may be suspended or discharged for cause for any of the reasons which are listed in section 19-1807, R. R. S. 1943.

Testimony was adduced at the hearing before the commission indicating that Cummings had been advised by proper authority that his driving habits so far as operating patrol cars was concerned was subject to criticism. Evidence was adduced as to specific instances of his careless and reckless driving, both while in the pursuit of vehicles and while not in pursuit of vehicles, which occurred after said warnings. Evidence was adduced indicating that Cummings had announced beforehand that he was going "to get" certain individuals before his shift was over. Evidence was adduced to indicate that on one occasion he had laughed at the recipient of a traffic citation he had issued, at the time of issuing the same. Evidence was adduced indicating that he disseminated information as to a possible raid to persons not entitled to such information. By his own admission Cummings made a derogatory remark about a fellow officer or officers to a person or persons outside the police department. If such evidence was believed, there was sufficient evidence to substantiate each of the findings determined by the commission.

An explanation of the statutory civil service scheme is contained in Ackerman v. Civil Service Commission, 177 Neb. 232, 128 N. W. 2d 588, and Sailors v. City of Falls City, 190 Neb. 103, 206 N. W. 2d 566. Both cases stand for the proposition that the purpose of the appeal to the District Court is to permit the employee to obtain a determination only as to whether the order of the commission was made in good faith for cause. If the evidence in the District Court is sufficient to show that the order of the commission was made in good faith for cause, then the order of the commission must be affirmed.

The record fully sustains the finding of the District Court that the order of the commission was made in good faith for cause.

Cummings maintains that the civil service commission did not act in good faith for the reason that one of its commissioners did not disqualify himself. The only evidence appearing in the record is that the commissioner was present at a meeting which lasted about 1½ hours in the home of the assistant police chief where the complaints against Cummings were formulated and thereafter reduced to writing. The record is absolutely devoid of any further evidence of the commissioner's activities relative to anything germane to this issue. One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. State v. Smith, 77 Neb. 824, 110 N. W. 557; Sailors v. City of Falls City, *supra*. Appellant has not met his burden of proof that the commissioner should have disqualified himself.

Appellant contends that he was denied due process of law. The basis for his contention seems to be that the statute provides that the commission shall make suitable rules and regulations, not inconsistent with the purpose of the provisions of the act creating the civil service commission, and therefore that not only must rules and regulations be promulgated in some manner or form, but that the penalty for a violation of the rules and regulations themselves must be promulgated. Appellant cites no authority for said proposition.

This court in Sailors v. City of Falls City, *supra*, affirmed the judgment of the District Court in upholding the civil service commission of Falls City, in discharging a police officer, at a time when the commission had not promulgated such rules as provided by statute. The court pointed out that the officer was not dismissed for any technical violation of the rules or regulations of

the commission or the police department, but that he was discharged for reasons specifically enumerated in section 19-1807, R. R. S. 1943, in accordance with the procedures spelled out in the statutes. In the instant case, the appellant was discharged for reasons specifically enumerated in section 19-1807, R. R. S. 1943. Further, police regulations for the City of Falls City, Nebraska, compiled by the civil service commission in 1972, were received into evidence. Appellant has not pointed out to this court any portion of said regulations which would lead to any prejudice insofar as appellant is concerned in any matter germane to this action. This court can find nothing contained therein which would in any way prejudice appellant thereby depriving him of due process of law. Lastly, the applicable statute does not provide that such rules and regulations designate penalties for the violation thereof.

Appellant contends that he was denied equal protection of the law. He cites no authority for such contention, but merely maintains that the list of reasons in section 19-1807, R. R. S. 1943, are arbitrary, capricious, and discriminatory when applied to civil services locally and civil services on a statewide basis. It is his contention that an officer in one locale might be discharged while another, committing the very same act in another locale, might be only demoted, suspended without pay for a time certain, or warned or censured by his department head or the local civil service commission. Since the criteria for discharge is created by statute which is applicable throughout the state, and since each discharged employee has the right of appeal to the District Court, said contention is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

DELORES L. BARTON, APPELLANT, V. DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

235 N. W. 2d 863

Filed December 4, 1975. No. 40024.

Intoxicating Liquors: Motor Vehicles: Licenses and Permits. On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal.

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

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

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and WINDRUM, District Judge.

NEWTON, J.

This is an appeal from an order revoking the driver's license of defendant. Defendant contends that her refusal to take any tests for alcohol under the implied consent law was due to her being confused as to her rights by the reading to her of the Miranda warnings and the implied consent law provisions. We affirm the judgment of the District Court.

The defendant relies on the case of Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906, which holds that if such confusion is present it may void a refusal under the implied consent law. The case is not applicable here. The record is entirely devoid of any evidence supporting a claim of confusion. "On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the

Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal." Mackey v. Director of Department of Motor Vehicles, *ante* p. 707, 235 N. W. 2d 394.

Defendant has failed to maintain her burden of proof and the judgment of the District Court is affirmed.

AFFIRMED.

FARMERS UNION COOPERATIVE INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. MARK E. REINWALD EL AL., APPELLEES.

235 N. W. 2d 630

Filed December 4, 1975. No. 40027.

1. **Trial: Judgments.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
2. **Trial: Pleadings.** There can be no recovery if there is a material variance between the allegations and the proof.
3. **Insurance: Pleadings: Contracts.** As a general rule, limitations of liability, and loss from an excepted cause, are matters of defense to be specially pleaded by the insurer.

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

August P. Ross and Bruce G. Mason of Ross & O'Connor, for appellant.

Robert T. Grimit of Baylor, Evnen, Baylor, Curtiss & Grimit, Leonard J. Germer, and Leroy P. Shuster, for appellees.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

NEWTON, J.

This is an action for a declaratory judgment to determine plaintiff's liability, if any, under an automobile insurance policy issued to the defendant Mark E. Reinwald on a Ford Fairlane automobile and a policy issued to defendants Henry Virus and his wife Ida Virus on a Ford Galaxie and a 1960 Ford 1½ ton truck. An accident occurred when the defendant Reinwald was driving an uninsured 1962 Ford pickup owned by the defendants Viruses. The District Court held that plaintiff had no liability under the Virus policy but was liable under the Reinwald policy. We affirm the judgment of the District Court.

Plaintiff has appealed. There is no cross-appeal in regard to the Virus policy. The issue is therefore limited to the question of plaintiff's liability under the Reinwald policy. That policy insured Reinwald when driving nonowned automobiles but contained certain exclusions. It defined a "nonowned automobile" as "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile." It also defined a "private passenger automobile" as "a four wheel private passenger, station wagon or jeep type automobile." A "farm automobile" was defined as "an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming." The policy stated it did not apply "to a non-owned automobile while * * * used by any person while such person is employed or otherwise engaged in * * * any * * * business or occupation of the insured, but this exclusion * * * does not apply to a private passenger automobile operated * * * by the named insured * * *."

The defendant Reinwald is a foster son of the defendants Viruses. Reinwald lived in town and the Viruses on the Virus farm. They had an arrangement whereby Reinwald did much of the labor and furnished minimal

equipment and fuel to operate the farm. Virus furnished the land and equipment and paid practically all expenses besides helping with the farm work. The crops raised were divided two-thirds to Virus and one-third to Reinwald. Each owned and maintained individual herds of cattle and hogs. In connection with the farm operation, Virus kept a 1962 ½ ton Ford pickup which Reinwald was permitted to use in connection with farm operations and occasionally for other purposes. In February 1969 Reinwald purchased a 1957 Ford pickup at the request of Ida Virus. It was not insured. Thereafter he generally used his own pickup for farm and other purposes but very occasionally used the Virus pickup for personal use when his own was being repaired and continued to use it occasionally for farm purposes but not on a steady basis as he had before he got his own pickup.

On October 4, 1969, Reinwald and Virus agreed that Reinwald should go to another farm to solicit aid in shelling corn 2 days later and to go into Deshler to see if a Virus tractor had been repaired. Reinwald drove the Virus pickup and, while enroute from the neighboring farm to town, was involved in an accident resulting in a suit against the defendants Reinwalds and Viruses.

Was the Virus pickup furnished for the "regular use" of Reinwald? The trial court found that it was not. The undisputed testimony shows that Reinwald, when not accompanied by Virus, used or drove the Virus pickup only four or five times between February 1969 when he got his own pickup, and October 4, 1969, when the accident occurred. This supports the finding of the trial court. "The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong." Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8.

Plaintiff now contends that, as a nonowned automobile, the Virus pickup, as here used, falls within the exclusion making the policy inapplicable when a non-

owned automobile, which is not a private passenger automobile, is used by the insured while engaged in his occupation. The evidence may be viewed as justifying this contention but the proposition would nevertheless be inapplicable here for it was not pleaded in plaintiff's petition. The plaintiff specifically pleaded that it was not a nonowned automobile as defined in the policy because of regular use. Now plaintiff has added a new dimension, namely, that it is a nonowned automobile which was not covered because it was being used by Reinwald in his business or occupation. This is a declaratory judgment action and plaintiff must allege the grounds on which it seeks relief. There can be no recovery if there is a material variance between the allegations and the proof. Talbott v. City of Lyons, 171 Neb. 186, 105 N. W. 2d 918. See, also, School Dist. No. 145 v. Robertson, 171 Neb. 176, 105 N. W. 2d 735. Plaintiff urges that it had attached a copy of the policy to its petition and thereby pleaded the new matter relied upon. This does not obviate the plaintiff's responsibility to allege the grounds upon which it seeks relief, otherwise all the exclusionary clauses contained in the policy would be grounds for relief. "As a general rule, limitations of liability, and loss from an excepted cause, are matters of defense to be specially pleaded by the insurer." 44 Am. Jur. 2d, Insurance, § 1947, p. 886. This is even more true where the insurer, as plaintiff, has the burden of alleging and proving a cause of action.

The judgment of the District Court is affirmed.

AFFIRMED.

BUCKLEY, District Judge, concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ALLEN JAMES GREEN, APPELLANT.

235 N. W. 2d 633

Filed December 4, 1975. No. 40056.

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

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

Jon Lance Jabenis, for appellant.

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

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

WHITE, C. J.

The only assignment of error in this case is the excessiveness of the appellant's sentence.

On October 9, 1972, the appellant presented and obtained payment on a Peter Kiewit Sons Company payroll check made out to C. F. Jones in the sum of $101.76 at the Bedford Market in Omaha, Nebraska. The payee had not authorized anyone to negotiate the check in his behalf.

After receiving appellant's plea of nolo contendere, the District Court for Douglas County, on December 11, 1974, found appellant guilty of uttering a forged instrument. On January 21, 1975, appellant was sentenced to a term of 1 to 3 years imprisonment in the Nebraska Penal and Correctional Complex. The maximum penalty for this offense, provided for in section 28-1212, R. S. Supp., 1974, is 10 years imprisonment and a fine of up to $5,000.

The District Court, before pronouncing sentence, indicated that appellant's record revealed the following: Numerous arrests showing no disposition; that appellant

was twice previously placed on probation in Chicago, once for burglary, and once for auto theft and was at the time wanted for violation of probation on the latter charge; and that appellant's arrest was his third felony arrest in Douglas County in the past year.

It has been repeatedly held by this court that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Swift, *ante* p. 515, 233 N. W. 2d 572 (1975); State v. Keil, 192 Neb. 741, 224 N. W. 2d 363 (1974). We have carefully reviewed the record before us and are satisfied that there was no abuse of discretion here.

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

AFFIRMED.

DARYL GENE CONGER, APPELLEE, V. MARY DELL CONGER, APPELLANT.

235 N. W. 2d 634

Filed December 4, 1975. No. 40059.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Infants: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Divorce: Parent and Child: Infants.** An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the entry of the decree.

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

Patrick J. Heaton, Jr., for appellant.

Jack R. Knicely, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and COLWELL and IRONS, District Judges.

IRONS, District Judge.

The marriage of the parties herein was terminated by divorce in 1971. Along with other matters the parties stipulated that the father, Daryl, was to have custody of Denise, a daughter, and the mother, Mary Dell, have custody of their two sons, Randall and Ronald. This stipulation was approved by the trial court. The custody of the older son, Randall, is no longer material to this appeal.

The father, plaintiff in the original action, and the appellee here, filed his application for modification of the decree fixing custody of Ronald and it was granted by the District Court on January 25, 1975, changing the custody of Ronald, age 13, from the mother to the father, and terminating support payments except for 1 month during the summer each year.

The mother, Mary Dell Conger, appeals from the order modifying the original decree.

"A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action * * *. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Bennett v. Bennett, 189 Neb. 654, 204 N. W. 2d 379.

A close review of the record discloses during much

of the time from the divorce of the parties to the time of the hearing on the application for modification, the mother, appellant, developed and maintained a behavioral pattern, which is unnecessary to detail here, that was detrimental to the welfare of the son, Ronald, and that such behavior would tend to destroy the moral fibers of a 13-year-old child.

The trial court apparently considered the facts to be a sufficient and material change in circumstances to warrant modifying the custody of Ronald - we agree.

The exclusion of evidence as to conduct of the parties, which acts occurred prior to the original divorce hearing, and the refusal of the court to personally interview the minor child was as to the exclusion proper and created no error, and as to the refusal to interview was discretionary, and no abuse of the discretion of the trial court is indicated.

The request of the appellant for allowance of attorney's fees in this court is denied.

The order of the District Court is in all respects affirmed.

AFFIRMED.

COLWELL, District Judge, concurs in result.

SANFORD M. DYAS, APPELLANT, V. IRENE E. MORRIS ET AL., APPELLEES, TRAVELERS INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, GARNISHEE-APPELLEE, AMERICAN FAMILY INSURANCE GROUP, INTERVENER-APPELLANT.

235 N. W. 2d 636

Filed December 4, 1975. No. 40070.

1. **Actions: Parties: Judgments.** In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein since a court should not adjudicate the rights and liabilities of a person unless he is actively or constructively before it.
2. **Insurance: Contracts: Motor Vehicles.** A garage liability policy

which excludes coverage of an automobile which has been transferred to another by the named insured, pursuant to an agreement of sale, is not proscribed by statute, nor is it against public policy.

3. ———: ———: ———. An agreement which fully complied with the provisions of section 60-1417, R. S. Supp., 1967, constituted a valid agreement of sale.

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

John C. Mitchell and Larry R. Demerath, for appellant.

Boland, Mullin & Walsh, for intervener-appellant.

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

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and WEAVER and BLUE, District Judges.

WEAVER, District Judge.

This is a garnishment action in which Sanford M. Dyas, as plaintiff, garnished Travelers Indemnity Company on a judgment which Dyas obtained against Irene E. Morris and Johnathan G. Linneman, Jr. On April 17, 1968, while standing on the sidewalk, Dyas had been struck by an automobile driven by Irene E. Morris which had collided with a car driven by Linneman. Linneman had purchased the car from Roger Newman Motors for cash on April 12, 1968, and that day received an "Invoice and Agreement" and possession of the automobile. A "reassignment" of the vehicle by a licensed dealer was made by Newman to Linneman on April 18, 1968, the day after the accident. Linneman did not obtain a new title until June 6, 1968. Dyas filed suit against Morris, Linneman, and Newman, but, after Newman had filed his answer, Dyas dismissed his action against Newman without prejudice. On January 27, 1970, Dyas obtained a judgment for $25,302 against defendants Morris and Linneman. On February 24, 1970, Dyas collected $10,000

uninsured motorist coverage from American Family Mutual Insurance Company.

On March 23, 1970, Dyas issued a summons with interrogatories in garnishment to Travelers Indemnity Company alleging said company "has property of and is indebted to the said judgment debtor, Johnathan G. Linneman, Jr." Travelers denied the allegation but stated it had issued a garage liability policy to Newman. On January 3, 1973, American Family intervened in the action. Trial was had on the liability of the garnishee and on December 30, 1974, the trial court entered its order discharging the garnishee and dismissing the garnishment proceedings.

The plaintiff has appealed the dismissal. We affirm.

We first examine Dyas' contention that he should prevail in the garnishment because Newman was insured by Travelers and Newman was in fact the owner of the automobile because he had failed to deliver a title pursuant to section 60-105, R. S. Supp., 1967.

There is no privity between Linneman and Travelers. Before there could be liability on the part of Travelers, Newman would first need to be liable for damages.

"In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein, since a court should not adjudicate the rights or liabilities of a person unless he is actively or constructively before it." 49 C. J. S., Judgments, § 28, p. 70. See, also, Olson v. Roscoe, 149 Neb. 189, 30 N. W. 2d 664; Clark v. Clark, 139 Neb. 446, 297 N. W. 661.

Newman was made a party defendant and then dismissed from the case without prejudice. Dyas now desires to impose a liability upon Newman and Travelers by indirect means after he had elected not to proceed directly against Newman.

"* * * where a person has been made a party, but by dismissal of the proceedings against him has ceased to be a party, a binding judgment may not thereafter be ren-

dered against him." 46 Am. Jur. 2d, Judgments, § 86, p. 373.

We now examine the coverage afforded to Newman by the Travelers policy. The pertinent portions of the policy provided: "Persons Insured * * * None of the following is an insured. * * * any person or organization, other than the named insured, with respect to any automobile * * * possession of which has been transferred to another by the named insured pursuant to an agreement of sale."

A garage insurance policy which excludes coverage of an automobile which has been transferred to another by the named insured, pursuant to an agreement of sale, is not proscribed by statute, nor is it against public policy. Equity Mut. Ins. Co. v. Allstate Ins. Co., 190 Neb. 515, 209 N. W. 2d 592; Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co., 189 Neb. 610, 204 N. W. 2d 162; Brander v. Eagle Raceways, Inc., 187 Neb. 508, 192 N. W. 2d 142.

Dyas strongly urges that unless a certificate of title is assigned and passed to the purchaser of the automobile at the time of delivery, the sale is void. He cites in support thereof Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913 (1951), and Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26 (1959).

If there was a valid "agreement of sale" between Linneman and Newman then Travelers' exclusionary clause is effective and Dyas is not entitled to prevail in the garnishment proceedings.

The question has been answered by legislative action subsequent to the Loyal and Turpin cases. In 1963 the Legislature amended the motor vehicle dealer licensing laws by L.B. 648 which was "An Act * * * to provide for conditions of sales * * *." At the time of the transaction between Linneman and Newman, section 60-1417, R. S. Supp., 1967, provided in part: "Every motor vehicle * * * sale * * * shall be evidenced by an instrument in

writing upon a form that may be promulgated by the board and approved by the Attorney General which shall contain all the agreements of the parties and shall be signed by the buyer and seller or a duly acknowledged agent of the seller." The section explicitly sets forth what shall be contained in the form. The instrument signed by Linneman as buyer and Newman as seller and entitled "Invoice and Agreement" fits the statutory requirement in every detail. An agreement which fully complied with the provisions of section 60-1417, R. S. Supp., 1967, constituted a valid agreement of sale of a motor vehicle. The agreement in this case effectively excluded coverage of Linneman under the terms of the Travelers' insurance policy.

The decision of the trial court is eminently correct and is affirmed.

AFFIRMED.

BLUE, District Judge, concurs in the result.

DOROTHY I. BRANDERT, APPELLANT, V. SCOTTSBLUFF NATIONAL BANK AND TRUST COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE, V. ABRAHAM ESCAMLLA, DOING BUSINESS AS NATIONAL JANITORIAL SERVICE, DEFENDANT AND THIRD PARTY DEFENDANT, APPELLEE.

235 N. W. 2d 864

Filed December 4, 1975. No. 40074.

1. **Negligence: Inviter and Invitee.** A business inviter owes a duty to exercise ordinary care to keep the approaches to his place of business reasonably safe for the use of customers.
2. ———: ———. There is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and be able to protect himself.
3. ———: ———. Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice

and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well-known to the invitee as to the store owner.

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

Meister & Morrison, for appellant.

Wright & Simmons, for appellee Scottsbluff Nat. Bank & Trust Co.

Holtorf, Hansen, Kovarik & Nuttleman, Robert M. Harris, and Byron J. Grogan, for appellee Escamilla.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and BRODKEY, JJ., and TESAR, District Judge.

WHITE, C. J.

This is a negligence action against the Scottsbluff National Bank and Trust Company for injuries suffered when the plaintiff fell on some ice in front of the bank. The District Court directed a verdict for the defendants. The plaintiff appeals that decision. We affirm the judgment of the District Court.

The plaintiff, Mrs. Brandert, on December 24, 1968, came to work at the greenhouse which she and her husband owned in Scottsbluff, Nebraska. Around noon, it started to mist, and the mist soon began to freeze. Mrs. Brandert was continually running "in and out all day," and testified that she noticed it was slippery outside. In fact, during the day, Mrs. Brandert was with a woman who slipped and fell because of the icy conditions. At approximately 6:30 p.m., the plaintiff and her husband left the greenhouse and stopped at the bank to make a deposit. It being Christmas Eve, the bank was closed, and so the plaintiff used a mailer wallet, furnished by the bank, to make the deposit. This procedure involved placing the mailer wallet in an envelope furnished by the bank and then slipping it into the envelope depository. This depository was a slot on the out-

side of the bank building into which envelopes could be dropped. As the plaintiff approached the bank, she walked very carefully due to the icy conditions. However, as she reached to place the envelope in the depository, she slipped and fell, injuring her forearm and wrist. The plaintiff brought this negligence action against the bank seeking to recover damages for her injury.

The plaintiff argues that there was sufficient evidence of negligence on the part of the bank to submit the issue of its negligence to the jury.

A business inviter owes a duty to exercise ordinary care to keep the approaches to his place of business reasonably safe for the use of customers. Maxwell v. Lewis, 186 Neb. 722, 186 N. W. 2d 119; Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578. However, there is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and be able to protect himself. Crawford v. Soennichsen, *supra.* In Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N. W. 2d 564, we said as follows: "If however the conditions and circumstances are such that the invitee has knowledge of the condition in advance, or should have knowledge comparable to that of the inviter then it may not be said that the inviter is guilty of actionable negligence."

The application of these general rules to fact situations involving natural accumulation of ice and snow is stated in Crawford v. Soennichsen, *supra,* as follows: "Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well known to the invitee as to the store owner."

Applying these principles to this case it is clear that the plaintiff had as much knowledge as the defendant

concerning the dangerous condition. In fact, the plaintiff was completely aware of the danger. The plaintiff testified that she "had been in and out all day" and had noticed the icy conditions. While outside, she was with a woman who slipped and fell on the ice. The plaintiff testified that when she walked up to the point of the insertion of the deposit envelope at the bank, she was walking very carefully, "like I was walking on eggs."

Assuming that the defendant was knowledgeable of these conditions, it is conclusive that the plaintiff was just as aware of the danger of crossing the snowy and icy conditions as was the defendant. The condition was as well-known to the plaintiff as to the defendant, and there is no proof of the defendant's superior knowledge, actual or constructive, to which the plaintiff was subjected. There is no contention that the defendant bank created the condition within the meaning of the rule announced above. The District Court was correct in directing a verdict for the defendants on the issues of actionable negligence.

The plaintiff cites Maxwell v. Lewis, *supra,* where the plaintiff slipped on the defendant's icy steps. In Maxwell, this court reversed a directed verdict for the defendant. However, the facts in that case are clearly distinguishable. In Maxwell, when the plaintiff entered the defendant's beauty parlor, the steps *were not icy,* but when she left later in the day, the temperature had dropped and ice had formed on the steps. The evidence disclosed the *defendant was aware* that on warm days snow melted from the roof, accumulated on the steps, and formed ice when the temperature dropped later in the afternoon. The *plaintiff was not aware* of this occurrence, and therefore, it appeared that the defendant had superior knowledge of the dangerous condition. However, as discussed above, in the instant case, the plaintiff's knowledge was at least equal to the defendant's knowledge of the icy condition.

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

AFFIRMED.

OSCAR SWICK, ADMINISTRATOR OF THE ESTATE OF KEVIN OSCAR SWICK, DECEASED, APPELLANT, V. GERALD COSLOR, APPELLEE.

235 N. W. 2d 639

Filed December 4, 1975. No. 40123.

1. **Pleadings.** The sole purpose of a special appearance is to question the jurisdiction of the court.
2. **Pleadings: Damages.** Under section 25-804, R. S. Supp., 1973, inclusion of dollar amount for general damages is not jurisdictional and summons not void.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Reversed and remanded.

Padley & Dudden, for appellant.

Maupin, Dent, Kay, Satterfield, Gerard & Scritsmier and Dale A. Romatzke, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and COLWELL and IRONS, District Judges.

IRONS, District Judge.

The plaintiff filed his petition in the District Court for Custer County, Nebraska, praying among other things general damages in a dollar amount of $100,000 and caused the summons to be issued with an endorsement including the $100,000 figure for recovery of general damages if the defendant defaulted.

There is no dispute that the summons was issued and served upon the defendant.

The defendant filed a special appearance for the sole purpose of objecting to the jurisdiction of the court for the reason that the summons was invalid and void.

Thereafter the court sustained the defendant's special appearance and plaintiff appeals.

The only question for consideration here is whether the inclusion of a dollar amount for general damages in the petition in light of the language of section 25-804, R. S. Supp., 1973, and section 25-503, R. R. S. 1943, relating to service of summons is sufficient to declare the summons void.

A special appearance must be confined to an attack on the jurisdiction of the court on the validity of the summons and its service. Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166.

In the present case the service is not in dispute, and the special appearance attacks only on the ground of the inclusion of a dollar amount for general damages.

Other than for this inclusion the plaintiff has fully complied with the requirement of section 25-804, R. S. Supp., 1973, and the defendant was fully informed of the action against him and was in no way deceived. Any error by the plaintiff in stating a dollar amount of general damage did not affect any substantial right of the defendant.

The order of the District Court in sustaining the defendant's special appearance is reversed and the cause remanded to the District Court for further proceedings.

REVERSED AND REMANDED.

COLWELL, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLEE, NEBRASKA PRESS ASSOCIATION ET AL., APPLICANTS-APPELLANTS.

STATE OF NEBRASKA EX REL. NEBRASKA PRESS ASSOCIATION ET AL., RELATORS, V. THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, RESPONDENT, ERWIN CHARLES SIMANTS, INTERVENER-RESPONDENT, STATE OF NEBRASKA, INTERVENER-RESPONDENT.

236 N. W. 2d 794

Filed December 1, 1975. Nos. 40445, 40471.

Case No. 40445: Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Appeal dismissed.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmeier and McGill, Koley & Parsonage, for applicants-appellants.

Paul L. Douglas, Attorney General, for appellee State.

Keith N. Bystrom and Leonard P. Vyhnalek, for appellee Simants.

Case No. 40471: Original action. Order vacated and reinstated as modified.

Stephen T. McGill of McGill, Koley & Parsonage, for relators.

Paul L. Douglas, Attorney General, Harold Mosher, and Melvin K. Kammerlohr, for respondent Stuart.

Keith Bystrom and Beatty, Morgan & Vyhnalek, for intervener-respondent Simants.

Milton R. Larson, for intervener-respondent State.

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

PER CURIAM.

At issue in these cases is the resolution of an apparent

conflict between the guarantees of the First and Sixth Amendments to the Constitution of the United States. This court is called upon to draw an accommmodation between these two "preferred" amendments which will preserve the right to a fair trial without abridging freedom of the press. The issue is laid before us in case No. 40471, by the relators, television, newspaper, and other media organizations and personnel, who seek through an original action a writ of mandamus which will compel the respondent District Court Judge for Lincoln County to vacate a restrictive order relating to the publication of pretrial publicity in State v. Simants, case No. 40445.

On October 18, 1975, six members of a family were found dead of gunshot wounds in their home at Sutherland, Nebraska. On October 19, 1975, Erwin Simants was charged with six counts of murder in the first degree, arraigned, and counsel was appointed for him. A preliminary hearing was set for October 22, 1975. On October 21, 1975, the prosecuting attorney filed a motion for a restrictive order with the county court, requesting the court to restrict publication of testimony to be presented at the preliminary hearing. A hearing on the motion was held that same evening. Attorneys representing the State, Simants, and the media were present. Attorney for the defendant advised the court that Simants consented to the State's motion to restrict publication of testimony from the preliminary hearing and further made an oral motion requesting that the restrictive order be broadened to close the preliminary hearing to the public and press. After arguments by counsel, the court found the State's motion should be sustained.

On October 22, 1975, prior to the preliminary hearing, the county court entered a restrictive order. The order precluded all parties involved in the preliminary hearing as well as the "news media" from releasing "for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the prelimin-

ary hearing." The order also contained additional restrictive provisions apart from the preliminary hearing. Finally, the court denied Simants' motion requesting a closed hearing.

On October 22, 1975, the preliminary hearing was held on an amended complaint which charged six counts of murder in the first degree and further alleged that the murders were committed in the perpetration of or attempt to perpetrate one or more sexual assaults. After testimony from several witnesses and the introduction of other evidence, Simants was bound over to District Court to stand trial.

On October 23, 1975, attorneys representing the persons who are now the relators in the mandamus action, case No. 40471, filed an application requesting the right to be heard on a challenge to the constitutionality of the restrictive order entered by the county court. The District Court granted petitioners' motion to intervene. On that same day, October 23, 1975, Simants filed a motion for a continuation of the county court's restrictive order with respect to pretrial publicity. On October 27, 1975, the District Court acted on defendant's motion. It terminated the county court's order and imposed its own restrictions on dissemination of pretrial publicity emanating from the case. The District Court adopted, with some clarifications, the standards set out in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation. These standards, together with the accompanying clarifications, precluded the media from reporting on most of the testimony and some other evidence presented at the preliminary hearing.

Relators sought relief in this court from the October 27, 1975, restrictive order imposed by the District Court via two procedural routes. On October 31, 1975, relators instituted a section 25-1912, R. R. S. 1943, appeal from the District Court order and at the same time petitioned this court for leave to file an original action

in the nature of a writ of mandamus requesting this court to vacate the October 27, 1975, restrictive order.

While relators' appeal and request to docket an original action in this court were pending, they petitioned Mr. Justice Blackmun of the United States Supreme Court, asking him as Circuit Justice to stay the October 27, 1975, District Court order under Title 28 U. S. C., sections 2101(f) and 1257(3). Thereafter, this court on November 10, 1975, issued a per curiam memorandum in which we noted that relators were seeking concurrent relief from both the United States Supreme Court and this court and we therefore declined to take action on the petition for a writ of mandamus so long as we were in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We continued action on the matter until the United States Supreme Court made known whether it would accept jurisdiction in the matter.

On November 13, 1975, Mr. Justice Blackmun, in his capacity as Circuit Justice, issued a chambers opinion in which he noted his desire to refrain from issuing or denying a stay on the restrictive order until this court had an opportunity to act on the same.

On November 18, 1975, this court set November 25, 1975, as the date on which we would hear relators' arguments on their request for an original action as well as on the substantive questions surrounding the constitutionality of the restrictive order. Relators thereafter filed a reapplication for a stay with Mr. Justice Blackmun.

On November 20, 1975, Mr. Justice Blackmun handed down a chambers opinion in which he granted relators a partial stay on the October 27, 1975, order.

On November 24, 1975, the Lincoln County attorney and defendant's attorney filed petitions in intervention with this court requesting to be heard at the November 25, 1975, hearing. The petitions were granted and a full hearing was held before this court on that date.

On November 25, 1975, this court, despite the intervening order of Mr. Justice Blackmun, heard oral arguments in both cases before us insofar as they pertain to the request for a stay of the restrictive order of the District Court. After Mr. Justice Blackmun issued his order the media, not being satisfied therewith, invoked the jurisdiction of the Supreme Court of the United States and asked it to vacate the portion of the trial court's restrictive order not vacated by Mr. Justice Blackmun. If we were to be entirely consistent we ought now to again refrain from acting because we are now in the position of exercising concurrent jurisdiction with the United States Supreme Court for which there is no precedent. Nonetheless, despite the regrettable possibility of collision, there are important questions of procedure and standing which need definition by us and which relate only to state procedures. In addition, the trial courts of this state are in need of some guidance from us in the matter at issue and which may not be otherwise forthcoming. Additionally, as Mr. Justice Blackmun appropriately notes, the question of the jurisdiction of the Supreme Court of the United States in this matter is "not without difficulty" because there has been no order, final or otherwise, by this court. That "difficulty" ought to be removed. So we proceed to determine the matter before us on the merits insofar as the request for the stay of the District Court order is concerned.

The first question we must decide is that of our own jurisdiction in case No. 40471, the original action of mandamus. We have jurisdiction in an original action of mandamus if the order of Judge Stuart of October 27, 1975, is in whole or in some significant part wholly void. State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144. We conclude, for reasons hereinafter stated, that the order is in part void and so affirm or grant permission to the relators to file the original action.

The next question before us is whether the relators

had standing to intervene in State v. Simants, case No. 40445. No third party has any right to intervene in a criminal prosecution. The matter at issue in such cases is the guilt or innocence of the accused. In legal contemplation no third party "has or can claim an interest in the matter in litigation, in the success of either of the parties to [the] action, or against both." This is the standard applicable to the right to intervene. § 25-328, R. R. S. 1943. See State v. Berry, 192 Neb. 826, 224 N. W. 2d 767. Accordingly, the appeal in case No. 40445 is dismissed.

The restrictive order of Judge Stuart of October 27, 1975, insofar as we need to set it forth is in summary as follows: It applies only to pretrial publicity and terminates when the jury is impaneled to try the case of State v. Simants. It applies only to the relators. It incorporates generally as a standard for reporting certain voluntary Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation. It prohibits the publication of the fact, if any, or the contents of confessions or admissions against interest or statements made by the accused to law enforcement officials. It prohibits the publication of the fact, if any, or the contents of statements against interest made to certain named individuals. It prohibits the publication of the nature of the probable testimony of certain named witnesses, and certain aspects of the testimony of another named witness. It prohibits the publication of the identity of a person or persons allegedly sexually assaulted. It prohibits the publication of the exact nature of the limiting order and prohibits reference to the contents of two specific paragraphs of the order.

We now proceed to our resolution and accommodation of the two conflicting constitutional rights and introduce that resolution with quotation from "Statement on Matters of Joint Concern to the Bench, the Bar, Law Enforcement Officers, and the News Media" contained

in the ABA Standards Relating to Fair Trial and Free Press, p. 16: "(a) *General.* Freedom of speech and of the press are fundamental liberties guaranteed by the United States Constitution. They must be zealously preserved, but at the same time must be exercised with an awareness of the potential impact of public statements on other fundamental rights, including the right of a person accused of crime, and of his accusers, to a fair trial by an impartial jury.

"(b) *The need to inform the public.* It is important both to the community and to the criminal process that the public be informed of the commission of crime, that corruption and misconduct, including the improper failure to arraign or to prosecute, be exposed whenever they are found, and that those accused of crime be apprehended. If, however, public statements and reporting with respect to these matters assume the truth of what may be only a belief or a suspicion, they may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial in the event that formal charges are filed.

"*(c) From the time of arrest or the filing of charges to the beginning of trial.* A man who has been arrested, for whom an arrest warrant has been issued, or against whom a criminal complaint, information, or indictment has been filed, has only been charged with the commission of crime. He is entitled under the Constitution to a fair and impartial trial, in which he is presumed innocent until proved guilty by competent evidence. Thus during the period prior to trial, public statements originating from officials, attorneys, or the news media that assume the guilt of the person charged, that include inaccurate or inadmissible information, or that serve to inflame the community, may undermine the judicial process by making unobtainable a jury satisfying the requisite standard of impartiality. Alleged facts may be untrue, confessions obtained or evidence seized may be inadmissible in evidence, prior criminal records will be

inadmissible except under limited circumstances and for restricted purposes, and witnesses may substantially modify their stories under oath or after confrontation by the accused or cross-examination. The right to a fair trial may thus be substantially endangered by public statements or by reporting prior to trial going beyond a factual description of the person arrested and of the crime charged and a factual statement of the arrest and surrounding circumstances. The danger is especially acute when public statements or reporting extend to such matters as confessions or admissions, prior history, or the performing of tests or refusal to submit to a test; opinions about guilt or innocence; interviews of prospective witnesses; interviews of the defendant before he has had an opportunity to consult with counsel; and speculation as to the plea to be entered or the evidence or testimony to be introduced at the trial. The release and publication of photographs when identification is a matter in dispute may cause particular difficulty, as may reiteration of any earlier detailed reports as the time of trial approaches."

The constitutional guarantees of freedom of speech and of the press and of the right of trial by an impartial jury are, in our judgment, the same under both the Constitutions of this state and of the United States and there is no need to differentiate between the two Constitutions in this discussion.

"The First Amendment freedoms are not ends in themselves, but only means to the end of a free society. . . . The First Amendment freedoms are vital, but their exercise must be compatible with the preservation of other essential rights. Application of the First Amendment can no more be governed by absolute rules than can that of other constitutional provisions." Schwartz on Constitutional Law, § 135, p. 251. The rights which are guaranteed by the First Amendment to the United States Constitution and the right to trial by an impartial jury guaranteed by the Sixth Amendment are both

"preferred" rights. Schwartz, op cit, § 111, p. 193. The Constitution makes no hierarchy of rights. Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), Mr. Justice Jackson dissenting at p. 180.

The Supreme Court of the United States has not yet had occasion to speak definitively where a clash between these two preferred rights was sought to be accommodated by a prior restraint on freedom of the press. There are, however, some statements in various opinions which lead to the conclusion that under some circumstances prior restraint may be appropriate. In Branzburg v. Hayes, 408 U. S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), where the claimed right of a newsman not to be compelled to testify before a grand jury was denied, Mr. Justice White, in the majority opinion said: "The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In Sheppard v. Maxwell, 384 U. S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' Id. at 358, 359. '[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which di-

vulged prejudicial matters.' Id., at 361." The statement immediately preceding the citation of Sheppard v. Maxwell is, however, dicta as no issue of prior restraint was actually involved in the Sheppard case. There are also implications in other opinions that prior restraints may be imposed and it is also clear that the Supreme Court of the United States has never said, in the context with which we are here concerned, that such restraints may never be imposed when necessary to assure trial by an impartial jury. See Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751, Mr. Justice Frankfurter, concurring, at p. 729. In Pennekamp v. Florida, 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295, Mr. Justice Reed said: "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon *pending trials* or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (Emphasis supplied.) In New York Times Co. v. United States, 403 U. S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, it is said in a case not

involving personal conflicting constitutional rights that a prior restraint on the media bears "a heavy presumption against its constitutional validity." This same statement has been made by the Supreme Court of the United States in other cases. The implication of such statement is that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption.

None of the cases in which the United States Supreme Court has used language which imports an absolutist view of the First Amendment free speech right involves a conflict between two fundamental or preferred constitutional rights. In Bridges v. State of California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, Mr. Justice Black noted the difficulty of resolving conflicts between the rights of free speech and fair trial and said: ". . . free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." In Cox Broadcasting Corp. v. Cohn, 420 U. S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328, the conflict was between freedom of the press and a claimed right of personal privacy which was, under the circumstance, clearly not a constitutional right. See, also, Craig v. Harney, 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (misconduct); Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (misconduct).

It is, of course, absolutely clear that the purpose of freedom of the press is not to determine the outcome of litigation by newspaper publicity, although unfortunately on some occasions it has been so used. Sheppard v. Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600; State v. Lovell, 117 Neb. 710, 222 N. W. 625; Irvin v. Dowd, *supra*; Rideau v. Louisiana, 373 U. S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663.

The relators take an absolutist position so far as freedom of the press is concerned and state that, even

if in some cases because of the exercise of freedom of the press pretrial publicity was such that trial by an impartial jury became impossible, it is better that an accused go free than that freedom of the press be impinged even in the slightest degree. They say: "Petitioners would initially point out that the irreparable injury in such a situation is not that defendant will be incarcerated on the basis of an unfair trial; *the injury . . . is to society as a whole, which, due to the impossibility of a defendants obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged.*" (Emphasis supplied.)

In the preface of its restrictive order the District Court found "there is a clear and present danger that pre-trial publicity could infringe upon the defendant's right" to be tried by an impartial jury, that is, as we see it, by 12 persons who have not already made up their minds as to the defendant's guilt or innocence. It is, of course, the constitutional right of a defendant to rely upon the presumption of innocence which the law gives and to require the State to prove that he (1) committed the act charged and (2) his legal culpability, if that is also an issue.

We have earlier referred to the principle that orders imposing prior restraint bear a heavy presumption of unconstitutionality. Does the evidence in the court below support the court's finding so as to overcome the heavy presumption of unconstitutionality of the prior restraint? The trial court in the preface to its restrictive order found that there was a clear and present danger that pretrial publicity could substantially impair the right of the defendant to a trial by an impartial jury unless restraints were imposed. Does that evidence clearly indicate that the obligation of this state under the Constitutions of the United States and of this state to afford the accused a trial by an impartial jury may be impaired by pretrial publicity? The relators

argue that there is no evidence to support the finding because there was no hearing at which they were represented and because no evidence was actually received by the county court at its hearing. Both assertions are true, but it is not the order of the county court which is under attack here.

We are confronted with two separate questions. The first is the question of the jurisdiction of the District Court over the persons of the relators. The second is the sufficiency of the evidence to support the necessity of an order imposing some prior restraints, assuming that prior restraint in any degree is constitutional. We first deal with the question of jurisdiction.

The relators, by their motion to intervene in State v. Simants invoked and submitted themselves to the jurisdiction of the District Court. Their motion was granted (erroneously, as we have previously indicated), nonetheless, at that time the District Court acquired jurisdiction over the persons of the relators. They were heard and evidence was received. The District Court then temporarily adopted as its own the previous order of the county court and later adopted its own modified order. It is that order which is before us for examination. Relators point out, quite properly we believe, that "a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void and may be collaterally impeached." Woods v. Goodson, 253 Ark. 196, 485 S. W. 2d 213. It seems clear enough that the county court had no jurisdiction over the persons of the relators. The order of the county court was void for lack of jurisdiction of the person. That order purports to restrain "the news media." The courts have no general power in any kind of case to enjoin or restrain "everybody." Even when acting with jurisdiction in proper cases, orders must pertain to particular persons or legal entities over whom the court has in some manner acquired jurisdiction.

The relators could have ignored the order, or, if they

wished to avoid the possibility of some effort by the court to start contempt proceedings, could have collaterally attacked the order in some manner as by mandamus or action for a declaratory judgment. Admittedly these latter courses would have been somewhat time consuming. Perhaps for that reason the relators sought to intervene directly in State v. Simants, which they did in the District Court. Their request was granted. Their appearance was not special, but general. These relators voluntarily submitted to the jurisdiction of the court and asked not only that the order be lifted, but also opposed the request of the defendant that certain pretrial proceedings be closed to the general public.

We now turn to the circumstances under which the District Court entered its restrictive order. The evidence in the hearing before the District Judge consisted principally of the testimony of the county judge who had entered the prior order and copies of numerous news articles from newspapers printed or circulated in the county where the crime occurred. The record demonstrates clearly that even before the defendant was afforded a preliminary hearing which section 29-1607, R. S. Supp., 1974, and probably the Constitution of the United States, requires (see Gerstein v. Pugh, 420 U. S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54), certain of the newspapers had printed articles which contained hearsay information and purported statements of the counsel, which, if true, tended clearly to connect the accused with the slayings and which information, if true, was likely to be, or at least some of it would be, presented at the preliminary hearing. The items to which we refer were printed within articles of the October 20, 1975, issue of the North Platte Telegraph; the October 20, 1975, issue of the Lincoln Star; the October 21, 1975, issue of the Denver Post. This information, if obtained from official sources, would not under the provisions of item 1 of the guidelines under the heading "Information Generally Not Appropriate for Disclosure and Reporting"

be appropriate for reporting. The record shows that this was recognized by some of the media, but doubt was expressed that the voluntary guidelines would apply to a preliminary hearing. The District Court, therefore, could quite properly conclude that the evidence from the preliminary hearing, if it was in fact presented would have again been repeated by at least some of the relators. Those conclusions are reinforced by the fact that in open court at the hearing before the District Judge, counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County. This statement of counsel was later reported in the October 23, 1975, issue of the North Platte Telegraph.

The concern of the prosecutor, the defense attorney, and the county judge that pretrial publicity might make it difficult or impossible for the State of Nebraska to afford Simants a trial before an impartial jury was not ill founded. Unless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly in restraining publication of certain information which might or may have been adduced at the preliminary hearing.

Section 29-1301, R. S. Supp., 1975, provides: "All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 24-903, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in some adjoining county." The laws of this state also provide that an accused must be tried within 6 months from the date of the filing of the information or be absolutely discharged. §§ 29-1205 et seq., R. S. Supp., 1974; State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604. Trial of the accused has now been set for January 5, 1976.

There are other factors which the District Court could properly take into consideration. The population of

Lincoln County, Nebraska, according to the 1970 census was 29,538. The populations, according to the same census of the adjacent counties to which venue might be changed are as follows:

County	1970 Population
Keith	8,487
Perkins	3,423
Hayes	1,530
Frontier	3,982
Dawson	19,537
Custer	14,092
Logan	991
McPherson	623

The area in which the jury may be selected is served by several radio stations, two television stations, and several newspapers in addition to those specifically mentioned. Modern communications tend toward the saturation point in news coverage and so, as a practical matter, in some cases it is much more difficult to obtain an impartial jury than it once was. This is evidenced by the reported cases, Sheppard v. Maxwell, *supra;* Irvin v. Dowd, *supra*; Rideau v. Louisiana, *supra.* The mere heinousness or enormity of a crime is, of course, by itself, no reason at all for a prior restraint of freedom of the press, but certainly it is a matter which a court may take into consideration along with all the other factors involved. One of these factors is, of course, the trial court's own knowledge of the surrounding circumstances.

We now turn to discussion of the merits of the basic issue. That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. Near v. Minnesota ex rel. Olson, *supra.* In these

instances and many others no preferred constitutional rights collide.

In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached. It is difficult to accept the relators' position that the press in such cases must be completely unrestrained even if the cost is that a criminal cannot be tried. It is also difficult to accept the proposition that an accused may not be irreparably harmed by wrongful incarceration. Sheppard v. Maxwell, *supra,* is a case in point. Defendant's guilt was doubtful. Defendant's conviction was accomplished, as the opinion of the Supreme Court of the United States indicates, almost wholly because of a concededly outrageous exercise of freedom of the press. The defendant served 10 years of his sentence until his conviction was overturned and a new trial granted. The subsequent finding of not guilty can scarcely be said to have made the injuries suffered by the incarceration reparable. This comment, of course, is not to suggest that the reporting in this case was or is even likely to be anything like that referred to in Sheppard v. Maxwell, *supra.* The press, in fact, appears to have followed the voluntary guidelines to which they apparently were parties.

It is not, however, the accused alone who has a large stake in the constitutional right of trial by an "impartial jury." Society as a whole has just as great a stake. This is true not only because each member of the public might some day need to exercise his own right of trial by jury, but because the United States and each state of the Union have the obligation under the Constitution to assure every accused of a trial by an impartial jury.

The extremist and absolutist position of the relators assumes too much. Society as a whole loses a great deal when a criminal has to go free because he cannot be tried. The same thing is true in the case where an innocent person may be convicted because an impartial

jury cannot be obtained. In such cases the true criminal has gone free.

In cases where such things as this are likely to occur the constitutional right of a free press comes into direct conflict with the obligation of the state under the United States and state Constitutions to assure an accused of a trial by an impartial jury. First Amendment rights other than freedom of the press and of speech are not absolute. Freedom of religion is one of the First Amendment rights. Yet religious belief cannot be pleaded as justification for criminal action. Davis v. Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637. The constitutional guarantee does not permit the practice of polygamy on the basis of religious belief. Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

The absolutist position of relators assumes that each and every exercise of freedom of the press is equally important and significant and that any impingement whatever may be equally disasterous for our state and nation. Such a position cannot, we believe, be supported. Near v. Minnesota ex rel. Olson, *supra,* and Sheppard v. Maxwell, *supra,* are examples of the wide disparity of importance. The absolutist position assumes there can be no degree of values for the particular right in which the absolutist has a special interest. It assumes that all other constitutional rights are somehow inferior and that impingement upon his right will ultimately lead to tyranny. The fact that our awareness of recent political history makes us extremely conscious of our great debt to a free press ought not to lead us to disparage other equally cherished personal rights, merely because, in this case, the right, trial by an impartial jury, need not be exercised by all persons. Nor should it lead us to disregard the stake all have in the exercise of that right by those who choose to or must exercise it.

We are cognizant of the possibility that this very court may be called upon in the near future to judge the fairness of Simants' trial. We ought not to take

action here which will in any measure jeopardize that ultimate fairness or put this court in the position of making prejudgments.

We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.

One other aspect of this case requires our attention. Counsel for Simants asked the court below to close to the public, including the press, such of the pretrial proceedings as might be necessary to insure the empaneling of an impartial jury. This request the District Court denied. Relators point out that section 24-311, R. S. Supp., 1974, provides that all judicial proceedings shall be open. State and Simants respond that the statute, if construed to apply to all pretrial proceedings, irrespective of how disclosures during such proceedings might affect Simants' right to be tried by an impartial jury and affect the duty of the State to assure such impartial jury, is then unconstitutional. We have a duty to construe statutes to make them constitutional if possible. ABA Standard 3.1, Fair Trial and Free Press, in

our judgment supplies an applicable standard for such construction. We, therefore, vacate the order in case No. 40471 and direct the District Court to consider any applications the State or the accused may make for closed pretrial proceedings in future instances in accord with the following standard which we adopt. ABA Standard 3.1, Fair Trial and Free Press: "Pretrial hearings. . . .

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

No. 40445. APPEAL DISMISSED.

No. 40471. ORDER VACATED AND REINSTATED AS MODIFIED.

CLINTON, J., dissenting.

After the issuance of the order of stay by Mr. Justice Blackmun as Circuit Judge, and since this matter was set for hearing in this court, the relators, we are reliably informed, have invoked the jurisdiction of the Supreme Court of the United States in an application to that court for full court action to overturn the portion of the order of the District Court for Lincoln County, Nebraska, sustained by the order of Mr. Justice Blackmun.

There is no precedent or authority for this court and the Supreme Court of the United States to exercise concurrent jurisdiction in matters relating to construction of the federal Constitution. Either we have jurisdiction in this case, or the Supreme Court of the United States has jurisdiction.

We have supervisory jurisdiction over the trial courts of this state. State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144. I know of no precedent and none has been cited to us which gives to the United States Supreme Court the same supervisory jurisdiction over the trial courts of this state that it clearly has over the federal courts.

The jurisdiction of Mr. Justice Blackmun, as Circuit Judge, and the jurisdiction of the Supreme Court of the United States, as Mr. Justice Blackmun recognizes in his opinion, rest upon the provisions of section 1257(3), Title 28 U.S.C., under which "Final judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed "where any title, right, privilege or immunity . . . is claimed under the Constitution . . . of the United States." Mr. Justice Blackmun concluded that a final order had been made because our failure to announce a decision exceeded "tolerable limits."

I again point out, as we did in the order which set this matter for hearing, that the application of the relators was filed in this court late on Friday, October 31,

1975. So far as the writer of this opinion is aware, the application did not come to the attention of any member of this court until Monday, November 3, 1975, at which time we were engaged in the first of 6 days of oral argument in cases pending before us and already irrevocably scheduled.

This is a collegial court and no member of this court has any constitutional or statutory power to grant a stay of the type here requested. That power must be exercised by the court as a whole. Neither may we act upon the basis of telephone calls from counsel, or telegrams. Where factual matters must be reviewed, we must have before us a bill of exceptions containing the evidence expected to be reviewed.

Although an application to file an original action would not normally be considered until we sat at a regularly scheduled weekly consultation, nonetheless, in this particular case the matter was, in accord with our standing practice, assigned to one of the judges of this court on November 4, 1975, for the purpose of preparing a report and recommendation to be considered by the full court at special consultation on Monday, November 10, 1975. While that report was in the process of preparation, the relators on November 4 or 5, 1975, had filed with Mr. Justice Blackmun in Washington, D. C., the application for a stay. This intervening, and to us unanticipated occurrence, affected the content of the report and resulted in the Per Curiam order of continuance adopted by us on November 10, 1975.

On November 13, 1975, Mr. Justice Blackmun rendered his first opinion on his expectation that we would "act forthwith and without delay." On November 13, 1975, there was filed by the relators the bill of exceptions in case No. 40445 and for the first time we had before us something other than ex parte representations as to what had occurred in the trial court. On November 17, 1975, we entered an order permitting the filing of the original action and set for hearing on November 25,

1975, the application for stay both in the original action and the direct appeal and gave notice to all parties of the hearing.

Apparently both the relators and Mr. Justice Blackmun expected that we would act summarily without notice to all interested parties and without a hearing. We did not do so, I think for reasons that should be obvious.

Despite the fact that Mr. Justice Blackmun acted on November 20, 1975, we nonetheless held the hearing on November 25, 1975. All parties were heard. However, between November 20, 1975, and November 25, 1975, as I have already mentioned, the relators invoked the jurisdiction of the Supreme Court of the United States to overturn Mr. Justice Blackmun's stay. I believe the relators are estopped to claim that we still have jurisdiction.

Mr. Justice Blackmun indicated that the problem of the jurisdiction of the United States Supreme Court under section 1257, Title 28 U.S.C., is "not free from difficulty." We ought now to remove that difficulty. The circular state of affairs which has existed ought to come to an end.

The appeal of the relators in case No. 40445 should be dismissed on the ground they have no standing to intervene in a criminal prosecution. § 25-328, R. R. S. 1943; State v. Berry, 192 Neb. 826, 224 N. W. 2d 767.

The original action of the relators, case No. 40471, ought to be dismissed as improvidently granted because of the intervening jurisdiction in the Supreme Court of the United States.

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

SPENCER, J., concurring.

This case requires immediate resolution in this court. While I am in full agreement with the merits of the dissent, I join in the majority opinion to resolve the immediate controversy in this jurisdiction.

NEWTON, J., joins in this concurrence.

STATE OF NEBRASKA EX REL. TOM CASSELMAN ET AL., APPELLANTS, V. JAMES L. MACKEN, COUNTY JUDGE, ET AL., APPELLEES.

235 N. W. 2d 867

Filed December 11, 1975. No. 39890.

1. **Habeas Corpus.** Habeas corpus is a collateral proceeding and cannot be used as a substitute for an appeal.
2. **Courts: Infants: Appeal and Error.** In Nebraska every dispositive order in a juvenile proceeding that rests on an adjudication of delinquency is an appealable order.
3. **Courts: Infants: Habeas Corpus.** The proceedings leading to a final judgment or order in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding.
4. **Judgments: Habeas Corpus.** A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void.
5. **Constitutional Law: Statutes.** This court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court.

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

Bertrand V. Tibbels, for appellants.

Leonard G. Tabor, II, for appellees.

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

McCOWN, J.

The plaintiffs have appealed from an order of the District Court dismissing both a petition for a writ of habeas corpus and a petition for a writ of mandamus. The habeas corpus action sought the return of plaintiffs' son who had been placed in a foster home by order of a juvenile court. The mandamus action sought to compel the county court to furnish the plaintiffs, as a part of a

transcript, certain reports received by the court which were designated by statute as privileged reports. The cases were combined for trial and appeal.

In November 1973, a juvenile court petition was filed alleging that plaintiffs' 15-year-old son, George Casselman, was a "child in need of special supervision." The proceeding was based upon the charge that on October 31, 1973, George was a minor in possession of liquor. On November 14, 1973, hearing was held on the petition. The parents were present with their son. He admitted the allegations and the court entered judgment finding that George Casselman was a child in need of special supervision. The court continued the dispositional portions of the hearing to a later date. On January 4, 1974, with all parties present, the matter came on for dispositional hearing. The court ordered plaintiffs' son to continue to reside in the plaintiffs' home subject to the supervision of the probation office, and ordered the dispositional portion of the hearing continued until the further order of the court.

On January 31, 1974, a juvenile court petition supplement was filed charging that George Casselman was a child in need of special supervision and delinquent by reason of an assault by him on January 19, 1974, on a named individual. The assault also constituted a violation of his probation under the order of January 4, 1974. On March 14, 1974, hearing was had on the supplemental petition. George and the plaintiffs were again present with retained counsel. The juvenile, by his counsel, admitted the allegations of the petition. The court entered judgment finding George Casselman to be a child in need of special supervision. On April 3, 1974, all parties and their counsel were again present and the case came on for dispositional hearing. The court ordered that until further order of the court, George Casselman be placed in a foster home. The order directed that he be placed in the care, custody, and control of the Scotts Bluff County division of pub-

lic welfare, with joint supervision of the probation officer, and set conditions and restrictions on his conduct. The order provided that if the terms and conditions of the orders were not met, the case would be subject to review and further action by the court.

On June 14, 1974, a social service worker filed an affidavit alleging various acts of misconduct and violation of the conditions of the order of April 3, 1974, by the juvenile; that the foster parents were unwilling to have him return to their home; and that it was necessary to have him placed in juvenile detention facilities. The court on that date ordered the juvenile detained in the juvenile detention facilities in Scottsbluff. On June 17, 1974, the court ordered that the juvenile be placed in the Nebraska Children's Home Society with care, custody, and control under the Scotts Bluff County division of public welfare, with joint supervision with the probation office.

On August 22, 1974, a motion was filed in the juvenile court proceedings by plaintiffs to set aside the judgments and orders previously entered on the ground that they were wholly void because the juvenile statutes were unconstitutional in that they deprived plaintiffs of the custody of their child without fault on their part, and that the juvenile statutes of Nebraska were so vague and ambiguous as to be wholly void and unconstitutional. The motion was denied by the juvenile court on October 29, 1974.

On November 21, 1974, the petitions for writs of habeas corpus and mandamus involved here were filed in the District Court for Scotts Bluff County. On November 29, 1974, hearing was held and on November 30, 1974, the District Court dismissed both petitions and this appeal followed.

Habeas corpus is a collateral proceeding and cannot be used as a substitute for an appeal. Nicholson v. Sigler, 183 Neb. 24, 157 N. W. 2d 872, cert. den. 393 U. S. 876, 89 S. Ct. 174, 21 L. Ed. 2d 148. It is apparent in

this case that no appeal was taken from any order of the juvenile court within the requisite time for appeal. In Nebraska every dispositive order in a juvenile proceeding that rests on an adjudication of delinquency is an appealable order. State v. Belding, 190 Neb. 646, 211 N. W. 2d 715. It is not necessary, however, that we determine in this proceeding whether or not the parents of a minor adjudged to be a juvenile delinquent are entitled to appeal from that order for their own interests. The issues raised by the plaintiffs in the habeas corpus proceeding here had already been raised in the juvenile court by their motion to set aside its judgments, and the plaintiffs here did not attempt to appeal from the order of the juvenile court overruling the motion. Instead, the habeas corpus and mandamus actions involved here were filed.

A judgment or dispositive order of a juvenile court is supported by the usual presumptions of validity and regularity. The proceedings leading to a final judgment or order in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void. See, State ex rel. Southeast Rural Fire Protection Dist. v. Grossman, 188 Neb. 424, 197 N. W. 2d 398; Restatement, Judgments, § 11, p. 65.

It is unnecessary to determine whether or not the constitutionality of the underlying juvenile court statutes which support the judgment here may be raised in a collateral attack. No issues of procedural due process are involved here. Plaintiffs had notice and were present at each hearing. The only basis upon which the plaintiffs claim the juvenile court judgments were void rests upon allegations that the juvenile court statutes of Nebraska are so vague and ambiguous as to be un-

constitutional. That assertion has already been answered by this court adversely to plaintiffs' contention. See, State v. Cialkowski, 193 Neb. 372, 227 N. W. 2d 406; State v. Simants, 182 Neb. 491, 155 N. W. 2d 788.

The mandamus action here was brought in support of the habeas corpus action, is also a collateral attack upon the judgments and orders of the juvenile court, and also rests upon an attack on the constitutionality of a portion of the juvenile court statutes. What has been said with respect to the habeas corpus action applies with equal validity to the mandamus action. Additionally, the mandamus action only sought to obtain a part of a transcript in support of the habeas corpus appeal. This court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court. Vodehnal v. Grand Island Daily Independent, 191 Neb. 836, 218 N. W. 2d 220. It is unnecessary here.

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

AFFIRMED.

CLARK & ENERSEN, HAMERSKY, SCHLAEBITZ, BURROUGHS & THOMSEN, INC., APPELLANT, V. SCHIMMEL HOTELS CORPORATION ET AL., APPELLEES.

235 N. W. 2d 870

Filed December 11, 1975. No. 39963.

1. **Estoppel: Actions.** Estoppel is not a cause of action nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones.
2. **Pleadings.** A petition which fails to plead actionable facts is vulnerable to a general demurrer.
3. ———. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor

find facts in aid of the pleading, nor consider what evidence may be introduced at the trial.

4. **Contracts.** A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct.

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

Robert L. Jeffrey and Michael F. Lee, for appellant.

Pierson, Pierson & Fitchett, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and BRODKEY, JJ., and TESAR, District Judge.

MCCOWN, J.

Plaintiff's petition seeks to recover for preliminary architectural and engineering services performed in connection with a contemplated 100-unit motor hotel addition to a hotel on which construction was never begun. The amended petition proceeded on two counts. Both counts seek to recover for the same work and both pray for recovery of an identical amount. The second count is on a quantum meruit theory of recovery. Defendants' demurrer to that count has been overruled and the case must still be tried on that count. Defendants' demurrer to the first count of plaintiff's amended petition was sustained by the District Court. Plaintiff elected to stand on the first count and declined to plead further. The District Court dismissed the first count and plaintiff has appealed.

It is difficult to determine exactly what theory the first count rests upon. The critical allegations are contained in paragraphs three and five of the first count of the amended petition. Paragraph three alleges that plaintiff performed the architectural and engineering services "for Defendants at their special instance and request * * *." Paragraph five alleges that defendants made representations and led plaintiff to believe that defendants would pay plaintiff "fees for architectural services in connection with the project * * *" and that

plaintiff relied upon such representations and rendered and performed the services, and "that Defendants should now be estopped from denying they so represented and so induced the Plaintiff to render and perform such architectural services and to incur such expenses." Paragraph five also refers to a number of attached letters and documents which are incorporated by reference. Included is an AIA standard form of agreement between owner and architect prepared for execution by the plaintiff and one of the defendants. The form was never executed by any of the parties, but plaintiff alleges that at the specific instance and request of the defendants, plaintiff prepared and delivered the form on March 27, 1969. Essentially the documents attached add nothing to the general quantum meruit allegations, nor do they add facts which would establish the making of an express contract. In this case, count II already states facts sufficient to constitute a cause of action on quantum meruit. Under those circumstances, unless count I states facts sufficient to constitute a cause of action other than one for quantum meruit, the demurrer must be sustained.

Plaintiff strenuously contends that the cause of action rests on equitable estoppel. Estoppel is not a cause of action nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones. See, Furstenberg v. Omaha & C.B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599.

The labels placed on the cause of action in count I are not controlling, nor do the conclusions of the pleader remove the requirements for pleading facts sufficient to constitute a cause of action. A petition which fails to plead actionable facts is vulnerable to a general demurrer. See Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor con-

sider what evidence may be introduced at the trial. State ex rel. Warren v. Kleman, 178 Neb. 564, 134 N. W. 2d 254.

An action in contract inevitably rests upon a promise or set of promises. A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct. Quasi contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice. See, Restatement, Contracts, § 5, p. 7; Restatement, Contracts 2d, T.D. No. 1, § 5, p. 24.

The pleadings under count I, including the documents incorporated by reference, fail to allege facts constituting the making of a promise or the manifesting of assent by the defendants to be bound by the terms of the AIA agreement form or by the terms of any other specific or express form of agreement. Any contract to be implied under the allegations of count I would simply be to pay a reasonable amount for the professional services of plaintiff. Count I fails to state facts sufficient to constitute a cause of action in contract against the defendants separate and distinct from the cause of action in quantum meruit set forth in count II.

The District Court was correct in sustaining the defendants' demurrer to count I, and its judgment is affirmed.

AFFIRMED.

ROGER S. SHEPHERD, APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, ET AL., APPELLEES.
235 N. W. 2d 873

Filed December 11, 1975. No. 40034.

1. **Administrative Law: Appeal and Error: Evidence.** Where it appears in an error proceeding that an administrative tribunal

has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed.

2. **Words and Phrases: Evidence.** "Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue.

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

Thomas F. Dowd, for appellant.

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

Heard before SPENCER, NEWTON, and CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

SPENCER, J.

Roger S. Shepherd appeals from the judgment of the District Court affirming the action of the Omaha city personnel board in approving his dismissal from the police department. The question presented is whether or not there is competent evidence in the record to support the finding that Shepherd committed fraud in answering a question as to physical defects or disability on his employment application. We reverse.

In May of 1968, Shepherd was involved in an automobile accident in which he sustained an injury to his back. In July of 1968, Dr. David W. Minard performed a partial hemilaminectomy and a herniated intervertebral disc was removed. Shepherd continued to improve but was still in pain for several weeks. He was directed to continue wearing lumbosacral support. In December of 1968, Shepherd was discharged from Dr. Minard's care.

Shepherd settled a civil lawsuit in connection with the injuries sustained in the accident for $8,000. His special damages were approximately $4,000. His testimony was that he had been advised by his attorney that

his attending physician felt there was no permanent disability.

In November 1969, Shepherd completed an application for employment with the city of Omaha. At that time he was employed as a grocery clerk with Hinky Dinky stores where his duties included unloading trucks, stocking shelves, and carrying out groceries for customers. Although these duties were of a strenuous and exertive nature, he testified that he experienced no pain, discomfort, or limitation of motion in his back while so employed.

Question No. 24 of the city's employment application form read: "Do you have any physical defects or disability?" Shepherd responded in the negative. Following the completion of this application form, Shepherd took a civil service test, a physical fitness test, a psychiatric test, and a physical examination, all of which he successfully completed. The physical examination involved his stripping down to his shorts. The examining doctor tapped on his back, which had a 4-inch scar from the laminectomy. No questions were asked relative to the scar. He was hired as a policeman on March 1, 1970.

In January of 1972, Shepherd was again treated by Dr. Minard for back pain. Shepherd's evidence indicated that his injury resulted from his jumping out of his cruiser while on duty on the early morning of January 19. The city introduced evidence that Shepherd had in fact visited Dr. Minard on the 18th of January, prior to the report of injury on duty. Shepherd subsequently returned to his duties as a policeman.

In December of 1973, while on duty, Shepherd sustained an injury to his back as a result of a fall. He was off duty for this injury but returned to duty when he obtained a release from his physician. In February of 1974, Shepherd again sustained an injury to his back in an off-duty automobile collision. Shepherd returned to work March 29, 1974. On April 23, 1974, Shepherd re-

ported sick. He stated that the back problems were worse and he would possibly be off for 30 days or more. On May 2, 1974, Shepherd advised the police department that he was in Immanuel Hospital and was to have back surgery that day. He was not released from Dr. Minard's care to return to work until August 5, 1974.

By a letter dated July 15, 1974, Shepherd was informed that his services were being terminated, effective August 1, 1974. The reason given for this action was that he had committed fraud or misrepresentation in his answer to question No. 24 on his original employment application. Shepherd contends the District Court erred in finding the existence of competent evidence to support the personnel board's finding that he committed fraud or misrepresentation in his answer.

It is well settled in Nebraska that where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Tinsley v. City of Omaha (1973), 190 Neb. 380, 208 N. W. 2d 693.

The District Court, in affirming the finding of the city personnel board, found: "Exhibits 7, 8 and 9 (medical and police records with reference to the January 1972 injury) were clearly relevant, at least to the extent that they indicate that on January 19, 1972 plaintiff claimed to have suffered an accident and injury in line of duty for which he had received medical treatment on January 18, 1972. They were relevant not because they furnished a direct basis for discharge, but because they related to plaintiff's credibility upon an issue directly related to the cause for discharge, his alleged misstatement of facts in Exhibit 1 (the employment application). As such, they constituted an adequate basis for the board's determination which should, therefore, be affirmed."

Shepherd does not contest here the finding that he

made misrepresentations in January of 1972. His contention is that even though the personnel board may have found that he lied in 1972, such a finding and the evidence which supports it can not support a finding that he lied on his employmemt application 2 years earlier.

"Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue. Black's Law Dictionary (4th Ed.), p. 355, defines it as: "That which the very nature of the thing to be proven requires, * * *."

It is elementary that fraud or misrepresentation requires: First, a false statement, and, second, knowledge of its falsity by the person making the same. The question presented therefore is whether the evidence discloses that on November 17, 1969, the date the application was made Shepherd knew that he suffered from a physical defect or disability because of the back operation performed 1½ years earlier. The only evidence of the city on this point was the application itself.

The evidence offered by Shepherd uncontrovertedly established the contrary. He had had no problems for more than 1 year prior to making the application. He had been performing reasonably strenuous physical activities involving his back in his employment with Hinky Dinky stores, and it was not for more than 2 years following the date of the application that he experienced any back difficulty.

His doctor's report, so far as material herein, is as follows: "I believe with relative medical certainty that in November of 1969 when he was taking a physical examination for being a police officer that he probably did not know of any physical defects or disabilities since at this time he felt that his back was asymptomatic. He would not know of it being a physical defect toward disability. In this matter, if he were asymptomatic, I believe that he would be correct.

"If the Police Force had been concerned about any possibility of a back problem, this should have been listed under operation and also observed in the physical findings of the examination. The scar from the lumbar laminectomy would be quite evident. Therefore, with medical certainty, I do not feel that Mr. Shepherd would feel that he had a physical defect or disability unless he was experiencing pain or other symptoms at the time of the examination in November of 1969."

Further, at the time of the application Shepherd was required to submit to certain physical exercises at the University of Omaha. These must have been performed to the satisfaction of the examiner.

To establish fraud or misrepresentation the city was required to show an intent on the part of Shepherd to deceive. Since the answer to the question calls for a subjective analysis of Shepherd's physical condition, some proof from which the state of his mind may be inferred is required. The city attempted to show this solely by evidence as to the recurrence of the back trouble 2 years after Shepherd entered its employ. On the record, this did not meet the city's burden of proof. An injury does not always result in a defect or a disability. As Dr. Minard suggests, on this record it is reasonable to believe that Shepherd probably did not know of any physical defect or disability, since he felt that his back was asymptomatic.

While grounds may have existed for Shepherd's discharge, the reason given by the city was not one of them. The judgment is reversed and the cause remanded with directions to the District Court to order the Omaha personnel board to reinstate Roger S. Shepherd to his position with the Omaha police department as of August 5, 1974, the date that Dr. Minard released him to return to his employment.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWTON, J., dissents.

WOODROW MEGEL ET AL., APPELLEES, V. CITY OF PAPILLION ET AL., APPELLANTS.

235 N. W. 2d 876

Filed December 11, 1975. No. 40039.

Attorneys at Law: Fees. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance.

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

Lee A. Larsen, for appellants.

Bernard E. Vinardi, for appellees.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and WARREN and VAN PELT, District Judges.

WARREN, District Judge.

This is an appeal from the District Court judgment awarding attorney's and expert witness' fees in favor of plaintiffs in a civil contempt action.

This court previously on May 11, 1973, found the defendants to be in willful contempt for failure to comply with the January 7, 1971, decree of the District Court for Sarpy County enjoining the defendants from diverting surface water onto plaintiffs' property and requiring the City of Papillion to construct certain drainage facilities to eliminate further damage to plaintiffs. Megel v. City of Papillion, 190 Neb. 238, 207 N. W. 2d 377 (1973). This court observed that: "There are mitigating circumstances in this case which make it inappropriate to impose any penalty upon the defendants at this time other than the costs and expenses of the proceeding in both courts, including a reasonable fee for the services of the attorney for the plaintiffs." This court then ordered that: "All costs and expenses in both courts, including a reasonable fee for the services of the

plaintiffs' attorney, are taxed to the City of Papillion. The plaintiffs are allowed the sum of $1,000 for the services of their attorney in this court."

Pursuant to the opinion and mandate of this court, the District Court, upon plaintiffs' application, set a hearing to fix fees for the services of plaintiffs' attorney and their consulting engineer in the original District Court contempt action, and ordered each party in turn to submit affidavits. Plaintiffs filed detailed time affidavits supporting a request for attorney's fees of $7,495 and expert witness' fees of $600. The defendants filed nothing, but orally objected at the hearing to the allowance of any further fee to plaintiffs' attorney, contending that the $1,000 fee fixed by the Supreme Court was the only fee allowable for plaintiffs' attorney. The trial court fixed fees at $6,450 for plaintiffs' attorney and $500 for plaintiffs' expert witness, and defendants perfected another appeal to this court.

The defendants' first group of assignments of error contends in substance that because this court allowed a $1,000 attorney's fee for services of plaintiffs' attorney "in this court," no other fee can be allowed. This contention borders on the ridiculous. Defendants disregard the plain language of the court's opinion and designedly return the case to a crowded appellate docket, when the effort required by a simple reading of the opinion should have been sufficient. There is no merit to this contention.

The second group of assignments of error contend that the District Court erred in determining attorney's fees solely upon affidavit. The procedure used by the trial court followed that recently approved in Schmer v. Hawkeye-Security Ins. Co., *ante* p. 94, 230 N. W. 2d 216 (1975). The defendants offered no evidence whatever bearing upon the allowance of fees. The amount of attorney's fees allowed generally rests in the sound discretion of the court. Schmer v. Hawkeye-Security Ins. Co., *supra*. The allowance of a reasonable attorney's

fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of abuse of discretion by the trial court in making the allowance. Y Motel, Inc. v. State, 193 Neb. 526, 227 N. W. 2d 869 (1975). We find no abuse of discretion in regard to either the method used in determining fees or the amount of the allowances.

The judgment of the District Court is affirmed. Costs are taxed to defendant City of Papillion. The plaintiffs are allowed the further sum of $1,000 for the services of their attorney in this court, to be paid forthwith by the defendant City of Papillion. To avoid any possibility of misreading this opinion, we specifically state that the foregoing allowance of attorney's fees is in addition to the previous allowances of $6,450 for the services of plaintiffs' attorney in the District Court contempt action and of $1,000 for the services of plaintiffs' attorney in the first appeal to this court.

AFFIRMED.

EDITH W. FANNING, APPELLEE AND CROSS-APPELLANT, V. ED R. FANNING, APPELLANT AND CROSS-APPELLEE.
235 N. W. 2d 878

Filed December 11, 1975. No. 40091.

1. **Divorce: Property.** This court is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record.
2. **Divorce: Trial: Appeal and Error.** In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.

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

Owens & Owens, for appellant.

Cunningham, Blackburn, VonSeggern & Livingston, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and COLWELL and RIST, District Judges.

SPENCER, J.

This is an action for dissolution of a marriage. The essential challenge is to the alimony and property division, although the respondent-appellant, Ed R. Fanning, also alleges irregularities in the proceedings of the court by which he was prevented from having a fair trial. Respondent husband appeals and the petitioner wife cross-appeals. We affirm.

The parties were married in 1961. They had both been previously married. They each had children from the previous marriages but none from the present one. At the time of the trial, the wife was 56 years of age and the husband 59.

At the time of the marriage, the wife owned 61 acres of land. Eleven of those acres were condemned during the marriage and the proceeds were used to pay debts and acquire more land. The husband at that time owned 400 unirrigated areas of farm land and during the marriage he inherited 175 acres from his mother. Together the couple purchased 1,585 acres during the marriage and placed $16,000 worth of irrigation equipment on 120 acres of land originally owned by the husband. The debts of the parties at the time of the trial were $150,706.28. The parties agreed that the value of their personal property totalled approximately $111,850.

The primary question herein relates to the value of the land. The wife's evidence would indicate a figure of approximately $300,000. The husband's evidence would indicate a value of approximately $210,000. Title to the 50 acres owned by the wife prior to the marriage

was quieted in her. Title to all other realty and personalty was quieted in the husband subject to indebtedness, and the wife was awarded $40,000 as her share of the joint property. Additionally, she was awarded alimony of $300 per month until the death of either party or until her remarriage, the costs of the action, and an attorney's fee of $750.

Neither party is satisfied with the division of property. This court has heretofore said that it is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record. Tavlin v. Tavlin (1975), *ante* p. 98, 230 N. W. 2d 108. This case does not meet that criteria. While this action is to be tried de novo on the issues presented on appeal, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Seybold v. Seybold (1974), 191 Neb. 480, 216 N. W. 2d 179. We have repeatedly held that the fixing of alimony rests in each case within the sound discretion of the trial court. Young v. Young (1974), 192 Neb. 735, 224 N. W. 2d 361. On this record we determine that the trial court did not abuse his discretion.

During the course of the trial, the judge stated: "Now, gentlemen, I'm going to remind you that when we set this case, I was told it wouldn't take any more than an hour. It has already taken over an hour and twenty minutes, and I have other matters scheduled, presently, so we'd better move along a little faster." The husband contends that because of this statement he was prevented from having a fair trial. The contention is without merit. There is no indication in the record that counsel was prevented from presenting any evidence. After the statement, the respondent's expert witness gave his testimony. The record discloses no objection to the conclusion of the trial or the offer of

additional evidence. If the respondent was prejudiced, he has not argued that point in his brief.

The judgment of the District Court is affirmed. Costs, including a $750 fee for the services of petitioner's attorney in this court, are taxed to the respondent.

AFFIRMED.

GARY T. STILEN, APPELLEE, V. CAVALIER INSURANCE CORPORATION, A FOREIGN INSURANCE COMPANY, APPELLANT.

236 N. W. 2d 178

Filed December 11, 1975. No. 40098.

1. **Insurance: Contracts: Cancellation of Instruments.** Cancellation of a policy by the insurer is an affirmative defense and the burden is upon the defendant liability insurance company to prove a valid cancellation effective before the liability of the insured arose.
2. **Insurance: Contracts: Cancellation of Instruments: Notice.** The burden of establishing an effective cancellation before loss is on the insurer. Notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional.
3. ———: ———: ———: ———. A notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable.

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

Emil F. Sodoro and Michael P. Cavel, for appellant.

Gerald M. Harrington, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and WEAVER and BLUE, District Judges.

WEAVER, District Judge.

This is a declaratory judgment action the object of which was to determine the existence of an automobile liability insurance policy issued by Cavalier Insurance Corporation to Gary T. Stilen and whether the policy was in full force and effect on September 30, 1973, on which date Stilen was involved in an automobile accident. The trial court held in favor of the appellee, Stilen, and this appeal from that decision followed. We affirm.

The stipulation of facts and the exhibits indicate that Cavalier Insurance Company is a foreign corporation, authorized to do business in the State of Nebraska, and that the premium herein was financed by Insurex Corporation which has its principal place of business in Denver, Colorado, and does premium financing and also is the managing general agent for Cavalier. An automobile liability policy was issued to Stilen by Cavalier effective June 22, 1973. On the same date Stilen signed a premium financing agreement with Insurex and paid $101 in cash, $12 of which represented the policy issuance fee and $89 of which represented a downpayment of 25% of the annual premium. On August 6, 1973, Stilen paid $35.51 to Insurex which was received by Insurex on August 9, 1973, and represented the installment due on July 22, 1973. Stilen made no further payments to Insurex.

The Insurex agreement provides in part as follows: "Premium Finance Agreement for financing insurance premiums on policies issued by Insurex Corporation, * * *. If any payment due hereunder is not paid when due * * * the unpaid balance due hereunder shall be immediately due and payable. In such event Insurex Corporation may immediately terminate the agreement and the unearned premiums on the financed policies shall be payable by the insurance companies to Insurex Corporation upon Insurex Corporation's request. * * * Any sum received from an insurance company shall be

credited to the unpaid balance due; any surplus shall be paid over to the party entitled to same * * *." The pertinent portions of the Cavalier policy are: "After this policy has been in effect for sixty days * * * the company shall not exercise its right to cancel the insurance unless: * * * the named insured fails to discharge when due any of his obligations in connection with the payment of premium for this policy or any installment thereof, whether payable directly to the company or its agents or indirectly under any premium finance plan or extension of credit; * * *

"If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancelation is effected or as soon as practical after cancelation becomes effective, but payment or tender of unearned premium is not a condition of cancelation."

On August 29, 1973, *Insurex Corporation* (emphasis added) mailed from Denver, Colorado, a notice of cancellation, addressed to plaintiff at 2501 South 37th Street, Omaha, Nebraska, a portion of which is as follows:

"NOTICE OF CANCELLATION OR NONRENEWAL
of Cavalier Insurance Corporation

Policy No.	Issued	Cancellation Date	Hour	Date of Notice
9149260	Denver, Colorado	9-8-73	12:01 AM	8-29-73

COPY OF NOTICE SENT TO NAMED INSURED

Insurance Company	Insurex Corp. 2829 E. 2nd Avenue Denver, Colorado
Name and Address of Insured	Gary T. Stilen 2501 So. 37th St. Omaha, Nebraska

(Applicable item marked ☒) REASON: NON-PAYMENT PREMIUM
BUDGET INSTALLMENT

☒ You are hereby notified in accordance with the terms and conditions of the above mentioned policy that your insurance will cease at and from the hour and date mentioned above due to nonpayment of premium. A bill for the premium earned to the time of cancellation will be forwarded in due course."

Cavalier erroneously computed the earned premium at the short rate. Cavalier then paid the unearned premium of $248.57 to Insurex Corporation in full settlement of said premium financing agreement. Under the terms of the policy Cavalier should have calculated the earned premium on a pro rata basis and as a result there was $32.03 left to the credit of Stilen, which amount was sufficient to have carried the policy coverage beyond September 30, 1973, the date of the accident.

Section 44-379, R. R. S. 1943, provides that a policy must contain "an appropriate provision for cancellation thereof by either the *insurer* or the insured." (Emphasis added.)

The record contains no evidence that Cavalier canceled the policy, only that Insurex mailed a notice of cancellation. There is no affirmative evidence in the record that Insurex had authority either as a financing agency or as general managing agent to cancel the policy. "Cancellation of the policy is an affirmative defense and the burden is upon a defendant liability insurance company to prove a valid cancellation effective before the liability of the insured arose." 44 Am. Jur. 2d, Insurance, § 1978, p. 921.

"Generally speaking, a strict compliance by the insurer with a policy provision for notice is essential to effect a cancellation by such a notice, and ambiguities in the notice will be resolved in favor of the insured." 43 Am. Jur. 2d, Insurance, § 405, p. 450. The notice sent to Stilen was ambiguous and misleading in that it advised him he would be billed for premium earned to the time of cancellation, when in fact he had a credit due him for unearned premium.

"The burden of establishing an effective cancelation before loss is on the insurer. Notice of cancelation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional." Petersen v. Ohio Casualty Ins. Co., 131 Neb. 128, 267 N. W. 393.

We hold that a notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable.

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

AFFIRMED.

BLUE, District Judge, concurs in the result.

DELBERT W. KORTE, APPELLANT, V. GEORGE BETZER, APPELLEE.

236 N. W. 2d 181

Filed December 11, 1975. No. 40130.

1. **Dismissal and Nonsuit: Waiver.** Where a dismissal for want of prosecution is vacated conditionally, and the plaintiff elects to review the order by filing a notice of appeal and supersedeas bond within the time provided for complying with the condition, the plaintiff abandons any right to later comply with the condition.
2. **Dismissal and Nonsuit: Time: Supersedeas.** Where a dismissal for want of prosecution is vacated upon condition the plaintiff pay costs, fees, and expenses within 30 days, a supersedeas bond filed before the expiration of the 30-day period does not suspend the running of the 30-day period but accelerates the dismissal of the action in accordance with the terms of the order.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Scott E. Daniel, for appellant.

J. Arthur Curtiss of Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

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

BOSLAUGH, J.

This is an appeal from the judgment entered upon the mandate of this court in a prior appeal.

The action was commenced in November 1971, to recover damages resulting from a 1969 automobile accident. The suit was dismissed for want of prosecution on January 28, 1974. On March 27, 1974, the order of January 28, 1974, was vacated upon condition the plaintiff pay $684.40 in fees, costs, and expenses within 30 days. The order further provided that in the event the money was not paid within the time provided, "plaintiff's cause stands dismissed for want of prosecution." Costs were taxed to the plaintiff.

On April 15, 1974, the plaintiff filed a notice of appeal and a supersedeas bond. The order of the District Court was affirmed by this court in Korte v. Betzer, 193 Neb. 15, 225 N. W. 2d 30. Judgment on the mandate dismissing the action was entered in the District Court on March 11, 1975. The plaintiff has appealed from that judgment.

Plaintiff contends the trial court erred in failing to grant him a trial on the merits after the mandate of this court had been filed in the trial court. The plaintiff's theory is that the supersedeas bond suspended the running of the 30-day period specified in the order of March 27, 1974, and that payment of the $684.40 to the clerk of the District Court on January 20, 1975, was a compliance with the order of March 27, 1974.

The difficulty with plaintiff's theory is that the order of March 27, 1974, was interlocutory in nature unless

the plaintiff failed to pay the $684.40 within 30 days. Plaintiff's theory would enable a litigant to review any interlocutory order by filing a notice of appeal and supersedeas bond before the time to comply with the order had expired. Such a form of piecemeal review will not be tolerated.

When plaintiff elected to challenge the order of March 27, 1974, by appeal, he abandoned any right to thereafter comply with the order. The order then became effective as a dismissal of the action, a final order from which an appeal could be taken.

The effect of the supersedeas was to stay enforcement of the defendant's judgment for costs until the appeal had been determined. After the order of March 27, 1974, had been affirmed by this court the litigation was at an end. The judgment on the mandate merely recorded the action of this court.

Carroll v. Polfus, 98 Neb. 657, 154 N. W. 213, cited by the plaintiff, has no application to this case. There a decree for specific performance required the appellee to reduce certain encumbrances within 20 days as a condition to specific performance. After an appeal had been perfected and a supersedeas bond filed, the appellant moved for judgment because the appellee had failed to reduce the encumbrances as required by the decree. This court held the supersedeas suspended the power of the District Court to proceed and the appellee was not required to comply with the decree until the appeal had been determined.

The judgment of the District Court is affirmed.

AFFIRMED.

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Access.

1. An abutting landowner has no vested interest in the flow of traffic past his premises, and a change in the flow of traffic resulting from the placing of medians in a street or highway is not compensable. Deyle v. State ---------- 36
2. Before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory. Deyle v. State ---------- 36

Actions.

1. In this state forms of action have been abolished and the nature of an action is to be judged by what is pled and not by the name which may have been applied to the pleading. State v. Turner ---------- 252
2. If the loss exceeds the amount of insurance paid, an action may be brought in the name of the insured for the entire loss. Schweitz v. Robatham -- 668
3. A party cannot maintain an action on a contract without a prior substantial compliance on his part. If there has been a substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Schweitz v. Robatham ---------- 668
4. In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein since a court should not adjudicate the rights and liabilities of a person unless he is actively or constructively before it. Dyas v. Morris ---------- 773
5. Estoppel is not a cause of action nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp. ---------- 810

Administrative Law.

1. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission. Myers v. Blair Tel. Co. ---------- 55

2. Unlike some public service commissions, the Nebraska Public Service Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Myers v. Blair Tel. Co. ---------- 55
3. The powers of the Public Service Commission are regulatory in nature and the judicial powers lodged in it are remedial of and ancillary to its regulatory powers. Myers v. Blair Tel. Co. ---------- 55
4. The Public Service Commission, as a part of its power and duty to establish rates which will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate. Myers v. Blair Tel. Co. ---------- 55
5. Inherent in the power of the Public Service Commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service. Myers v. Blair Tel. Co. 55
6. Section 84-1405, R. S. Supp., 1974, specifically authorizes administrative agencies to hold executive sessions under certain conditions. South Maple Street Assn. v. Board of Adjustment ---------- 118
7. An administrative agency is not required to set out statutory provisions in its rules and regulations. South Maple Street Assn. v. Board of Adjustment -- 118
8. Under section 52-118.02, R. R. S. 1943, a final settlement is a determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. -- 248
9. An administrative agency settlement involves a statement of account, including all charges and credits deemed allowable by the department, after deciding, with intended finality so far as its functions are concerned, such matters as the sufficiency of performance, allowance of liquidated damages, contingent liabilities, etc. A determination that particular amounts may be due or paid merely as pay-

ments on account is not a final settlement. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. -- 248

10. So long as the public body contends that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is ordinarily no final settlement of the contract. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. ---------- 248

11. The Nebraska State Racing Commission has authority to bring an original action on its own motion to revoke any license issued by the commission where the holder has violated the rules and regulations of the commission. Durousseau v. Nebraska State Racing Commission ---------- 288

12. An administrative agency may take notice of general, technical, or scientific facts within its specialized knowledge, and may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. Durousseau v. Nebraska State Racing Commission ---------- 288

13. An order of revocation of a license to engage in an occupation or profession will ordinarily not be disturbed on appeal in the absence of an abuse of discretion. Durousseau v. Nebraska State Racing Commission ---------- 288

14. 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. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322

15. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322

16. The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative Procedures Act. § 84-901, R. S. Supp., 1974. J K & J, Inc. v. Nebraska Liquor Control Commission - 413

17. The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative

Procedures Act. § 84-901, R. S. Supp., 1974. J K & J, Inc. v. Nebraska Liquor Control Commission -- 413

18. When an objection is filed to an application for a liquor license and the Nebraska Liquor Control Commission is required to set the matter for hearing under the provisions of section 53-133, R. R. S. 1943, the matter becomes a contested case under the provisions of section 84-901(3), R. S. Supp., 1974. J K & J, Inc. v. Nebraska Liquor Control Commission 413

19. At the hearing on a contested case, the applicant is entitled, under the provisions of section 84-901(3), R. S. Supp., 1974, to notice of the issues. J K & J, Inc. v. Nebraska Liquor Control Commission ---- 413

20. The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

21. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

22. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

23. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

24. The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in Chapter 53, R. R. S. 1943, is vested exclusively in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

25. Section 79-1254.02, R. S. Supp., 1974, is applicable to the Board of Trustees of the Nebraska State Colleges. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

26. In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

27. Section 79-1254.02, R. S. Supp., 1974, requires the affirmative vote of a majority of all members of the board to amend or terminate the contract of a member of the teaching staff. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

28. In the absence of a contrary statute or rule, at a meeting of an administrative body where a quorum is present, a vote which is insufficient and ineffective to constitute any official action of the board does not deprive the board of power and jurisdiction to make an effective and final determination on the issue at a subsequent meeting of the board. Chase v. Board of Trustees of Nebraska State Colleges --- 688

29. The demands of due process do not require a hearing in the initial stage, or at any particular point, or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Chase v. Board of Trustees of Nebraska State Colleges ---- 688

30. The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission. Cummings v. City of Falls City ---- 759

31. If the evidence in the District Court on appeal is sufficient to show that the order of the civil service commission suspending or discharging an employee was made in good faith for cause, then the order of the commission must be affirmed. Cummings v. City of Falls City ---------- 759

32. One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. Cummings v. City of Falls City ------ 759

33. Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Shepherd v. City of Omaha ---------- 813

Affidavits.

1. Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper and that the evidence secured thereby should be suppressed. State v. Hogan ---------- 207
2. Although an affidavit may be used to prove service of process, such an affidavit cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Anderson v. Autocrat Corp. ---------- 278
3. Affidavits not offered and received in evidence will not be considered on appeal. Center Bank v. Mid-Continent Meats, Inc. ---------- 665

Aiders and Abettors.

Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. State v. Spidell ------ 494

Aircraft.

1. Where an aircraft can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damage. Sky Harbor Air Service, Inc. v. Lang ---------- 428
2. Where the aircraft cannot be restored to substantially the same condition as it was before the injury, the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident. Sky Harbor Air Service, Inc. v. Lang ---------- 428
3. Where personal property can be repaired so that when repaired it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of the repair plus the reasonable value of the use of the aircraft while being repaired with ordinary diligence, not exceeding the

value of the article before the injury. Sky Harbor Air Service, Inc. v. Lang ---------- 428

4. Where the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident, the injured party is not permitted to recover, in addition thereto, damages for loss of use. Sky Harbor Air Service, Inc. v. Lang ---------- 428

Alimony.

1. The District Court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. Tavlin v. Tavlin ---------- 98
2. The fixing of alimony rests in each case within the sound discretion of the trial court. Tavlin v. Tavlin 98
   Mathias v. Mathias ---------- 598
   Fanning v. Fanning ---------- 821
3. The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case. Tavlin v. Tavlin -- 98
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. Bralick v. Bralick ---------- 183
5. The proper procedure where an appeal is contemplated is to apply to the trial court for temporary allowances. Berigan v. Berigan ---------- 185
6. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree. Berigan v. Berigan ---------- 185
7. 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. Connolly v. Connolly ---------- 241
8. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. 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. Connolly v. Connolly -------- 241
9. A judgment of a trial court making a distribution of property will not be disturbed on appeal unless good cause is shown. Mathias v. Mathias -------- 598
10. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Hermance v. Hermance ---------- 720
11. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion. Hermance v. Hermance ---------- 720

Appeal and Error.

1. In reviewing a jury verdict involving rights of free expression under the First Amendment to the United States Constitution, the reviewing court shall make an independent judgment as a matter of law as to the obscenity vel non of the particular work. State v. American Theater Corp. ---------- 84
2. While in a divorce action the case is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Tavlin v. Tavlin ---------- 98
3. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Tavlin v. Tavlin -- 98
4. Sections 41 to 51 of Laws 1972, L.B. 1032, pp. 347 to 351, now sections 24-541 to 24-551, R. S. Supp., 1974, govern appeals to and trials in the District

Court of judgments of the county and municipal courts and do not pertain to appeals from the District Court to the Supreme Court. State v. Jacobsen ---------- 105

5. The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943. State v. Jacobsen ---------- 105

6. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Jacobsen ---------- 105

7. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. State v. Jacobsen ---------- 105

8. The requirement that on an appeal under section 60-420, R. R. S. 1943, a petition be filed in the District Court within 30 days from filing of the final order of the director is mandatory and jurisdictional. Miller v. Sullivan ---------- 127

9. An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children. Berigan v. Berigan ---------- 185

10. 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 thereon obtained. State v. Lytle ---------- 353

11. An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal. Omaha Assn. of Firefighters v. City of Omaha ---------- 436

12. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Williams ---------- 483

13. An order placing a defendant on probation is a final and appealable order. State v. Williams ---------- 483
14. 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. State v. Clark ---------- 487
15. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is 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. State v. Clark ---------- 487
16. Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court. State v. Clark ---------- 487
17. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett ---------- 502
18. In an appeal the appellant has the burden of establishing that there was error in the proceeding from which he appeals. State v. Schnatz ---------- 516
19. The findings of the trial court on conflicting evidence will not be disturbed on appeal unless clearly wrong. State v. McClelland ---------- 535
20. A defendant in a criminal case prosecuted in the municipal or county court is not, upon trial of his appeal to the District Court under the provisions of section 29-613, R. S. Supp., 1974, entitled to have the facts again determined by a jury. State v. Young ---------- 544
21. A verdict of guilty, based upon conflicting evidence, will not be set aside on appeal unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding beyond a reasonable doubt. State v. Fischer ---------- 578
22. The statutory requirement that the transcript be filed in the District Court within 30 days from the entry of judgment in the lower court is mandatory, and unless the appellant was prevented from comply-

ing with the statute by some default of the lower court, the District Court acquires no jurisdiction of the appeal if the filing was out of time. First Nat. Bank of Omaha v. Mitchell ---------- 628

23. Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed by this court. State v. Svoboda ---------- 663

24. 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. Svoboda ---- 663

25. On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo. Mackey v. Director of Department of Motor Vehicles ---------- 707

26. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Hermance v. Hermance ---------- 720

27. An appeal from an order revoking probation will lie even though no motion for new trial is filed. State v. Mosley ---------- 740

28. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Conger v. Conger ------- 771

29. In Nebraska every dispositive order in a juvenile proceeding that rests on an adjudication of delinquency is an appealable order. State ex rel. Casselman v. Macken ---------- 806

30. Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Shepherd v. City of Omaha ---------- 813

31. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Fanning v. Fanning ---------- 821

Arbitration and Award.

1. In the absence of fraud or mistake an arbitration award, whether at common law or under the statute, when regularly made and published, is prima facie binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it. Simpson v. Simpson -------- 453
2. Unless the contrary appears expressly, or is shown, it will be presumed that all matters which were presented to the arbitrators were passed on by them, and that the award is in conformity to the submission in this regard. Simpson v. Simpson -------- 453
3. Arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by simple announcement of the result of their investigations. Simpson v. Simpson ---------- 453

Arrest.

1. The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. State v. Lytle ---------- 353
2. Sufficient probable cause for an arrest is shown when the investigating officer of a fatal collision identifies the driver of one of the vehicles and observes his physical condition, including a strong odor of alcohol. State v. Fischer ---------- 578
3. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Franklin ---------- 630
4. In determining the voluntariness of the consent to search, the fact that a person is in custody when the consent is given is one of the circumstances to be considered. State v. Van Ackeren --------- 650

Attorney and Client.

1. An attorney is not barred from representing a subsequent client against a former client if the duties required of him do not conflict with those involved in the first employment. Bellairs v. Dudden ------ 5
2. General duties imposed on a public defender by statute do not automatically make him counsel for any individual in a criminal proceeding until appointment to represent a specific individual in a particular criminal proceeding has been made by a judicial officer. State v. Russell ---------- 64
3. In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
4. The amount of attorney's fees allowed generally rests in the sound discretion of the court. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
5. The award of attorneys' fees is discretionary with the District Court. Tavlin v. Tavlin ---------- 98
6. Where the trial court has made a property division and allowance of alimony, it may well feel to allow additional attorneys' fees would unbalance the division it had in mind. The trial court is in a much better position to make this decision. We will not disturb it in the absence of an abuse of discretion. Tavlin v. Tavlin ---------- 98
7. In order to come within the attorney-client privilege of section 25-1206, R. R. S. 1943, the communication must have been between the attorney and client and made in the course of professional employment and with reference to the subject matter of that employment. State v. Spidell ---------- 494
8. A communication between attorney and client made in the presence of others does not constitute a privileged communication within the meaning of section 25-1206, R. R. S. 1943. State v. Spidell ------ 494

Attorneys at Law.

1. In a disciplinary proceeding against an attorney,

the burden rests upon the relator to establish each count of the complaint to a reasonable certainty by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Cook 365

2. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Cook 365

3. Disciplinary Rule 1-102(A) provides, among other things: "A lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law." State ex rel. Nebraska State Bar Assn. v. Cook 365

4. The commission by an attorney of perjury is ground, depending upon the circumstances, for either disbarment or suspension from the practice of law. State ex rel. Nebraska State Bar Assn. v. Cook .. 365

5. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. Megel v. City of Papillion .. 819

Bailments.

1. In a prosecution for larceny as bailee under section 28-540, R. R. S. 1943, there must be a bailment of the property; while so held the bailee must convert the property to his own use; and such converting to his own use must be with the intent to steal the property. State v. McClanahan 261

2. In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. State v. McClanahan 261

Bills and Notes.

1. Unless specifically denied in the pleadings, signa-

tures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
2. When signatures are admitted, the burden is upon the defendant to plead and prove a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
3. The plea nil debet puts in issue no fact and cannot be regarded as a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
4. When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented. Center Bank v. Mid-Continent Meats, Inc. -------- 665

Brokers.

1. A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
2. The burden of proof is upon the real estate agent to show that he satisfied the fiduciary duties he owed his principal. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
3. A stockholder and officer of a real estate brokerage firm is jointly and individually liable for a breach of a fiduciary duty and constructive fraud committed by said firm where he had knowledge of and instigated such breach and fraud. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
4. A real estate broker becomes the agent of a property owner and owes the fiduciary duties incident to such relationship from the moment the parties orally agree to the listing of the property for the owner. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
5. A commission cannot be collected by the real estate broker for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Vogt v. Town & Country Realty of Lincoln, Inc. ------ 308

Burglary.

Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. State v. Spidell ---------- 494

Cancellation of Instruments.

1. Cancellation of a policy by the insurer is an affirmative defense and the burden is upon the defendant liability insurance company to prove a valid cancellation effective before the liability of the insured arose. Stilen v. Cavalier Ins. Corp. ---------- 824
2. The burden of establishing an effective cancellation before loss is on the insurer. Notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional. Stilen v. Cavalier Ins. Corp. ---------- 824
3. A notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable. Stilen v. Cavalier Ins. Corp. 824

Carriers.

Evidence of the existing rates for services as established by the Interstate Commerce Commission constitutes prima facie evidence of the reasonableness of those rates for the same services when performed in intrastate commerce in this state. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322

Civil Service.

1. The Civil Service Act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in section 19-1807, R. R. S. 1943. Cummings v. City of Falls City ---------- 759

2. The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission. Cummings v. City of Falls City ------ 759
3. If the evidence in the District Court on appeal is sufficient to show that the order of the civil service commission suspending or discharging an employee was made in good faith for cause, then the order of the commission must be affirmed. Cummings v. City of Falls City ---------- 759
4. One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. Cummings v. City of Falls City ---------- 759

Colleges and Universities.
1. A technical community college board may act officially only when convened and meeting in such capacity. Busboom v. Southeast Nebraska Tech. Community College ---------- 448
2. Section 79-1254.02, R. S. Supp., 1974, is applicable to the Board of Trustees of the Nebraska State Colleges. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

Commerce.
1. The Supremacy Clause (Article VI, paragraph 2), together with the Commerce Clause (Article I, section 8, clause 3), of the United States Constitution gives Congress the right and power to regulate interstate commerce, and this power acts to preempt state regulations in the area of interstate commerce if Congress intended to preempt the area, or if the state and federal laws irreconcilably conflict, or if in the nature of the subject regulated, there is a need for national uniformity. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
2. Title 47 U.S.C.A., section 221 (b), provides: Subject to the provisions of section 301 of this title, nothing in this act shall be construed to apply, or to give the commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in the connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or

foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ------ 404

Confessions.

1. Where an in-custody interrogation of a defendant fully complied with the procedures laid down in Miranda v. Arizona, appellate courts should be slow to mandate additional responsibilities. State v. Russell ---------- 64
2. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell ---- 64
3. A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective. State v. Russell ---------- 64
4. Where an accused in custody has been fully informed as to all his constitutional rights, and thereafter makes a statement admitting criminal conduct, the statement is admissible if it was otherwise voluntarily made. State v. Krueger ---------- 304
5. Law enforcement officers should make sure that no statements are made which offer the defendant a benefit or an advantage dependent upon the making or executing of a statement or confession. State v. Krueger ---------- 304
6. Minority is simply another factor to be considered in determining voluntariness, and there is no distinct or separate rule of evidence applicable to the confession of minors. State v. Lytle ---------- 353
7. It is elementary that a confession, in order to be admissible in evidence against its maker, must be voluntarily made with knowledge of the maker's constitutional rights, or in other words his rights must be voluntarily and intelligently waived. State v. Lytle ---------- 353
8. The admission of a codefendant's statement in-

culpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant. State v. Saltzman ---------- 525

9. The improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error in some cases. State v. Saltzman ---------- 525

10. The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination. State v. Saltzman ---------- 525

11. In a joint trial where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable. State v. Saltzman -------- 525

Confidential Communications.

Former section 25-1207, R. R. S. 1943, does not render confidential the communications to a physician in judicial proceedings involving injuries to children. State v. Norwood ---------- 595

Conflict of Laws.

1. A state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state. Miller v. Kingsley ---------- 123

2. The Supremacy Clause (Article VI, paragraph 2), together with the Commerce Clause (Article I, section 8, clause 3), of the United States Constitution gives Congress the right and power to regulate interstate commerce, and this power acts to preempt state regulations in the area of interstate commerce if Congress intended to preempt the area, or if the state and federal laws irreconcilably conflict, or if in the nature of the subject regulated, there is a need for national uniformity. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. -------- 404

3. In areas of the law not inherently requiring national uniformity, it is required that state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes that both cannot stand in the same area, or evidence of a congressional design to preempt the field. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

Conspiracy.

1. In conspiracy cases unusual latitude is permitted in the admission of evidence where the prosecution must depend upon circumstantial evidence to establish criminal intent, and the entire history of the conspiracy may be shown if the evidence tends to establish the ultimate fact. State v. McSwain ---------- 31
2. In the reception of circumstantial evidence in a conspiracy prosecution, great latitude must be allowed, and jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable jurors to come to a satisfactory conclusion. State v. McSwain ---------- 31
3. The Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction. State v. Karsten ---------- 227

Constitutional Law.

1. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission. Myers v. Blair Tel. Co. ---------- 55
2. Unlike some public service commissions, the Nebraska Public Service Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Myers v. Blair Tel. Co. ---------- 55
3. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell --- 64
4. The criteria for determining obscenity set forth in

the Nebraska obscenity statutes and as construed by this court are not violative of the First and Fifth Amendments to the United States Constitution, nor does such judicial construction as it applies to pre-Miller v. California offenses constitute such statutes ex post facto laws. State v. American Theater Corp. 84

5. In reviewing a jury verdict involving rights of free expression under the First Amendment to the United States Constitution, the reviewing court shall make an independent judgment as a matter of law as to the obscenity vel non of the particular work, State v. American Theater Corp. ---------- 84

6. 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. Jacobsen ---------- 105

7. Where a classification impinges upon fundamental freedoms protected by the Constitution, such classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest. Viochahoske v. City of Grand Island ---------- 175

8. The right to marry is a fundamental right afforded protection by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Viochahoske v. City of Grand Island ---------- 175

9. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island --- 175

10. It is a well-established rule that no one can complain a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason there is a possibility that one's interest may be injuriously affected in the future. Blackledge v. Richards ---------- 188

11. This court will not strike down legislation as violative of the title provision of Article III, section 14, of the Nebraska Constitution, if the title calls attention to the subject matter of the bill, and the portion of the bill challenged is germane to the

purpose announced in the title. Blackledge v. Richards ---------- 188

12. This court will not consider a constitutional question in the absence of a specification of the portion of the Constitution appellant desires vindicated. Blackledge v. Richards ---------- 188

13. Where an act does not purport to be amendatory, but it is enacted as original and independent legislation and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication, modify or repeal prior acts or parts thereof. Blackledge v. Richards 188

14. A grant of prescribed administrative powers is not an unlawful delegation of legislative authority. Blackledge v. Richards ---------- 188

15. The fact that a statutory grant of legislative authority to a municipal corporation is made in general terms is not basis for constitutional challenge. Blackledge v. Richards ---------- 188

16. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief. State v. Turner - 252

17. The Supremacy Clause (Article VI, paragraph 2), together with the Commerce Clause (Article I, section 8, clause 3), of the United States Constitution gives Congress the right and power to regulate interstate commerce, and this power acts to preempt state regulations in the area of interstate commerce if Congress intended to preempt the area, or if the state and federal laws irreconcilably conflict, or if in the nature of the subject regulated, there is a need for national uniformity. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

18. In areas of the law not inherently requiring national

uniformity, it is required that state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes that both cannot stand in the same area, or evidence of a congressional design to preempt the field. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

19. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Saltzman ---------- 525

20. The guarantee of a jury trial contained in the Sixth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment does not apply to petty offenses. Offenses for which the possible penalty does not exceed 6 months are classified as petty. State v. Young ---------- 544

21. The purpose of the provision of Article I, section 6, of the Nebraska Constitution, providing that the "right of trial by jury shall remain inviolate" was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. The constitutional right to a trial by jury under the Nebraska Constitution does not apply to a charge of second offense drunk driving because it is a misdemeanor, not recognized by the common law or any statute in existence when the Nebraska Constitution was adopted. State v. Young ---------- 544

22. The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons. State v. Skonberg ---------- 550

23. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Norwood ---------- 595

24. The special protection accorded by the Fourth Amendment to the people in their person, houses, papers, and effects is not extended to the open fields. State v. Poulson ---------- 601

25. In order to have standing to raise Fourth Amendment rights the individual must show he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence. State v. Van Ackeren ---------- 650

26. A defendant in a criminal case has no standing to

assert Fourth Amendment claims merely because evidence may have been obtained as the product of the invalid arrest of a third person. State v. Van Ackeren ---------- 650

27. A person against whom a search is directed and whose property is seized in a search has standing to challenge the validity of the search under the Fourth Amendment where the prosecution case against him depends upon the defendant's possession of the goods. State v. Van Ackeren ---------- 650

28. The Miranda rule is not applicable to searches and seizures under the Fourth Amendment. State v. Shepardson ---------- 673

29. The demands of due process do not require a hearing in the initial stage, or at any particular point, or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Chase v. Board of Trustees of Nebraska State Colleges ---- 688

30. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another. State ex rel. Douglas v. Gradwohl ---------- 745

31. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State ex rel. Douglas v. Gradwohl ---------- 745

32. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. State ex rel. Douglas v. Gradwohl ---------- 745

33. The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter. State ex rel. Douglas v. Gradwohl -- 745

34. Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication modify or repeal prior acts or parts thereof. State ex rel. Douglas v. Gradwohl 745

35. If an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other statutes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified. State ex rel. Douglas v. Gradwohl -- 745

36. The provision of Article III, section 14, of the Constitution of Nebraska, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," is not violated by the failure to mention in the title of a punitive act an incidental provision of the act providing for the payment, or the exemption from payment, of the costs of prosecution, where the title itself appropriately describes the general subject of the legislation. State ex rel. Douglas v. Gradwohl -------- 745

37. This court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court. State ex rel. Casselman v. Macken ---------- 806

Continuances.

An application for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Boyce ---------- 538

Contractors.

Generally a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. Stover v. Ed Miller & Sons, Inc. ---------- 422

Contracts.

1. Section 30-106, R. S. Supp., 1974, requires that an antenuptial contract to be effective shall be in writing, signed by both parties to such marriage, and acknowledged in the manner required by law for the conveyance of real estate or executed in con-

formity with the laws of the place where made. Antenuptial agreements are only valid in this state if made in conformity with this section. Tavlin v. Tavlin ---------- 98

2. Where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment. Schademann v. Casey ---------- 149

3. Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. Olson v. Pedersen ---------- 159

4. An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it. Olson v. Pedersen ---------- 159

5. Under section 52-118.02, R. R. S. 1943, a final settlement is a determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. -- 248

6. An administrative agency settlement involves a statement of account, including all charges and credits deemed allowable by the department, after deciding, with intended finality so far as its functions are concerned, such matters as the sufficiency of performance, allowance of liquidated damages, contingent liabilities, etc. A determination that particular amounts may be due or paid merely as

payments on account is not a final settlement. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. ---------- 248

7. So long as the public body contends that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is ordinarily no final settlement of the contract. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. ---------- 248

8. Generally, a party cannot accept the benefits of a contract, and then claim that the contract is forfeited. Randall v. Erdman ---------- 390

9. Where a party to a contract, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach. Randall v. Erdman ---------- 390

10. The courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constitute a waiver of the default so as to entitle the lessee to enforce the option to purchase. Randall v. Erdman ---------- 390

11. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and of the parties. Such a construction of the contract should ordinarily be enforced. Randall v. Erdman ---------- 390

12. Generally a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. Stover v. Ed Miller & Sons, Inc. -- 422

13. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence. Stover v. Ed Miller & Sons, Inc. 422

14. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. Stover v. Ed Miller & Sons, Inc. ---------- 422

15. Substantial performance is shown when the follow-

ing circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial, and the party has no right of recovery. Alliance Tractor & Imp. Co. v. Lukens Tool & Die Co. ---------- 473

16. When parties to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. Burhoop v. Pegram ---------- 606

17. Written evidence of antecedent understandings and agreements will not be used to vary a later unambiguous integrated agreement. Burhoop v. Pegram - 606

18. A finding of law that a contract is unambiguous is correct, if the contract as a whole is not susceptible to being understood in more than one sense. Burhoop v. Pegram ---------- 606

19. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Wyatt v. Woodmen Acc. & Life Co. ---------- 614

20. The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. Wyatt v. Woodmen Acc. & Life Co. ---------- 614

21. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to mean but what a reasonable person in

the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction. Wyatt v. Woodmen Acc. & Life Co. ---------- 614

22. If the loss exceeds the amount of insurance paid, an action may be brought in the name of the insured for the entire loss. Schweitz v. Robatham -- 668

23. A party cannot maintain an action on a contract without a prior substantial compliance on his part. If there has been a substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Schweitz v. Robatham ---- 668

24. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Klabunde v. Klabunde ---------- 681

25. An agreement between a lessor and a lessee that the lessee will apply to the Nebraska Liquor Control Commission for a license for the premises, and will not seek permission to transfer the license to a different location, and upon expiration of the lease will assist the lessor in obtaining a license for the premises is not void as against public policy. Greco v. Bonacci ---------- 685

26. If a party by his contract creates a duty or imposes a charge upon himself, he must ordinarily substantially comply with the undertaking. University Products of Nebraska, Inc. v. Jensen ---------- 700

27. As a general rule, limitations of liability, and loss from an excepted cause, are matters of defense to be specially pleaded by the insurer. Farmers Union Coop. Ins. Co. v. Reinwald ---------- 766

28. A garage liability policy which excludes coverage of an automobile which has been transferred to another by the named insured, pursuant to an agreement of sale, is not proscribed by statute, nor is it against public policy. Dyas v. Morris ---------- 773

29. An agreement which fully complied with the pro-

visions of section 60-1417, R. S. Supp., 1967, constituted a valid agreement of sale. Dyas v. Morris 773

30. A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp. 810

31. Cancellation of a policy by the insurer is an affirmative defense and the burden is upon the defendant liability insurance company to prove a valid cancellation effective before the liability of the insured arose. Stilen v. Cavalier Ins. Corp. 824

32. The burden of establishing an effective cancellation before loss is on the insurer. Notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional. Stilen v. Cavalier Ins. Corp. 824

33. A notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable. Stilen v. Cavalier Ins. Corp. 824

Controlled Substances.

1. 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. Bartlett 502

2. 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 narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Bartlett 502

3. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. State v. Bartlett 502

Coram Nobis.

1. The enactment of the Post Conviction Act, sections

29-3001 to 29-3004, R. S. Supp., 1974, did not eliminate the common law remedy of writ of error coram nobis. State v. Turner ---------- 252

2. A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented the entry of judgment. State v. Turner ---------- 252

3. The common law writ of error coram nobis is intended to correct a judgment in the same court in which it was rendered on the ground of error of fact for which the statute provides no other remedy. State v. Schnatz ---------- 516

4. The writ of error coram nobis is available when that error of fact for which the statute provides no other remedy does not appear of record or was unknown to the court when the judgment was pronounced and which if known would have prevented the judgment. State v. Schnatz ---------- 516

5. 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. State v. Wilson ---------- 587

6. A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented entry of the judgment. State v. Wilson ---- 587

7. The remedy of coram nobis is not available to correct errors of law. State v. Wilson ---------- 587

Costs.

The provision of Article III, section 14, of the Constitution of Nebraska, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," is not violated by the failure to mention in the title of a punitive act an incidental provision of the act providing for the payment, or the exemption from payment, of the costs of prosecution, where the title itself appropriately describes the general subject of the legislation. State ex rel. Douglas v. Gradwohl -- 745

Court of Industrial Relations.

1. Prevalent wage rates to be determined by the Court of Industrial Relations for firemen in the City of Omaha, Nebraska, must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. Omaha Assn. of Firefighters v. City of Omaha ---------- 436
2. Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Omaha Assn. of Firefighters v. City of Omaha ---------- 436
3. In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits. Omaha Assn. of Firefighters v. City of Omaha ---------- 436
4. An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal. Omaha Assn. of Firefighters v. City of Omaha --- 436

Courts.

1. Sections 41 to 51 of Laws 1972, L.B. 1032, pp. 347 to 351, now sections 24-541 to 24-551, R. S. Supp., 1974, govern appeals to and trials in the District Court of judgments of the county and municipal courts and do not pertain to appeals from the District Court to the Supreme Court. State v. Jacobsen 105
2. Ordinarily the duly authenticated record of a county court imports absolute verity. State v. Goodrich -- 217
3. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws. State v. Lytle ---------- 353
4. Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court. State v. Clark ---------- 487
5. A defendant in a criminal case prosecuted in the municipal or county court is not, upon trial of his appeal to the District Court under the provisions

of section 29-613, R. S. Supp., 1974, entitled to have the facts again determined by a jury. State v. Young ---------- 544

6. Under section 39-669.22, R. R. S. 1943, every court in this state shall make complete records, including the judgment of conviction, of every case in which a person is charged with the violation of traffic regulations specified in that section. Hyland v. State ---------- 737

7. Under section 39-669.24, R. R. S. 1943, a certified abstract for conviction report forwarded by the trial court to the Director of Motor Vehicles must include a judgment of conviction to authorize the Director of Motor Vehicles to revoke or suspend a motor vehicle operator's license on the basis of that conviction. Hyland v. State ---------- 737

8. In Nebraska every dispositive order in a juvenile proceeding that rests on an adjudication of delinquency is an appealable order. State ex rel. Casselman v. Macken ---------- 806

9. The proceedings leading to a final judgment or order in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding. State ex rel. Casselman v. Macken ---------- 806

Criminal Law.

1. In this state the test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Russell ---------- 64

2. A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. State v. Russell ---------- 64

3. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. State v. Russell -- 64

4. Where an in-custody interrogation of a defendant fully complied with the procedures laid down in

Miranda v. Arizona, appellate courts should be slow to mandate additional responsibilities. State v. Russell ---------- 64

5. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell - 64

6. A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective. State v. Russell ---------- 64

7. While procedural statutes do apply to pending litigation, they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. State v. Russell ---------- 64

8. In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused. State v. Harris ---------- 74
State v. Lytle ---------- 353

9. In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another. State v. Harris ---------- 74
State v. Lytle ---------- 353

10. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. State v. Harris ---------- 74
State v. Lytle ---------- 353

11. An efficient intervening cause is a new and inde-

pendent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death. State v. Harris - 74
State v. Lytle ---------- 353

12. The criteria for determining obscenity set forth in the Nebraska obscenity statutes and as construed by this court are not violative of the First and Fifth Amendments to the United States Constitution, nor does such judicial construction as it applies to pre-Miller v. California offenses constitute such statutes ex post facto laws. State v. American Theater Corp. ---------- 84

13. Where a movie film is publicly shown, knowledge of its contents by the exhibitor is sufficiently demonstrated so as to establish scienter necessary in criminal cases. State v. American Theater Corp. ------ 84

14. The limitation upon the minimum term specified in section 83-1,105(1), R. S. Supp., 1974, is the maximum sentence provided by law and not the maximum sentence imposed by the court. State v. Miles ---------- 123

15. In this state all public offenses are statutory. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law. State v. Ewert ---------- 203
State v. Karsten ---------- 227

16. Where in a criminal prosecution the face of the record clearly discloses that the information upon which the defendant has been found guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and no appeal has been taken, the trial court should, upon proper motion, vacate the judgment of conviction. State v. Ewert ---------- 203

17. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Hogan ---------- 207

18. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal on one or more degrees of a crime, an attempt to do

so will be treated as withdrawing the issue from consideration by the jury. State v. Hogan ---------- 207

19. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence. State v. Miller -- 215

20. Ordinarily, no penalty can be incurred under the law of this state except for transactions occurring within this state, and our state law has no extraterritorial effect. State v. Karsten ---------- 227

21. The Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction. State v. Karsten ---------- 227

22. To sustain a conviction the evidence must show beyond a reasonable doubt not only that the crime was committed, but also that the defendant committed it. State v. Cardin ---------- 231

23. Under section 29-2261, R. S. Supp., 1974, the use of a presentence report is only required for sentencing if the offense is a felony. State v. Cardin -------- 231

24. A remedy is cumulative when it is created by statute and is in addition to a remedy which still remains in force. State v. Turner ---------- 252

25. A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented the entry of judgment. State v. Turner ---- 252

26. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief. State v. Turner ---------- 252

27. 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. McClanahan ---------- 261
28. It is preferable that all participants in one crime or series of related crimes should be sentenced by the same judge, if possible, on their conviction. State v. Burkhardt ---------- 265
29. Where an accused in custody has been fully informed as to all his constitutional rights, and thereafter makes a statement admitting criminal conduct, the statement is admissible if it was otherwise voluntarily made. State v. Krueger ---------- 304
30. Law enforcement officers should make sure that no statements are made which offer the defendant a benefit or an advantage dependent upon the making or executing of a statement or confession. State v. Krueger ---------- 304
31. The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. State v. Lytle ---------- 353
32. 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. Huskey ---------- 388
State v. Ford ---------- 400
State v. Swift ---------- 515
State v. Howard ---------- 521
State v. Green ---------- 770
33. The action of a trial court in denying probation and imposing a sentence will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Huskey ---------- 388
34. The interpretation of the indeterminate sentence statute, section 83-1,105 (1), R. S. Supp., 1974, announced in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, is adhered to. State v. Ford ---------- 400
35. In imposing sentence and denying probation in a

criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Basler ---- 402

36. A plea of nolo contendere admits the matters alleged in the information and has the same effect as a plea of guilty so far as issues of fact are concerned. State v. Kilmer ---------- 434

37. An erroneous or invalid sentence, unauthorized under the law or the statute, may be set aside by the District Court during the period of time that it retains jurisdiction of the defendant, and a valid sentence authorized by law may be pronounced providing the record shows a personal appearance of the defendant and counsel and the sentence and proceedings are otherwise properly entered. State v. Shelby ---------- 445

38. In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal. State v. Weiand ---------- 461
State v. Suttle ---------- 470
State v. Clark ---------- 487

39. An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity. State v. Williams ---------- 483

40. If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted. State v. Williams ---- 483

41. Section 29-2261, R. S. Supp., 1974, contemplates that when imposing sentence a judge should consider, among other things, the offender's history of delinquency or criminality. Offenses committed while on probation are a part of such a history. State v. Williams ---------- 483

42. 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. Carr ---------- 485

43. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Carr ---------- 485

44. 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. State v. Clark ---------- 487

45. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is 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. State v. Clark ---------- 487

46. Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court. State v. Clark ---------- 487

47. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Spidell ---------- 494
State v. Bartlett ---------- 502

48. In order to come within the attorney-client privilege of section 25-1206, R. R. S. 1943, the communication must have been between the attorney and client and made in the course of professional employment and with reference to the subject matter of that employment. State v. Spidell ---------- 494

49. A communication between attorney and client made in the presence of others does not constitute a privileged communication within the meaning of section 25-1206, R. R. S. 1943. State v. Spidell ---- 494

50. Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. State v. Spidell ---------- 494

51. Exercise of discretion by the trial court to impose sentence of imprisonment is properly exercised when the record shows risk of further criminal conduct, and that most effective correctional treatment will

be provided by commitment to a correctional facility. State v. Dedrick ---------- 500

52. 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. Bartlett ---------- 502

53. 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 narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Bartlett ---------- 502

54. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. State v. Bartlett ---------- 502

55. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Bartlett ---------- 502

56. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. State v. Bartlett ---------- 502

57. Where, as a consequence of a lawful search, police officers lawfully obtain knowledge of relevant and material facts they may testify to those facts. State v. Bartlett ---------- 502

58. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire

cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett ---------- 502

59. The common law writ of error coram nobis is intended to correct a judgment in the same court in which it was rendered on the ground of error of fact for which the statute provides no other remedy. State v. Schnatz ---------- 516

60. The writ of error coram nobis is available when that error of fact for which the statute provides no other remedy does not appear of record or was unknown to the court when the judgment was pronounced and which if known would have prevented the judgment. State v. Schnatz ---------- 516

61. In an appeal the appellant has the burden of establishing that there was error in the proceeding from which he appeals. State v. Schnatz ---------- 516

62. The Nebraska statute on kidnapping, section 28-417, R. S. Supp., 1974, refers to "any person" and does not exclude a wife or former wife as a victim. State v. St. Clair ---------- 519

63. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. St. Clair ---------- 519

64. Where defendants participated in the same series of acts or transactions constituting the offense charged, in the absence of a showing that a defendant would be prejudiced by a consolidation of the cases for trial, the consolidation is proper and will not be disturbed on appeal. State v. Saltzman ---- 525

65. The admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant. State v. Saltzman ---------- 525

66. The improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error in some cases. State v. Saltzman ---------- 525

67. The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement so long as the declarant is testifying as a witness and

is or has been subject to full and effective cross-examination. State v. Saltzman ---------- 525

68. In a joint trial where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable. State v. Saltzman ---------- 525

69. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Saltzman ---------- 525

70. Circumstantial evidence is sufficient to sustain a finding of guilty if it is substantial. State v. Billingsley ---------- 532

71. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the evidence is sufficient to sustain a finding of guilty. State v. Billingsley ---------- 532

72. An application for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Boyce ---------- 538

73. Where a county attorney has a disqualifying personal interest in obtaining an acquittal or conviction, a special prosecutor should be appointed to conduct the criminal prosecution. State v. Boyce -- 538

74. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion. State v. Purviance -------- 541

75. The guarantee of a jury trial contained in the Sixth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment does not apply to petty offenses. Offenses for which the possible penalty does not exceed 6 months are classified as petty. State v. Young ---------- 544

76. The purpose of the provision of Article I, section 6, of the Nebraska Constitution, providing that the "right of trial by jury shall remain inviolate" was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. The constitu-

tional right to a trial by jury under the Nebraska Constitution does not apply to a charge of second offense drunk driving because it is a misdemeanor, not recognized by the common law or any statute in existence when the Nebraska Constitution was adopted. State v. Young ---------- 544

77. A defendant in a criminal case prosecuted in the municipal or county court is not, upon trial of his appeal to the District Court under the provisions of section 29-613, R. S. Supp., 1974, entitled to have the facts again determined by a jury. State v. Young ---------- 544

78. The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons. State v. Skonberg ---------- 550

79. The existence and voluntariness of a consent to search is a question of fact. State v. Skonberg -- 550

80. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Bell ---------- 554

81. A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, and escape with the loot is as important in the commission of the crime as gaining possession of the property. State v. Bell ---------- 554

82. If one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, the crime of robbery has been committed. State v. Bell ---------- 554

83. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Evans ---------- 559

84. It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice. State v. Evans ---------- 559

85. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section

1.8 of the ABA Standards Relating to Pleas of Guilty. State v. Evans ---------- 559

86. When the evidence is insufficient to establish a taking of property or the ownership of such property, a charge of larceny should be dismissed. State v. McFarland ---------- 569

87. 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. The above principle does not apply, however, where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crimes, and where the new statute, taken as a whole, may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Country ---------- 570

88. Sufficient probable cause for an arrest is shown when the investigating officer of a fatal collision identifies the driver of one of the vehicles and observes his physical condition, including a strong odor of alcohol. State v. Fischer ---------- 578

89. When the instructions given to the jury correctly submit the essential elements of the offense charged and state generally the law of the case, error may not be predicated on the failure to further instruct the jury on some particular phase of the case, when no proper instruction on the subject was requested by appellant. State v. Fischer ---------- 578

90. A verdict of guilty, based upon conflicting evidence, will not be set aside on appeal unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding beyond a reasonable doubt. State v. Fischer ---------- 578

91. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975). State v. Trowbridge - 582

92. 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. State v. Wilson ---------- 587

93. A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented entry of the judgment. State v. Wilson --- 587

94. The remedy of coram nobis is not available to correct errors of law. State v. Wilson ---------- 587

95. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. State v. Adamson ---------- 592

96. The admission of irrelevant evidence and the asking of improper questions is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Gurule -------- 618

97. Where a person has no previous intent or purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforement agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer apparently provides a favorable opportunity for the violation does not constitute entrapment. State v. Gurule ---------- 618

98. The important consideration in determining whether entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime. State v. Gurule ---------- 618

99. Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers. State v. Gurule -- 618

100. An undercover agent who is employed by the State and paid a weekly salary to investigate and gather evidence of drug violations is not an informer such

as to require that the jury be advised his testimony is entitled to special scrutiny. State v. Gurule ---- 618

101. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Franklin ---------- 630

102. It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Evidence of similar crimes with third persons is not admissible. State v. Franklin ------ 630

103. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.
State v. Franklin ---------- 630
State v. Van Ackeren ---------- 650

104. The criteria for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Mitchell --- 648

105. As to a factual basis for a plea of guilty, it is sufficient if the presentence investigation report which is before the court when sentence is pronounced discloses a factual basis for the plea. State v. Mitchell 648

106. 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. Svoboda ---- 663

107. The Miranda rule requires only that a suspect be advised of his constitutional rights before a custodial interrogation occurs; and general on-the-scene questioning as to circumstances surrounding criminal activity or other general questioning of citizens in

the fact-finding process is not proscribed by that decision. State v. Shepardson ---------- 673
108. The Miranda rule is not applicable to searches and seizures under the Fourth Amendment. State v. Shepardson ---------- 673
109. Contraband objects falling in plain view of a peace officer who has a lawful right to be in the position from which he makes his observation are subject to seizure and may be introduced into evidence. State v. Shepardson ---------- 675

Crosswalks.
1. The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within a crosswalk. § 39-754.05(1), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729
2. Crosswalk shall mean: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edge of the traversable roadway; or (b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface. § 39-741(10) (a), (b), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

Damages.
1. It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed. The measure of recovery in all civil cases is compensation for the injury sustained. Miller v. Kingsley ---------- 123
2. Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. K & R, Inc. v. Crete Storage Corp. ---------- 138
3. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof.

They may not be established by conjecture, speculation, or doubtful proof. K & R, Inc. v. Crete Storage Corp. ---------- 138

4. An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it. Olson v. Pedersen ---------- 159

5. Under some circumstances a party may be required to mitigate his damages by resorting to appropriate and reasonable legal remedies to obtain possession of personal property wrongfully detained from him, and if he does not do so, damages will be denied. Olson v. Pedersen ---------- 159

6. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. Olson v. Pedersen ---------- 159

7. The opinion of a witness as to the value of property will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the trier of fact. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308

8. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308

9. Where an aircraft can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damage. Sky Harbor Air Service, Inc. v. Lang ---------- 428

10. Where the aircraft cannot be restored to substantially the same condition as it was before the injury, the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident. Sky Harbor Air Service, Inc. v. Lang ---------- 428

11. Where personal property can be repaired so that when repaired it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of the repair plus the reasonable value of the use of the aircraft while being repaired with ordinary diligence, not exceeding the value of the article before the injury. Sky Harbor Air Service, Inc. v. Lang ---------- 428
12. Where the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident, the injured party is not permitted to recover, in addition thereto, damages for loss of use. Sky Harbor Air Service, Inc. v. Lang ---------- 428
13. A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law. Schweitz v. Robatham ---------- 668
14. Under section 25-804, R. S. Supp., 1973, inclusion of dollar amount for general damages is not jurisdictional and summons not void. Swick v. Coslor - 781

Decedents' Estates.

The fact that the minor stepdaughter of a testatrix was physically absent from the home and household of the testatrix attending school, during a part of which time she lived with maternal relatives in another state and was physically present in the testatrix' home only during vacation time, did not of itself prevent the stepdaughter from being a member of the household of and having her permanent home in the home of the testatrix for 5 continuous years within the meaning of section 77-2004, R. R. S. 1943. Wondra v. Platte Valley State Bank & Trust Co. ---------- 41

Disciplinary Proceedings.

1. In a disciplinary proceeding against an attorney, the burden rests upon the relator to establish each count of the complaint to a reasonable certainty by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Cook -------- 365

2. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365
3. Disciplinary Rule 1-102(A) provides, among other things: "A lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law." State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365
4. The commission by an attorney of perjury is ground, depending upon the circumstances, for either disbarment or suspension from the practice of law. State ex rel. Nebraska State Bar Assn. v. Cook ---- 365

Discovery.

A transcript of court proceedings prepared by an official court reporter is not a part of an attorney's work product; it is subject to discovery on payment of a proportionate share of its cost. Schademann v. Casey ---------- 149

Dismissal and Nonsuit.

1. Where a dismissal for want of prosecution is vacated conditionally, and the plaintiff elects to review the order by filing a notice of appeal and supersedeas bond within the time provided for complying with the condition, the plaintiff abandons any right to later comply with the condition. Korte v. Betzer -- 828
2. Where a dismissal for want of prosecution is vacated upon condition the plaintiff pay costs, fees, and expenses within 30 days, a supersedeas bond filed before the expiration of the 30-day period does not suspend the running of the 30-day period but accelerates the dismissal of the action in accordance with the terms of the order. Korte v. Betzer ---------- 828

Divorce.

1. The District Court has power to consider all the property accumulated by the joint efforts of both

husband and wife, and to adjust their respective property rights. Tavlin v. Tavlin ---------- 98

2. The fixing of alimony rests in each case within the sound discretion of the trial court. Tavlin v. Tavlin 98
Mathias v. Mathias ---------- 598
Fanning v. Fanning ---------- 821

3. The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case. Tavlin v. Tavlin ---------- 98

4. While in a divorce action the case is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Tavlin v. Tavlin ---------- 98

5. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Tavlin v. Tavlin ---------- 98
Fanning v. Fanning ---------- 821

6. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Carper v. Rokus ---------- 113

7. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771

8. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the en-

try of the decree. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771
9. 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. Bralick v. Bralick ---------- 183
10. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered, and the amount rests in the sound discretion of the court. Bralick v. Bralick ---------- 183
11. An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children. Berigan v. Berigan -- 185
12. The proper procedure where an appeal is contemplated is to apply to the trial court for temporary allowances. Berigan v. Berigan ---------- 185
13. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree. Berigan v. Berigan ---------- 185
14. 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. Bliven v. Bliven ---------- 225
15. 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. Connolly v. Connolly ---------- 241
16. 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. Connolly v. Connolly -------- 241
17. In a divorce case, ex parte investigative reports are

not evidence, and cannot be the basis for any adjudication. Jorgensen v. Jorgensen ---------- 271

18. Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Jorgensen v. Jorgensen ---------- 271

19. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights of a fit, proper, and suitable parent. Jorgensen v. Jorgensen ---------- 271

20. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken. Mathias v. Mathias ---------- 598

21. A judgment of a trial court making a distribution of property will not be disturbed on appeal unless good cause is shown. Mathias v. Mathias ---------- 598

22. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Klabunde v. Klabunde ---------- 681

23. A refusal by the trial court to set aside a decree within the 6-month period will not be reversed on appeal in the absence of an affirmative showing of an abuse of discretion. Klabunde v. Klabunde ---------- 681

24. Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce. State ex rel. Frasier v. Whaley 703

25. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Hermance v. Hermance ---------- 720

26. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in

this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion. Hermance v. Hermance ---------- 720

27. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Conger v. Conger ---------- 771

28. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Fanning v. Fanning ---------- 821

Domicile.

1. The fact that the minor stepdaughter of a testatrix was physically absent from the home and household of the testatrix attending school, during a part of which time she lived with maternal relatives in another state and was physically present in the testatrix' home only during vacation time, did not of itself prevent the stepdaughter from being a member of the household of and having her permanent home in the home of the testatrix for 5 continuous years within the meaning of section 77-2004, R. R. S. 1943. Wondra v. Platte Valley State Bank & Trust Co. -- 41

2. The domicile of an unemancipated, legitimate infant is the same as that of the father and will be deemed to have continued the same until it is shown to have been legally changed in circumstances warranting the change. Clymer v. La Velle ---------- 91

3. The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right. Clymer v. La Velle -------- 91

4. It is a well-settled general rule that an infant's domicile, upon the death of both parents, is ordinarily determined by the domicile at death of the last surviving parent, and remains the same until changed by operation of law or the proper act of a guardian. Clymer v. La Velle ---------- 91

5. It is the rule at common law that the domicile of a

minor is the same as the domicile of the parent with whom he lives. State ex rel. Frasier v. Whaley -- 703

6. Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce. State ex rel. Frasier v. Whaley - 703

Due Process.

1. Ex parte statements are too unreliable to be considered in the investigation of controverted facts, and due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. Jorgensen v. Jorgensen -------- 271
2. Neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he takes the stand as a witness, is sworn, and is subjected to the usual test of cross-examination. Jorgensen v. Jorgensen ---------- 271
3. Where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report to testify and may call other witnesses to contradict any facts in the report. Jorgensen v. Jorgensen -- 271

Election of Remedies.

A remedy is cumulative when it is created by statute and is in addition to a remedy which still remains in force. State v. Turner ---------- 252

Employer and Employee.

1. Where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment. Schademann v. Casey ---------- 149
2. The theory that public employment which may be denied altogether may be subjected to any conditions

regardless of how unreasonable has been uniformly rejected. Viochahoske v. City of Grand Island ---- 175
3. Where a classification impinges upon fundamental freedoms protected by the Constitution, such classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest. Viochahoske v. City of Grand Island ---------- 175
4. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island 175
5. The state or a subdivision thereof, having formulated a law or rule which establishes a system of classification which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest. Viochahoske v. City of Grand Island ---------- 175
6. Discrimination by an employer against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex is an unlawful employment practice under the Nebraska Fair Employment Practice Act. Richards v. Omaha Public Schools ---------- 463
7. A maternity leave policy which requires that an employee's leave begin a fixed period before the expected date of birth is an unlawful employment practice. Richards v. Omaha Public Schools ---- 463
8. A classification based on pregnancy is not a classification based on sex. Richards v. Omaha Public Schools ---------- 463

Entrapment.
1. Where a person has no previous intent or purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer apparently provides a favorable opportunity for the violation does not constitute entrapment. State v. Gurule ---------- 618
2. The important consideration in determining whether

entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime. State v. Gurule ---------- 618

Equity.

An action to enforce a constructive trust is an equitable action, and on appeal the Supreme Court will consider the record de novo. Bellairs v. Dudden --- 5

Estates.

Where a will, in express terms, creates a life estate in the donee, and annexes thereto a power of appointment or disposal, with remainder over to certain named beneficiaries, the first taker takes but a life estate. McDonald v. Schaughnessy ---------- 221

Estoppel.

Estoppel is not a cause of action nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp. ---------- 810

Evidence.

1. There are exceptions to the general rule requiring identification of participants in telephone conversations. One is a class of cases comprising statements which themselves are facts constituting part of the transaction under investigation and which are admissible in evidence under the rule of res gestae. The motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act; such statements are in the nature of verbal acts and are admissible in evidence with the remainder of the transaction which they illustrate. The purpose of admitting a verbal act or fact is to prove the nature of an act rather than to prove the truth of any alleged statement. State v. McSwain ---------- 31
2. In conspiracy cases unusual latitude is permitted in the admission of evidence where the prosecution must depend upon circumstantial evidence to establish criminal intent, and the entire history of the conspiracy may be shown if the evidence tends to establish the ultimate fact. State v. McSwain ---- 31
3. Circumstances preceding or following a telephone

conversation may serve to sufficiently identify the caller so as to render the telephone communication admissible. State v. McSwain ---------- 31

4. In the reception of circumstantial evidence in a conspiracy prosecution, great latitude must be allowed, and jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable jurors to come to a satisfactory conclusion. State v. McSwain -------- 31

5. A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. State v. Russell ---------- 64

6. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. State v. Russell -- 64

7. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell 64

8. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Jacobsen ---------- 105

9. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance that is being attacked precludes our consideration of it here. State v. Sator ---------- 120

10. The jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. K & R, Inc. v. Crete Storage Corp. - 138

11. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof.

They may not be established by conjecture, speculation, or doubtful proof. K & R, Inc. v. Crete Storage Corp. ---------- 138

12. A defendant who seeks to suppress evidence under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed. State v. Hogan ---------- 207

13. Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper and that the evidence secured thereby should be suppressed. State v. Hogan ---------- 207

14. The failure to object promptly to an offer of evidence waives the objection. State v. Hogan ---------- 207

15. A written extrajudicial utterance may be admissible in evidence without regard to the truth of the assertion made for its nontestimonial value as a circumstance, provided it is legally relevant. The hearsay rule does not apply to such use. State v. Hogan 207

16. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Hogan ---------- 207

17. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal on one or more degrees of a crime, an attempt to do so will be treated as withdrawing the issue from consideration by the jury. State v. Hogan ---------- 207

18. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence. State v. Miller 215

19. Error in the admission of evidence is not ground for reversal if no substantial miscarriage of justice occurred. State v. Miller ---------- 215

20. To sustain a conviction the evidence must show beyond a reasonable doubt not only that the crime was committed, but also that the defendant committed it. State v. Cardin ---------- 231

21. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief. State v. Turner 252

22. In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. State v. McClanahan --- 261

23. 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. McClanahan ---------- 261

24. If an objection to the introduction of evidence is made, the party making the objection must insist that the trial court rule on the objection or else it is waived. State v. McClanahan ---------- 261

25. In a divorce case, ex parte investigative reports are not evidence. and cannot be the basis for any adjudication. Jorgensen v. Jorgensen ---------- 271

26. Under section 25-540, R. S. Supp., 1974, of the Nebraska Long Arm Statute, when service upon a nonresident defendant is made by mail, proof of such service must include a receipt signed by the addressee, or other evidence of personal delivery to the addressee satisfactory to the court. Anderson v. Autocrat Corp. ---------- 278

27. Although an affidavit may be used to prove service of process, such an affidavit cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in

and made a part of the bill of exceptions. Anderson v. Autocrat Corp. ---------- 278

28. The burden of proving a cause of action is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. Wees v. Creighton Memorial St. Joseph's Hospital - 295

29. In every case before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

30. Evidence of the existing rates for services as established by the Interstate Commerce Commission constitutes prima facie evidence of the reasonableness of those rates for the same services when performed in intrastate commerce in this state. Nebraska Railroads of Omaha v. Nebco, Inc. -------- 322

31. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Lytle ---------- 353

32. The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

33. An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal. Omaha Assn. of Firefighters v. City of Omaha --- 436

34. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is 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. State v. Clark ---------- 487

35. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State

v. Spidell ---------- 494
State v. Bartlett ---------- 502
36. 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. Bartlett ---------- 502
37. 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 narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Bartlett ---------- 502
38. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. State v. Bartlett 502
39. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Bartlett ---- 502
40. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. State v. Bartlett ---------- 502
41. Circumstantial evidence is sufficient to sustain a finding of guilty if it is substantial. State v. Billingsley 532
42. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the evidence is sufficient to sustain a finding of guilty. State v. Billingsley ---------- 532
43. In a post conviction proceeding the petitioner has the burden of establishing a basis for relief. State v. McClelland ---------- 535
44. The existence and voluntariness of a consent to search is a question of fact. State v. Skonberg -- 550

45. When the evidence is insufficient to establish a taking of property or the ownership of such property, a charge of larceny should be dismissed. State v. McFarland ---------- 569
46. A verdict of guilty, based upon conflicting evidence, will not be set aside on appeal unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding beyond a reasonable doubt. State v. Fischer ---------- 578
47. The findings of the trial court as to the evaluation of the evidence and the question of custody will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Norwood ---------- 595
48. When parties to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. Burhoop v. Pegram ---------- 606
49. Written evidence of antecedent understandings and agreements will not be used to vary a later unambiguous integrated agreement. Burhoop v. Pegram - 606
50. The admission of irrelevant evidence and the asking of improper questions is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Gurule ---------- 618
51. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Franklin ---------- 630
52. After trial and conviction in the District Court, any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Franklin ---------- 630
53. It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corrob-

orative value. Evidence of similar crimes with third persons is not admissible. State v. Franklin ------ 630

54. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.
State v. Franklin ---------- 630
State v. Van Ackeren ---------- 650

55. The determination of whether a consent to search is voluntarily given is a question of fact. State v. Van Ackeren ---------- 650

56. The burden of proving the voluntariness of the consent is upon the prosecutor. State v. Van Ackeren - 650

57. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Van Ackeren ---- 650

58. In determining the voluntariness of the consent to search, the fact that a person is in custody when the consent is given is one of the circumstances to be considered. State v. Van Ackeren ---------- 650

59. The applicable standard of review of the District Court's determination of the voluntariness of a consent to search is: The findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence. State v. Van Ackeren --------- 650

60. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Van Ackeren ---------- 650

61. Where an offer consists of several statements tendered as a unit, e.g., a letter, a conversation, or a transcript of testimony, and parts are admissible and parts are not, objection should be made only to the improper parts and not to the offer as a whole.

The general objection cannot avail the defendant on appeal to this court. State v. Van Ackeren ------ 650
62. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Van Ackeren ---------- 650
63. Affidavits not offered and received in evidence will not be considered on appeal. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
64. A party cannot retry the issues in the original proceeding upon a motion to vacate. Klabunde v. Klabunde ---------- 681
65. One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. Cummings v. City of Falls City ------ 759
66. Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Shepherd v. City of Omaha ---------- 813
67. "Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue. Shepherd v. City of Omaha ---------- 813

Extraterritoriality.
1. Ordinarily, no penalty can be incurred under the law of this state except for transactions occurring within this state, and our state law has no extraterritorial effect. State v. Karsten ---------- 227
2. The Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction. State v. Karsten ---------- 227
3. An ordinance proscribing leaving a motor vehicle on any street unattended without locking the ignition and removing the key is not applicable where the vehicle is left on private property. Flannery v. Sample Hart Motor Co. ---------- 244
4. In the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle

is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person. Flannery v. Sample Hart Motor Co. ---------- 244

Fair Employment Practices.

1. Discrimination by an employer against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex is an unlawful employment practice under the Nebraska Fair Employment Practice Act. Richards v. Omaha Public Schools ---------- 463
2. A maternity leave policy which requires that an employee's leave begin a fixed period before the expected date of birth is an unlawful employment practice. Richards v. Omaha Public Schools ---------- 463
3. A classification based on pregnancy is not a classification based on sex. Richards v. Omaha Public Schools ---------- 463
4. A maternity leave policy which requires that the leave for teachers begin at the start of a semester is not an unlawful employment practice. Richards v. Omaha Public Schools ---------- 463
5. A sick leave policy which provides no benefits for disability occurring while the employee is on leave of absence for any purpose, including maternity, is not an unlawful employment practice. Richards v. Omaha Public Schools ---------- 463

Fees.

1. In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
2. The amount of attorney's fees allowed generally rests in the sound discretion of the court. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
3. The award of attorneys' fees is discretionary with the District Court. Tavlin v. Tavlin ---------- 98
4. Where the trial court has made a property division

and allowance of alimony, it may well feel to allow additional attorneys' fees would unbalance the division it had in mind. The trial court is in a much better position to make this decision. We will not disturb it in the absence of an abuse of discretion. Tavlin v. Tavlin ---------- 98

5. A commission cannot be collected by the real estate broker for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Vogt v. Town & Country Realty of Lincoln, Inc. -------- 308

6. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. Megel v. City of Papillion - 819

Forfeitures.

1. Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. Olson v. Pedersen ---------- 159

2. Ordinarily forfeiture for breach of a condition subsequent may not be declared in the absence of a demand for performance. Olson v. Pedersen ------- 159

Fraud.

1. Essential elements required to sustain an action for fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for purpose of inducing the other party to act upon it; and that the other party did in fact rely on it and was induced thereby to act to his injury or damage. Bellairs v. Dudden ---------- 5

2. In an action at law, the essential elements of fraud are: The making of a false representation, knowing it was false or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that injury resulted. Moser v. Jeffrey 132

3. A stockholder and officer of a real estate brokerage

firm is jointly and individually liable for a breach of a fiduciary duty and constructive fraud committed by said firm where he had knowledge of and instigated such breach and fraud. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308

4. Constructive fraud involves a breach of a fiduciary duty and neither actual dishonesty of purpose nor intent to deceive is an essential element. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308

Gambling.

1. A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player. Indoor Recreation Enterprises, Inc. v. Douglas ---------- 715
2. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game. Indoor Recreation Enterprises, Inc. v. Douglas ---------- 715
3. The test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not to be measured by the standards of experts or any limited class of players, but by that of the average skill of a majority of players likely to play the game. Indoor Recreation Enterprises, Inc. v. Douglas ---------- 715

Guardian and Ward.

1. Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed by the court. Clymer v. La Velle ---------- 91
2. The testamentary appointment of a guardian for a minor child by the last surviving parent will be upheld unless the best interests of the child require otherwise. Clymer v. La Velle ---------- 91

Guilty Pleas.

1. In determining the validity of guilty pleas the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative

courses of action open to the defendant. Specific articulation of the Boykin rights is not the sine qua non of a valid guilty plea. State v. Goodrich ------ 217
2. The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. State v. Goodrich ---------- 217
3. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. St. Clair ---------- 519
4. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Evans - 559
5. It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice. State v. Evans ---------- 559
6. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty. State v. Evans ---------- 559
7. The criteria for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Mitchell - 648
8. As to a factual basis for a plea of guilty, it is sufficient if the presentence investigation report which is before the court when sentence is pronounced discloses a factual basis for the plea. State v. Mitchell 648

Habeas Corpus.
1. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Franklin ---------- 630
2. Habeas corpus is a collateral proceeding and cannot be used as a substitute for an appeal. State ex rel. Casselman v. Macken ---------- 806
3. The proceedings leading to a final judgment or order

in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding. State ex rel. Casselman v. Macken ---------- 806

4. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void. State ex rel. Casselman v. Macken --------- 806

Hearings.

1. Parents are entitled to notice and hearing with regard to termination of parental rights. Perkins v. Perkins ---------- 201
2. In an application for post conviction relief, if the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief the court may deny an evidentiary hearing. State v. Turner ---------- 252
3. The demands of due process do not require a hearing in the initial stage, or at any particular point, or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Chase v. Board of Trustees of Nebraska State Colleges ---- 688
4. In a hearing under section 29-2267, R. S. Supp., 1974, a defendant must be allowed to confront and cross-examine adverse witnesses unless the trial court specifically finds good cause for not allowing confrontation. State v. Mosley ---------- 740

Highways.

1. An abutting landowner has no vested interest in the flow of traffic past his premises, and a change in the flow of traffic resulting from the placing of medians in a street or highway is not compensable. Deyle v. State ---------- 36
2. Before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory. Deyle v. State ---------- 36
3. Intersection shall mean: (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if there are no lateral curb lines,

then the lateral boundary lines of the roadways of two highways, which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict. (b) Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection. § 39-741(17) (a), (b), R. S. Supp., 1972. Therkildsen v. Gotsch -------- 729

4. Crosswalk shall mean: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edge of the traversable roadway; or (b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface. § 39-741(10) (a), (b), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

5. Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians. § 39-741(44), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

6. No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic-control devices pertaining to such crossing movements. § 39-754.06(4), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

7. Roadway shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term roadway shall refer to any such roadway separately but not to all such roadways collectively. § 39-741(39), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

Homicide.

1. In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused. State v. Harris ---------- 74
State v. Lytle ---------- 353
2. In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another. State v. Harris ---------- 74
State v. Lytle ---------- 353
3. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. State v. Harris ---------- 74
State v. Lytle ---------- 353
4. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death. State v. Harris ---------- 74
State v. Lytle ---------- 353

Hospitals.

The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

Husband and Wife.

Section 30-106, R. S. Supp., 1974, requires that an antenuptial contract to be effective shall be in writing, signed by both parties to such marriage, and acknowledged in the manner required by law for the conveyance of real estate or executed in conformity with the laws of the place where made. Antenup-

tial agreements are only valid in this state if made in conformity with this section. Tavlin v. Tavlin - 98

Idem Sonans.

1. Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. State v. Cardin ---------- 231
2. The doctrine of idem sonans is applicable to both civil and criminal proceedings. State v. Cardin ---- 231

Implied Consent Law.

1. On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo. Mackey v. Director of Department of Motor Vehicles ---------- 707
2. Where blood, breath, or urine tests were available to a motorist under arrest for operating a motor vehicle while under the influence of alcoholic liquors, his inability to provide, within a reasonable time, a urine sample for a chemical test, which he elected to take, and his unwillingness to submit to either blood or breath tests offered to him in the alternative constitute a refusal to permit chemical testing as provided for in the implied consent statute. Mackey v. Director of Department of Motor Vehicles ------ 707
3. Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08, R. S. S. 1943, and the test may be given. § 39-669.10, R. R. S. 1943. Mackey v. Director of Department of Motor Vehicles ---------- 707

Improvements.

The Downtown Improvement and Parking District Act of 1969, sections 19-3401 to 19-3420, R. R. S. 1943, prescribes the method by which cities of the first and second class may raise additional revenue for certain stated purposes relating to the improvement of public facilities within the district. Blackledge v. Richards ---------- 188

Indictments and Informations.

Where in a criminal prosecution the face of the record

clearly discloses that the information upon which the defendant has been found guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and no appeal has been taken, the trial court should, upon proper motion, vacate the judgment of conviction. State v. Ewert ---------- 203

Infants.

1. A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective. State v. Russell ---------- 64
2. The domicile of an unemancipated, legitimate infant is the same as that of the father and will be deemed to have continued the same until it is shown to have been legally changed in circumstances warranting the change. Clymer v. La Velle ---------- 91
3. The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right. Clymer v. La Velle ---------- 91
4. It is a well-settled general rule that an infant's domicile, upon the death of both parents, is ordinarily determined by the domicile at death of the last surviving parent, and remains the same until changed by operation of law or the proper act of a guardian. Clymer v. La Velle ---------- 91
5. Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed by the court. Clymer v. La Velle ---------- 91
6. The testamentary appointment of a guardian for a minor child by the last surviving parent will be upheld unless the best interests of the child require otherwise. Clymer v. La Velle ---------- 91
7. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Carper v. Rokus ---------- 113

8. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771
9. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the entry of the decree. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771
10. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered, and the amount rests in the sound discretion of the court. Bralick v. Bralick ---------- 183
11. An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children. Berigan v. Berigan 185
12. The termination of parental rights to children is an issue separate and apart from the award of custody usually made in a proceeding for dissolution of a marriage. Perkins v. Perkins ---------- 201
13. Parents are entitled to notice and hearing with regard to termination of parental rights. Perkins v. Perkins ---------- 201
14. Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Jorgensen v. Jorgensen ---------- 271
15. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights of a fit, proper, and suitable parent. Jorgensen v. Jorgensen ---------- 271
16. Minority is simply another factor to be considered in determining voluntariness, and there is no distinct or separate rule of evidence applicable to the confession of minors. State v. Lytle ---------- 353

17. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws. State v. Lytle ---------- 353
18. Former section 25-1207, R. R. S. 1943, does not render confidential the communications to a physician in judicial proceedings involving injuries to children. State v. Norwood ---------- 595
19. A proceeding brought in the interests of dependent and neglected children is one involving injuries to children. State v. Norwood ---------- 595
20. The findings of the trial court as to the evaluation of the evidence and the question of custody will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Norwood ---------- 595
21. It is the rule at common law that the domicile of a minor is the same as the domicile of the parent with whom he lives. State ex rel. Frasier v. Whaley 703
22. Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce. State ex rel. Frasier v. Whaley - 703
23. Visitation rights granted a parent need not be the same for all children and there is no abuse of discretion in providing different conditions where a child of tender years is concerned. Hermance v. Hermance ---------- 720
24. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Conger v. Conger ---------- 771
25. In Nebraska every dispositive order in a juvenile proceeding that rests on an adjudication of delinquency is an appealable order. State ex rel. Casselman v. Macken ---------- 806
26. The proceedings leading to a final judgment or order in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding. State ex rel. Casselman v. Macken ---------- 806

Insane Persons.

1. In this state the test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to dis-

tinguish between right and wrong with respect to the act. State v. Russell ---------- 64

2. A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. State v. Russell ---------- 64

3. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. State v. Russell ---------- 64

Instructions.

1. Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented. Nebraska State Bank v. Dudley --- 1

2. The proper method of presenting a case to a jury is a clear and concise statement by the court of the issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal. Nebraska State Bank v. Dudley ---------- 1

3. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Moser v. Jeffrey -- 132

4. Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. State v. Spidell ---------- 494

5. It is not error for the trial court to refuse to give instructions tendered where the substance of the request is covered by instructions given. State v. Bartlett ---------- 502

6. The admission of a codefendant's statement inculpating another defendant at a joint trial constitutes

error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant. State v. Saltzman ---------- 525

7. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Bell ---------- 554

8. When the instructions given to the jury correctly submit the essential elements of the offense charged and state generally the law of the case, error may not be predicated on the failure to further instruct the jury on some particular phase of the case, when no proper instruction on the subject was requested by appellant. State v. Fischer ---------- 578

9. An instruction should not be given which is likely to confuse or mislead the jury. State v. Poulson -- 601

10. Where portions of a statute are inapplicable, it is not error to omit them from an instruction to the jury given in the language of the statute. State v. Poulson ---------- 601

11. Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers. State v. Gurule -- 618

12. An undercover agent who is employed by the State and paid a weekly salary to investigate and gather evidence of drug violations is not an informer such as to require that the jury be advised his testimony is entitled to special scrutiny. State v. Gurule ---- 618

13. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Franklin ---------- 630
State v. Van Ackeren ---------- 650

14. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Vistron Corp. v. Scoular-Bishop Grain Co. ---------- 696

Insurance.

1. Ordinarily, subrogation under an insurance policy depends upon a payment having been made under the policy. Schmer v. Hawkeye-Security Ins. Co. -- 94
2. Where there has been no payment under an insurance policy, the insured has no duty to bring an action against a third party. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
3. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Wyatt v. Woodmen Acc. & Life Co. ---------- 614
4. The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. Wyatt v. Woodmen Acc. & Life Co. ---------- 614
5. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to mean but what a reasonable person in the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction. Wyatt v. Woodmen Acc. & Life Co. ---------- 614
6. If the loss exceeds the amount of insurance paid, an action may be brought in the name of the insured for the entire loss. Schweitz v. Robatham ------- 668
7. As a general rule, limitations of liability, and loss from an excepted cause, are matters of defense to

be specially pleaded by the insurer. Farmers Union Coop. Ins. Co. v. Reinwald ---------- 766

8. A garage liability policy which excludes coverage of an automobile which has been transferred to another by the named insured, pursuant to an agreement of sale, is not proscribed by statute, nor is it against public policy. Dyas v. Morris ---------- 773

9. An agreement which fully complied with the provisions of section 60-1417, R. S. Supp., 1967, constituted a valid agreement of sale. Dyas v. Morris - 773

10. Cancellation of a policy by the insurer is an affirmative defense and the burden is upon the defendant liability insurance company to prove a valid cancellation effective before the liability of the insured arose. Stilen v. Cavalier Ins. Corp. -------- 824

11. The burden of establishing an effective cancellation before loss is on the insurer. Notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional. Stilen v. Cavalier Ins. Corp. ---------- 824

12. A notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable. Stilen v. Cavalier Ins. Corp. ---------- 824

Intent.

1. The interpretation of the indeterminate sentence statute, section 83-1,105 (1), R. S. Supp., 1974, announced in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, is adhered to. State v. Ford ---------- 400

2. It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Evidence of similar crimes with third persons is not admissible. State v. Franklin - 630

Interest.

1. Where a reasonable controversy exists as to plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and prejudgment interest is not allowed. K & R, Inc. v. Crete Storage Corp. ---------- 138
2. Interest on damages for breach of a building contract, where the amount of the claim is not known or determinable, runs from the date of the judgment. Schweitz v. Robatham ---------- 668

Intoxicating Liquors.

1. When an objection is filed to an application for a liquor license and the Nebraska Liquor Control Commission is required to set the matter for hearing under the provisions of section 53-133, R. R. S. 1943, the matter becomes a contested case under the provisions of section 84-901(3), R. S. Supp., 1974. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413
2. At the hearing on a contested case, the applicant is entitled, under the provisions of section 84-901(3), R. S. Supp., 1974, to notice of the issues. J K & J, Inc. v. Nebraska Liquor Control Commission ------ 413
3. The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413
4. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413
5. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413
6. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

7. The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in Chapter 53, R. R. S. 1943, is vested exclusively in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

8. Sufficient probable cause for an arrest is shown when the investigating officer of a fatal collision identifies the driver of one of the vehicles and observes his physical condition, including a strong odor of alcohol. State v. Fischer ---------- 578

9. An agreemenut between a lessor and a lessee that the lessee will apply to the Nebraska Liquor Control Commission for a license for the premises, and will not seek permission to transfer the license to a different location, and upon expiration of the lease will assist the lessor in obtaining a license for the premises is not void as against public policy. Greco v. Bonacci ---------- 685

10. On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal. Mackey v. Director of Department of Motor Vehicles ---------- 707
Barton v. Director of Department of Motor Vehicles - 765

11. Where blood, breath, or urine tests were available to a motorist under arrest for operating a motor vehicle while under the influence of alcoholic liquors, his inability to provide, within a reasonable time, a urine sample for a chemical test, which he elected to take, and his unwillingness to submit to either blood or breath tests offered to him in the alternative constitute a refusal to permit chemical testing as provided for in the implied consent statute. Mackey v. Director of Department of Motor Vehicles ------ 707

12. Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08, R. R. S. 1943, and the test may be given. § 39-669.10, R. R. S. 1943. Mackey v. Director of Department of Motor Vehicles 707

Inviter and Invitee.

1. A business inviter owes a duty to exercise ordinary care to keep the approaches to his place of business reasonably safe for the use of customers. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777
2. There is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and be able to protect himself. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777
3. Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well-known to the invitee as to the store owner. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777

Issue Preclusion.

1. The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Hickman v. Southwest Dairy Suppliers, Inc. ---------- 17
2. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. Hickman v. Southwest Dairy Suppliers, Inc. ---------- 17
3. The basis of the doctrine of res judicata is that the party to be affected, or someone with whom he is in privity, has litigated or has had an opportunity to litigate the same matter in a former action. Hickman v. Southwest Dairy Suppliers, Inc. ---------- 17

Judges.

1. Absent either statutory disqualification, bias, or other cause shown, it is not prejudicial for the one judge of the Workmen's Compensation Court to thereafter serve as one of the judges of that court on rehearing. Schademann v. Casey ---------- 149
2. It is preferable that all participants in one crime or series of related crimes should be sentenced by the same judge, if possible, on their conviction. State v. Burkhardt ---------- 265
3. A trial judge should not enter into any agreement

that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Evans _ 559

4. It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice. State v. Evans ---------- 559

5. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty. State v. Evans ---------- 559

Judgments.

1. Under the Uniform Enforcement of Foreign Judgments Act, a judgment of another state is entitled to registration if it is entitled to full faith and credit in this state. Miller v. Kingsley ---------- 123

2. A judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced. Miller v. Kingsley 123

3. A state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state. Miller v. Kingsley ---------- 123

4. 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. Miles ---------- 128

5. Where in a criminal prosecution the face of the record clearly discloses that the information upon which the defendant has been found guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and no appeal has been taken, the trial court should, upon proper motion, vacate the judgment of conviction. State v. Ewert ---------- 203

6. 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. Bliven v. Bliven ------ 225
7. 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. Connolly v. Connolly ---------- 241
8. If a judgment of dismissal is on the merits it operates to preclude subsequent relitigation of the same cause of action but if it is not on the merits it does not operate to preclude subsequent relitigation of the same cause of action. Durousseau v. Nebraska State Racing Commission ---------- 288
9. Section 25-1333, R. R. S. 1943, provides that the court shall if practicable ascertain what material facts exist without substantial controversy, and it shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Randall v. Erdman ---------- 390
10. In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Burhoop v. Pegram 606
11. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Van Ackeren ---------- 650
12. Interest on damages for breach of a building contract, where the amount of the claim is not known or determinable, runs from the date of the judgment. Schweitz v. Robatham ---------- 668
13. A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law. Schweitz v. Robatham ---------- 668
14. The findings of a court in a law action in which a

jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Farmers Union Coop. Ins. Co. v. Reinwald ---------- 766

15. In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein since a court should not adjudicate the rights and liabilities of a person unless he is actively or constructively before it. Dyas v. Morris ---------- 773

16. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void. State ex rel. Casselman v. Macken -------- 806

Judicial Notice.

1. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance that is being attacked precludes our consideration of it here. State v. Sator ---------- 120

2. A court must be reasonably certain of everything of which it takes judicial notice, that is, the certainty that the fact is uniform and fixed, and if there is any doubt whatever either as to the fact itself or as to its being established or a matter of common knowledge, evidence must be required to support a finding of fact based upon it. Indoor Recreation Enterprises, Inc. v. Douglas ---------- 715

Juries.

1. The guarantee of a jury trial contained in the Sixth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment does not apply to petty offenses. Offenses for which the possible penalty does not exceed 6 months are classified as petty. State v. Young -- 544

2. The purpose of the provision of Article I, section 6, of the Nebraska Constitution, providing that the "right of trial by jury shall remain inviolate" was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. The constitutional right to a trial by jury under the Nebraska Constitution does not apply to a charge of second offense drunk driving because it is a misdemeanor, not recog-

nized by the common law or any statute in existence when the Nebraska Constitution was adopted. State v. Young ---------- 544

3. A defendant in a criminal case prosecuted in the municipal or county court is not, upon trial of his appeal to the District Court under the provisions of section 29-613, R. S. Supp., 1974, entitled to have the facts again determined by a jury. State v. Young ---------- 544

Kidnapping.

The Nebraska statute on kidnapping, section 28-417, R. S. Supp., 1974, refers to "any person" and does not exclude a wife or former wife as a victim. State v. St. Clair ---------- 519

Landlord and Tenant.

1. Nonperformance of a covenant by one party to a lease, unless the performance is an express condition, does not excuse the other party from performing further than the law of property governing evictions provides. Olson v. Pedersen ---------- 159
2. In the absence of a statute to the contrary, a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. Olson v. Pedersen ---------- 159
3. Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. Olson v. Pedersen ---------- 159
4. Where ore is mined under a lease, the title to it vests as personal property in the lessee as soon as it is mined and removed from its original place, subject, however, to the royalty rights of the lessor. Olson v. Pedersen ---------- 159
5. The courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constitute a waiver of the default so as to entitle the lessee to enforce the option to purchase. Randall v. Erdman ---------- 390

Larceny.

1. In a prosecution for larceny as bailee under section 28-540, R. R. S. 1943, there must be a bailment of the property; while so held the bailee must convert the property to his own use; and such converting to his own use must be with the intent to steal the property. State v. McClanahan ---------- 261
2. In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. State v. McClanahan ---------- 261
3. A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, and escape with the loot is as important in the commission of the crime as gaining possession of the property. State v. Bell ---------- 554
4. When the evidence is insufficient to establish a taking of property or the ownership of such property, a charge of larceny should be dismissed. State v. McFarland ---------- 569

Legislature.

1. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another. State ex rel. Douglas v. Gradwohl ---------- 745
2. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State ex rel. Douglas v. Gradwohl ---------- 745

Lessor and Lessee.

An agreement between a lessor and a lessee that the lessee will apply to the Nebraska Liquor Control Commission for a license for the premises, and will not seek permission to transfer the license to a different location, and upon expiration of the lease will assist the lessor in obtaining a license for the premises is not void as against public policy. Greco v. Bonacci ---------- 685

Licenses and Permits.

1. The Nebraska State Racing Commission has authority to bring an original action on its own motion to revoke any license issued by the commission where the holder has violated the rules and regulations of the commission. Durousseau v. Nebraska State Racing Commission ---------- 288
2. An order of revocation of a license to engage in an occupation or profession will ordinarily not be disturbed on appeal in the absence of an abuse of discretion. Durousseau v. Nebraska State Racing Commission ---------- 288
3. Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. State v. Holmberg ---------- 337
4. The only practical method of enforcing the licensing laws involved in section 60-435, R. R. S. 1943, is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws. State v. Holmberg 337
5. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights. State v. Holmberg ---------- 337
6. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Holmberg ---- 337
7. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning. State v. Holmberg ---------- 337
8. When an objection is filed to an application for a liquor license and the Nebraska Liquor Control Commission is required to set the matter for hearing

under the provisions of section 53-133, R. R. S. 1943, the matter becomes a contested case under the provisions of section 84-901(3), R. S. Supp., 1974. J K & J, Inc. v. Nebraska Liquor Control Commission -- 413

9. The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

10. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. J K & J, Inc. v. Nebraska Liquor Control Commission ---------- 413

11. Section 60-435, R. R. S. 1943, is constitutional and it authorizes officers of the law to conduct routine stops for the purpose of checking motor vehicle registrations and operators' licenses, even though there exists no probable cause or reasonable grounds for the officer to believe that a violation of law has occurred or is occurring. State v. Shepardson -- 673

12. An agreement between a lessor and a lessee that the lessee will apply to the Nebraska Liquor Control Commission for a license for the premises, and will not seek permission to transfer the license to a different location, and upon expiration of the lease will assist the lessor in obtaining a license for the premises is not void as against public policy. Greco v. Bonacci ---------- 685

13. On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal. Mackey v. Director of Department of Motor Vehicles ---------- 707
Barton v. Director of Department of Motor Vehicles 765

14. Under section 39-669.24, R. R. S. 1943, a certified abstract for conviction report forwarded by the trial court to the Director of Motor Vehicles must include a judgment of conviction to authorize the Director of Motor Vehicles to revoke or suspend a motor vehicle operator's license on the basis of that conviction. Hyland v. State ---------- 737

Malfeasance.

Malfeasance by a public officer consists of doing some act which is wholly wrongful and unlawful. State v. Kilmer ---------- 434

Malicious Prosecution.

1. To maintain an action for malicious prosecution, plaintiff must prove want of probable cause. Rose v. Reinhart ---------- 478
2. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. Rose v. Reinhart ---------- 478
3. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed in the evidence on behalf of the plaintiff. Rose v. Reinhart ---------- 478

Mandamus.

Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. State ex rel. Frazier v. Whaley ---------- 703

Marriage.

1. The right to marry is a fundamental right afforded protection by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Viochahoske v. City of Grand Island ---------- 175
2. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island ---- 175

Mines and Minerals.

Where ore is mined under a lease, the title to it vests as personal property in the lessee as soon as it is mined and removed from its original place, subject, however, to the royalty rights of the lessor. Olson v. Pedersen ---------- 159

Miranda Rule.

1. The Miranda rule requires only that a suspect be advised of his constitutional rights before a custodial interrogation occurs; and general on-the-scene questioning as to circumstances surrounding criminal activity or other general questioning of citizens in the fact-finding process is not proscribed by that decision. State v. Shepardson ---------- 673
2. The Miranda rule is not applicable to searches and seizures under the Fourth Amendment. State v. Shepardson ---------- 673

Motions, Rules, and Orders.

1. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Hall ---------- 173
   State v. Haskett ---------- 523
2. An order placing a defendant on probation is a final and appealable order. State v. Williams ---------- 483
3. An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity. State v. Williams ---------- 483
4. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. State v. Bartlett ---------- 502
5. A party cannot retry the issues in the original proceeding upon a motion to vacate. Klabunde v. Klabunde ---------- 681

Motor Vehicles.

1. An ordinance proscribing leaving a motor vehicle on any street unattended without locking the ignition and removing the key is not applicable where the

vehicle is left on private property. Flannery v. Sample Hart Motor Co. ---------- 244

2. In the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person. Flannery v. Sample Hart Motor Co. ---------- 244

3. In the absence of applicable statutes or ordinances, the failure of a person having charge of a motor vehicle to remove the ignition key does not constitute a negligent omission or the breach of a duty owed to a third person in the position of the plaintiff here. Flannery v. Sample Hart Motor Co. ---------- 244

4. Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. State v. Holmberg ---------- 337

5. The only practical method of enforcing the licensing laws involved in section 60-435, R. R. S. 1943, is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws. State v. Holmberg ---------- 337

6. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights. State v. Holmberg ---------- 337

7. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Holmberg ---------- 337

8. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer

becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning. State v. Holmberg ---------- 337

9. Section 60-435, R. R. S. 1943, is constitutional and it authorizes officers of the law to conduct routine stops for the purpose of checking motor vehicle registrations and operators' licenses, even though there exists no probable cause or reasonable grounds for the officer to believe that a violation of law has occurred or is occurring. State v. Shepardson ------ 673

10. On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal. Mackey v. Director of Department of Motor Vehicles -------- 707
Barton v. Director of Department of Motor Vehicles 765

11. Where blood, breath, or urine tests were available to a motorist under arrest for operating a motor vehicle while under the influence of alcoholic liquors, his inability to provide, within a reasonable time, a urine sample for a chemical test, which he elected to take, and his unwillingness to submit to either blood or breath tests offered to him in the alternative constitute a refusal to permit chemical testing as provided for in the implied consent statute. Mackey v. Director of Department of Motor Vehicles ------ 707

12. The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within a crosswalk. § 39-754.05(1), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

13. Under section 39-669.24, R. R. S. 1943, a certified abstract for conviction report forwarded by the trial court to the Director of Motor Vehicles must include a judgment of conviction to authorize the Director of Motor Vehicles to revoke or suspend a motor vehicle operator's license on the basis of that conviction. Hyland v. State ---------- 737

14. A garage liability policy which excludes coverage of an automobile which has been transferred to another by the named insured, pursuant to an agreement of sale, is not proscribed by statute, nor is it against public policy. Dyas v. Morris ---------- 773

15. An agreement which fully complied with the pro-

visions of section 60-1417, R. S. Supp., 1967, constituted a valid agreement of sale. Dyas v. Morris 773

Municipal Corporations.

1. The theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable has been uniformly rejected. Viochahoske v. City of Grand Island 175
2. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island 175
3. The state or a subdivision thereof, having formulated a law or rule which establishes a system of classification which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest. Viochahoske v. City of Grand Island 175
4. The Downtown Improvement and Parking District Act of 1969, sections 19-3401 to 19-3420, R. R. S. 1943, prescribes the method by which cities of the first and second class may raise additional revenue for certain stated purposes relating to the improvement of public facilities within the district. Blackledge v. Richards 188
5. The fact that a statutory grant of legislative authority to a municipal corporation is made in general terms is not basis for constitutional challenge. Blackledge v. Richards 188
6. An occupation and license tax levied by a municipality under the Downtown Improvement and Parking District Act of 1969 for the purpose of raising revenue may be based upon a square footage formula. Blackledge v. Richards 188
7. A classification of businesses made pursuant to the levying of an occupation and license tax will not be set aside unless it is arbitrary, capricious, and unreasonable. Blackledge v. Richards 188
8. Prevalent wage rates to be determined by the Court of Industrial Relations for firemen in the City of Omaha, Nebraska, must of necessity be determined by comparison with wages paid for comparable serv-

ices in reasonably similar labor markets. Omaha Assn. of Firefighters v. City of Omaha ---------- 436

9. Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Omaha Assn. of Firefighters v. City of Omaha ---------- 436

10. The Civil Service Act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in section 19-1807, R. R. S. 1943. Cummings v. City of Falls City ---------- 759

11. The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission. Cummings v. City of Falls City ---- 759

12. If the evidence in the District Court on appeal is sufficient to show that the order of the civil service commission suspending or discharging an employee was made in good faith for cause, then the order of the commission must be affirmed. Cummings v. City of Falls City ---------- 759

Names.

1. Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. State v. Cardin ---------- 231

2. The doctrine of idem sonans is applicable to both civil and criminal proceedings. State v. Cardin ---- 231

Negligence.

1. In the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person. Flannery v. Sample Hart Motor Co. ---------- 244

2. In the absence of applicable statutes or ordinances,

the failure of a person having charge of a motor vehicle to remove the ignition key does not constitute a negligent omission or the breach of a duty owed to a third person in the position of the plaintiff here. Flannery v. Sample Hart Motor Co. ---- 244

3. The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

4. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

5. Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence. Wees v. Creighton Memorial St. Joseph's Hospital -------- 295

6. Generally a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. Stover v. Ed Miller & Sons, Inc. -- 422

7. A business inviter owes a duty to exercise ordinary care to keep the approaches to his place of business reasonably safe for the use of customers. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777

8. There is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and be able to protect himself. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777

9. Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well-known to the invitee as to the store owner. Brandert v. Scottsbluff Nat. Bank & Trust Co. ---------- 777

New Trial.

1. 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 thereon obtained. State v. Lytle ---- 353
2. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Bartlett ---- 502
   State v. Franklin ---- 630
3. Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed by this court. State v. Svoboda ---- 663
4. 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. Svoboda ---- 663

Nolo Contendere Plea.

A plea of nolo contendere admits the matters alleged in the information and has the same effect as a plea of guilty so far as issues of fact are concerned. State v. Kilmer ---- 434

Notice.

1. Parents are entitled to notice and hearing with regard to termination of parental rights. Perkins v. Perkins ---- 201
2. At the hearing on a contested case, the applicant is entitled, under the provisions of section 84-901(3), R. S. Supp., 1974, to notice of the issues. J K & J, Inc. v. Nebraska Liquor Control Commission ---- 413
3. The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission. J K & J, Inc. v. Nebraska Liquor Control Commission ---- 413
4. The burden of establishing an effective cancellation before loss is on the insurer. Notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating

thereto, and be peremptorily explicit and unconditional. Stilen v. Cavalier Ins. Corp. ---------- 824

5. A notice of cancellation of insurance for nonpayment of premium or a premium installment must be explicit and, unless accompanied by a remittance to the insured for any unearned premium, must include among other things an accurate statement of the balance of the account and to whom and when such balance is payable. Stilen v. Cavalier Ins. Corp. ---------- 824

Obscenity.

1. The criteria for determining obscenity set forth in the Nebraska obscenity statutes and as construed by this court are not violative of the First and Fifth Amendments to the United States Constitution, nor does such judicial construction as it applies to pre-Miller v. California offenses constitute such statutes ex post facto laws. State v. American Theater Corp. 84
2. Where a movie film is publicly shown, knowledge of its contents by the exhibitor is sufficiently demonstrated so as to establish scienter necessary in criminal cases. State v. American Theater Corp. ------ 84
3. In reviewing a jury verdict involving rights of free expression under the First Amendment to the United States Constitution, the reviewing court shall make an independent judgment as a matter of law as to the obscenity vel non of the particular work. State v. American Theater Corp. ---------- 84

Officers.

1. In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties as required by law. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322
2. Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. State v. Holmberg ---------- 337
3. The only practical method of enforcing the licensing laws involved in section 60-435, R. R. S. 1943, is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict

enforcement of the licensing laws. State v. Holmberg ---------- 337

4. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights. State v. Holmberg ---------- 337

5. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Holmberg ---- 337

6. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning. State v. Holmberg ---------- 337

7. Section 60-435, R. R. S. 1943, is constitutional and it authorizes officers of the law to conduct routine stops for the purpose of checking motor vehicle registrations and operators' licenses, even though there exists no probable cause or reasonable grounds for the officer to believe that a violation of law has occurred or is occurring. State v. Shepardson ---- 673

Ordinances.

An ordinance proscribing leaving a motor vehicle on any street unattended without locking the ignition and removing the key is not applicable where the vehicle is left on private property. Flannery v. Sample Hart Motor Co. ---------- 244

Parent and Child.

1. The fact that the minor stepdaughter of a testatrix was physically absent from the home and household of the testatrix attending school, during a part of which time she lived with maternal relatives in another state and was physically present in the testatrix' home only during vacation time, did not of itself prevent the stepdaughter from being a member of the household of and having her permanent home in the home of the testatrix for 5 con-

tinuous years within the meaning of section 77-2004, R. R. S. 1943. Wondra v. Platte Valley State Bank & Trust Co. ---------- 41

2. The domicile of an unemancipated, legitimate infant is the same as that of the father and will be deemed to have continued the same until it is shown to have been legally changed in circumstances warranting the change. Clymer v. La Velle ---------- 91

3. The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right. Clymer v. La Velle ---------- 91

4. It is a well-settled general rule that an infant's domicile, upon the death of both parents, is ordinarily determined by the domicile at death of the last surviving parent, and remains the same until changed by operation of law or the proper act of a guardian. Clymer v. La Velle ---------- 91

5. Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed by the court. Clymer v. La Velle ---------- 91

6. The testamentary appointment of a guardian for a minor child by the last surviving parent will be upheld unless the best interests of the child require otherwise. Clymer v. La Velle ---------- 91

7. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Carper v. Rokus ---------- 113

8. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771

9. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the entry of the decree. Carper v. Rokus ---------- 113
Conger v. Conger ---------- 771

10. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered, and the amount rests in the sound discretion of the court. Bralick v. Bralick ---------- 183
11. An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children. Berigan v. Berigan ---- 185
12. The termination of parental rights to children is an issue separate and apart from the award of custody usually made in a proceeding for dissolution of a marriage. Perkins v. Perkins ---------- 201
13. Parents are entitled to notice and hearing with regard to termination of parental rights. Perkins v. Perkins ---------- 201
14. 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. Bliven v. Bliven -------- 225
15. 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. Connolly v. Connolly -------- 241
16. Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Jorgensen v. Jorgensen ---------- 271
17. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights of a fit, proper, and suitable parent. Jorgensen v. Jorgensen ---------- 271
18. A proceeding brought in the interests of dependent and neglected children is one involving injuries to children. State v. Norwood ---------- 595
19. The findings of the trial court as to the evaluation of the evidence and the question of custody will not

be disturbed on appeal unless there is a clear abuse of discretion. State v. Norwood ---------- 595

20. Where parents of the child are separated by a decree of divorce, the domicile normally follows that of the parent who has custody by virtue of the decree of divorce. State ex rel. Frasier v. Whaley ---------- 703

21. Visitation rights granted a parent need not be the same for all children and there is no abuse of discretion in providing different conditions where a child of tender years is concerned. Hermance v. Hermance ---------- 720

22. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion. Hermance v. Hermance ---------- 720

23. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Conger v. Conger ---------- 771

Parliamentary Law.

1. Section 79-1254.02, R. S. Supp., 1974, is applicable to the Board of Trustees of the Nebraska State Colleges. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

2. In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

3. Section 79-1254.02, R. S. Supp., 1974, requires the affirmative vote of a majority of all members of the board to amend or terminate the contract of a member of the teaching staff. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688

4. In the absence of a contrary statute or rule, at a meeting of an administrative body where a quorum is present, a vote which is insufficient and ineffective

to constitute any official action of the board does not deprive the board of power and jurisdiction to make an effective and final determination on the issue at a subsequent meeting of the board. Chase v. Board of Trustees of Nebraska State Colleges -- 688

Parking.

1. An ordinance proscribing leaving a motor vehicle on any street unattended without locking the ignition and removing the key is not applicable where the vehicle is left on private property. Flannery v. Sample Hart Motor Co. ---------- 244
2. In the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person. Flannery v. Sample Hart Motor Co. -------- 244
3. In the absence of applicable statutes or ordinances, the failure of a person having charge of a motor vehicle to remove the ignition key does not constitute a negligent omission or the breach of a duty owed to a third person in the position of the plaintiff here. Flannery v. Sample Hart Motor Co. ------- 244

Parties.

1. Where there has been no payment under an insurance policy, the insured has no duty to bring an action against a third party. Schmer v. Hawkeye-Security Ins. Co. ---------- 94
2. It is a well-established rule that no one can complain a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason there is a possibility that one's interest may be injuriously affected in the future. Blackledge v. Richards ---------- 188
3. If the loss exceeds the amount of insurance paid, an action may be brought in the name of the insured for the entire loss. Schweitz v. Robatham -- 668
4. A party cannot maintain an action on a contract without a prior substantial compliance on his part. If there has been a substantial performance, an

action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Schweitz v. Robatham ---------- 668

5. A third party petition must allege facts showing why the third party defendant is liable to the third party plaintiff for all or any part of the claim made against the third party plaintiff. Schweitz v. Robatham ---------- 668

6. In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein since a court should not adjudicate the rights and liabilities of a person unless he is actively or constructively before it. Dyas v. Morris ---------- 773

Pedestrians.

1. The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within a crosswalk. § 39-754.05(1), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

2. No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic-control devices pertaining to such crossing movements. § 39-754.06(4), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

Perjury.

1. To lie is to make an untrue statement with intent to deceive. Even though a statement as to the truth of a fact is mistaken, the statement is not a lie if the sayer himself honestly believes it to be true. State ex rel. Nebraska State Bar Assn. v. Cook -- 365

2. The commission by an attorney of perjury is ground, depending upon the circumstances, for either disbarment or suspension from the practice of law. State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365

Physicians and Surgeons.

Former section 25-1207, R. R. S. 1943, does not render confidential the communications to a physician in judicial proceedings involving injuries to children. State v. Norwood ---------- 595

Plea Bargains.

1. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Evans ---------- 559
2. It is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice. State v. Evans ---------- 559
3. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty. State v. Evans ---------- 559

Plea in Abatement.

1. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Franklin ---------- 630
2. After trial and conviction in the District Court, any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Franklin ---------- 630

Pleadings.

1. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Jacobsen ---- 105
2. The requirement that on an appeal under section 60-420, R. R. S. 1943, a petition be filed in the District Court within 30 days from filing of the final order of the director is mandatory and jurisdictional. Miller v. Sullivan ---------- 127
3. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face

that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Hall ---------- 173
State v. Haskett ---------- 523
4. This court will not consider a constitutional question in the absence of a specification of the portion of the Constitution appellant desires vindicated. Blackledge v. Richards ---------- 188
5. In this state forms of action have been abolished and the nature of an action is to be judged by what is pled and not by the name which may have been applied to the pleading. State v. Turner ---------- 252
6. In a proceeding under the Post Conviction Act the applicant is required to plead facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusion of fact or law is not sufficient to require the court to grant an evidentiary hearing. State v. Turner -- 252
7. In the absence of fraud or mistake an arbitration award, whether at common law or under the statute, when regularly made and published, is prima facie binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it. Simpson v. Simpson ------ 453
8. Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
9. When signatures are admitted, the burden is upon the defendant to plead and prove a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
10. The plea nil debet puts in issue no fact and cannot be regarded as a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
11. When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented. Center Bank v. Mid-Continent Meats, Inc. -- 665
12. A third party petition must allege facts showing why the third party defendant is liable to the third party plaintiff for all or any part of the claim made against the third party plaintiff. Schweitz v. Robatham -- 668
13. There can be no recovery if there is a material variance between the allegations and the proof. Farmers Union Coop. Ins. Co. v. Reinwald ------- 766

14. As a general rule, limitations of liability, and loss from an excepted cause, are matters of defense to be specially pleaded by the insurer. Farmers Union Coop. Ins. Co. v. Reinwald ---------- 766
15. The sole purpose of a special appearance is to question the jurisdiction of the court. Swick v. Coslor ---------- 781
16. Under section 25-804, R. S. Supp., 1973, inclusion of dollar amount for general damages is not jurisdictional and summons not void. Swick v. Coslor ---- 781
17. A petition which fails to plead actionable facts is vulnerable to a general demurrer. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp. ---------- 810
18. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp. ---------- 810

Police Officers and Sheriffs.

1. Law enforcement officers should make sure that no statements are made which offer the defendant a benefit or an advantage dependent upon the making or executing of a statement or confession. State v. Krueger ---------- 304
2. Where, as a consequence of a lawful search, police officers lawfully obtain knowledge of relevant and material facts they may testify to those facts. State v. Bartlett ---------- 502
3. The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons. State v. Skonberg ---------- 550

Post Conviction.

1. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Robinson ---------- 111
2. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Miles ---------- 128
3. 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. Miles ---------- 128

4. The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same prisoner. State v. Hall ---------- 173

5. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Hall ----- 173
State v. Haskett ---------- 523

6. The enactment of the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1974, did not eliminate the common law remedy of writ of error coram nobis. State v. Turner ---------- 252

7. In an application for post conviction relief, if the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief the court may deny an evidentiary hearing. State v. Turner ---------- 252

8. In a proceeding under the Post Conviction Act the applicant is required to plead facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusion of fact or law is not sufficient to require the court to grant an evidentiary hearing. State v. Turner - 252

9. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is

not ground for post conviction relief. State v. Turner ---------- 252
10. In a post conviction proceeding the petitioner has the burden of establishing a basis for relief. State v. McClelland ---------- 535

Preliminary Hearing.
The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Franklin ---------- 630

Presentence Reports.
1. Under section 29-2261, R. S. Supp., 1974, the use of a presentence report is only required for sentencing if the offense is a felony. State v. Cardin - 231
2. As to a factual basis for a plea of guilty, it is sufficient if the presentence investigation report which is before the court when sentence is pronounced discloses a factual basis for the plea. State v. Mitchell ---------- 648

Principal and Agent.
1. A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
2. The burden of proof is upon the real estate agent to show that he satisfied the fiduciary duties he owed his principal. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
3. A stockholder and officer of a real estate brokerage firm is jointly and individually liable for a breach of a fiduciary duty and constructive fraud committed by said firm where he had knowledge of and instigated such breach and fraud. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
4. A real estate broker becomes the agent of a property owner and owes the fiduciary duties incident to such relationship from the moment the parties orally agree to the listing of the property for the

owner. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308

5. A commission cannot be collected by the real estate broker for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Vogt v. Town & Country Realty of Lincoln, Inc. - 308

Privileged Communications.

1. In order to come within the attorney-client privilege of section 25-1206, R. R. S. 1943, the communication must have been between the attorney and client and made in the course of professional employment and with reference to the subject matter of that employment. State v. Spidell ---------- 494
2. A communication between attorney and client made in the presence of others does not constitute a privileged communication within the meaning of section 25-1206, R. R. S. 1943. State v. Spidell ------ 494

Probable Cause.

1. A customs officer has the unique power to stop a person at an international entry point and to conduct a border search of persons or mail without having a search warrant or probable cause to believe a crime has been committed. Reasonable suspicion of possible illegal activity is sufficient. State v. Hogan ---------- 207
2. A border search is not presumptively illegal even though it is conducted without a warrant. State v. Hogan ---------- 207
3. A defendant who seeks to suppress evidence under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed. State v. Hogan ---------- 207
4. Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper and that the evidence secured thereby should be suppressed. State v. Hogan ---------- 207
5. The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record

rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. State v. Lytle ---------- 353

6. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. Rose v. Reinhart ---------- 478

7. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed in the evidence on behalf of the plaintiff. Rose v. Reinhart ---------- 478

8. Sufficient probable cause for an arrest is shown when the investigating officer of a fatal collision identifies the driver of one of the vehicles and observes his physical condition, including a strong odor of alcohol. State v. Fischer ---------- 578

Probation and Parole.

1. The action of a trial court in denying probation and imposing a sentence will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Huskey ---------- 388

2. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Basler ---- 402

3. An order placing a defendant on probation is a final and appealable order. State v. Williams ---- 483

4. An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity. State v. Williams ---------- 483

5. If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted. State v. Williams 483

6. Section 29-2261, R. S. Supp., 1974, contemplates

that when imposing sentence a judge should consider, among other things, the offender's history of delinquency or criminality. Offenses committed while on probation are a part of such a history. State v. Williams ---------- 483

7. This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion. State v. Purviance -------- 541

8. At a probation revocation hearing in the District Court under the Nebraska Probation Administration Act, where a complete record of the evidence and testimony is made, the court is not required to specify which particular evidence, exhibits, or witnesses were relied upon for its written findings and judgment. State v. Jaworski ---------- 645

9. An appeal from an order revoking probation will lie even though no motion for new trial is filed. State v. Mosley ---------- 740

10. In a hearing under section 29-2267, R. S. Supp., 1974, a defendant must be allowed to confront and cross-examine adverse witnesses unless the trial court specifically finds good cause for not allowing confrontation. State v. Mosley ---------- 740

Process.

1. Service of process on the Secretary of State pursuant to section 21-20,114, R. R. S. 1943, is valid only where the action is brought in a court in a county where the cause of action, or some part thereof, arose, or in counties where the contract, or portion thereof, has been violated or is to be performed. Failure to file the action in such a court renders the service void. Anderson v. Autocrat Corp. ---------- 278

2. Under section 25-540, R. S. Supp., 1974, of the Nebraska Long Arm Statute, when service upon a nonresident defendant is made by mail, proof of such service must include a receipt signed by the addressee, or other evidence of personal delivery to the addressee satisfactory to the court. Anderson v. Autocrat Corp. ---------- 278

3. Although an affidavit may be used to prove service of process, such an affidavit cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved

in and made a part of the bill of exceptions. Anderson v. Autocrat Corp. ---------- 278

Property.

1. An abutting landowner has no vested interest in the flow of traffic past his premises, and a change in the flow of traffic resulting from the placing of medians in a street or highway is not compensable. Deyle v. State ---------- 36
2. Before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory. Deyle v. State ---------- 36
3. The District Court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. Tavlin v. Tavlin ---------- 98
4. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Tavlin v. Tavlin ---------- 98
   Fanning v. Fanning ---------- 821
5. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Klabunde v. Klabunde ---------- 681

Prosecuting Attorneys.

Where a county attorney has a disqualifying personal interest in obtaining an acquittal or conviction, a special prosecutor should be appointed to conduct the criminal prosecution. State v. Boyce ---------- 538

Proximate Cause.

1. In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused. State v. Harris ---------- 74
   State v. Lytle ---------- 353

2. In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another. State v. Harris ---- 74
State v. Lytle ---------- 353
3. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. State v. Harris ---------- 74
State v. Lytle ---------- 353
4. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death. State v. Harris ---------- 74
State v. Lytle ---------- 353
5. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Wees v. Creighton Memorial St. Joseph's Hospital -------- 295

Public Defender.

General duties imposed on a public defender by statute do not automatically make him counsel for any individual in a criminal proceeding until appointment to represent a specific individual in a particular criminal proceeding has been made by a judicial officer. State v. Russell ---------- 64

Public Officers.

Malfeasance by a public officer consists of doing some act which is wholly wrongful and unlawful. State v. Kilmer ---------- 434

Public Officers and Employees.

1. The theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable has been uniformly

rejected. Viochahoske v. City of Grand Island ---- 175
2. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island 175
3. The state or a subdivision thereof, having formulated a law or rule which establishes a system of classification which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest. Viochahoske v. City of Grand Island ---- 175

Public Service Commissions.

1. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission. Myers v. Blair Tel. Co. ---------- 55
2. The Public Service Commission is empowered to, and was created with the intention that it would, regulate public utilities insofar as the powers and operations of such utility affect the public interest and welfare. Consequently, it does have authority to supervise the operation of a utility to the extent of seeing that the utility provides the service for which it is exacting payment. Myers v. Blair Tel. Co. ---------- 55
3. A public utility is obligated to serve all its ratepayers fairly and without undue discrimination. In seeing that the utility meets this obligation, the Public Service Commission is not directing how funds of the utility are to be used. Myers v. Blair Tel. Co. ---------- 55
4. The primary object of the regulation of public utilities by the Public Service Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public. Myers v. Blair Tel. Co. ---------- 55
5. As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities. Myers v. Blair Tel. Co. ---------- 55
6. Unlike some public service commissions, the Ne-

braska Public Service Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Myers v. Blair Tel. Co. ---------- 55

7. The powers of the Public Service Commission are regulatory in nature and the judicial powers lodged in it are remedial of and ancillary to its regulatory powers. Myers v. Blair Tel. Co. ---------- 55

8. The Public Service Commission, as a part of its power and duty to establish rates which will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate. Myers v. Blair Tel. Co. ---------- 55

9. Inherent in the power of the Public Service Commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service. Myers v. Blair Tel. Co. ---- 55

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. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322

11. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved. Nebraska Railroads of Omaha v. Nebco, Inc. 322

12. Evidence of the existing rates for services as established by the Interstate Commerce Commission constitutes prima facie evidence of the reasonableness of those rates for the same services when performed in intrastate commerce in this state. Nebraska Railroads of Omaha v. Nebco, Inc. ---------- 322

Public Utilities.

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Racing Commission.

The Nebraska State Racing Commission has authority to bring an original action on its own motion to revoke any license issued by the commission where the holder has violated the rules and regulations of the commission. Durousseau v. Nebraska State Racing Commission ---------- 288

Rape.

1. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975). State v. Trowbridge 582
2. It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Evidence of similar crimes with third persons is not admissible. State v. Franklin ------ 630

Records.

1. The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943. State v. Jacobsen ---------- 105
2. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. State v. Jacobsen ---------- 105
3. A transcript of court proceedings prepared by an official court reporter is not a part of an attorney's work product; it is subject to discovery on payment of a proportionate share of its cost. Schademann v. Casey ---------- 149
4. Ordinarily the duly authenticated record of a county court imports absolute verity. State v. Goodrich -- 217
5. In an application for post conviction relief, if the files and records of the case show to the satisfac-

tion of the court that the prisoner is entitled to no relief the court may deny an evidentiary hearing. State v. Turner ---------- 252

6. The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. State v. Lytle ---------- 353

7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. J K & J, Inc. v. Nebraska Liquor Control Commission 413

8. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. J K & J, Inc. v. Nebraska Liquor Control Commission ---- 413

9. 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. State v. Clark ---------- 487

10. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is 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. State v. Clark ---------- 487

11. Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court. State v. Clark ---------- 487

12. Exercise of discretion by the trial court to impose sentence of imprisonment is properly exercised when the record shows risk of further criminal conduct, and that most effective correctional treatment will be provided by commitment to a correctional facility. State v. Dedrick ---------- 500

13. The writ of error coram nobis is available when that error of fact for which the statute provides

no other remedy does not appear of record or was unknown to the court when the judgment was pronounced and which if known would have prevented the judgment. State v. Schnatz 516

14. At a probation revocation hearing in the District Court under the Nebraska Probation Administration Act, where a complete record of the evidence and testimony is made, the court is not required to specify which particular evidence, exhibits, or witnesses were relied upon for its written findings and judgment. State v. Jaworski 645

15. Under section 39-669.22, R. R. S. 1943, every court in this state shall make complete records, including the judgment of conviction, of every case in which a person is charged with the violation of traffic regulations specified in that section. Hyland v. State .. 737

16. Under section 39-669.24, R. R. S. 1943, a certified abstract for conviction report forwarded by the trial court to the Director of Motor Vehicles must include a judgment of conviction to authorize the Director of Motor Vehicles to revoke or suspend a motor vehicle operator's license on the basis of that conviction. Hyland v. State 737

Reports.

1. In a divorce case, ex parte investigative reports are not evidence, and cannot be the basis for any adjudication. Jorgensen v. Jorgensen 271

2. Ex parte statements are too unreliable to be considered in the investigation of controverted facts, and due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. Jorgensen v. Jorgensen 271

3. Neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he takes the stand as a witness, is sworn, and is subjected to the usual test of cross-examination. Jorgensen v. Jorgensen 271

4. Where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report

to testify and may call other witnesses to contradict any facts in the report. Jorgensen v. Jorgensen -- 271

Res Judicata.

1. The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Hickman v. Southwest Dairy Suppliers, Inc. ---------- 17
2. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. Hickman v. Southwest Dairy Suppliers, Inc. ---------- 17
3. The basis of the doctrine of res judicata is that the party to be affected, or someone with whom he is in privity, has litigated or has had an opportunity to litigate the same matter in a former action. Hickman v. Southwest Dairy Suppliers, Inc. ------ 17
4. The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same prisoner. State v. Hall ---------- 173
5. If a judgment of dismissal is on the merits it operates to preclude subsequent relitigation of the same cause of action but if it is not on the merits it does not operate to preclude subsequent relitigation of the same cause of action. Durousseau v. Nebraska State Racing Commission ---------- 288

Rescission.

1. Ordinarily forfeiture for breach of a condition subsequent may not be declared in the absence of a demand for performance. Olson v. Pedersen ----- 159
2. An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it. Olson v. Pedersen ---------- 159
3. Where rescission is granted both parties must, as

nearly as possible, be restored to the status quo. Olson v. Pedersen ---------- 159
4. Under some circumstances a party may be required to mitigate his damages by resorting to appropriate and reasonable legal remedies to obtain possession of personal property wrongfully detained from him, and if he does not do so, damages will be denied. Olson v. Pedersen ---------- 159
5. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. Olson v. Pedersen ---------- 159

Robbery.
1. A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, and escape with the loot is as important in the commission of the crime as gaining possession of the property. State v. Bell ---------- 554
2. If one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, the crime of robbery has been committed. State v. Bell ---------- 554

Rules.
1. An administrative agency is not required to set out statutory provisions in its rules and regulations. South Maple Street Assn. v. Board of Adjustment - 118
2. A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry. Viochahoske v. City of Grand Island ---------- 175
3. The state or a subdivision thereof, having formulated a law or rule which establishes a system of classification which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest. Viochahoske v. City of Grand Island 175
4. Whether a proceeding be criminal or civil the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or

proceeding and not those in effect when the act or violation is charged to have taken place. Durousseau v. Nebraska State Racing Commission ---------- 288

5. Disciplinary Rule 1-102(A) provides, among other things: "A lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law." State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365

Rules of Supreme Court.

1. The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943. State v. Jacobsen ---------- 105
2. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. State v. Jacobsen ---------- 105

Schools and School Districts.

1. A technical community college board may act officially only when convened and meeting in such capacity. Busboom v. Southeast Nebraska Tech. Community College ---------- 448
2. Continuity of instruction is a significant and legitimate educational goal. Richards v. Omaha Public Schools ---------- 463
3. A maternity leave policy which requires that the leave for teachers begin at the start of a semester is not an unlawful employment practice. Richards v. Omaha Public Schools ---------- 463
4. A sick leave policy which provides no benefits for disability occurring while the employee is on leave of absence for any purpose, including maternity, is not an unlawful employment practice. Richards v. Omaha Public Schools ---------- 463
5. It is the rule at common law that the domicile of a

minor is the same as the domicile of the parent with whom he lives. State ex rel. Frasier v. Whaley 703

Scienter.

Where a movie film is publicly shown, knowledge of its contents by the exhibitor is sufficiently demonstrated so as to establish scienter necessary in criminal cases. State v. American Theater Corp. 84

Searches and Seizures.

1. A customs officer has the unique power to stop a person at an international entry point and to conduct a border search of persons or mail without having a search warrant or probable cause to believe a crime has been committed. Reasonable suspicion of possible illegal activity is sufficient. State v. Hogan 207
2. A border search is not presumptively illegal even though it is conducted without a warrant. State v. Hogan 207
3. A defendant who seeks to suppress evidence under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed. State v. Hogan 207
4. Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper and that the evidence secured thereby should be suppressed. State v. Hogan 207
5. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session

where the stipulation was entered into is not ground for post conviction relief. State v. Turner ------ 252
6. Where, as a consequence of a lawful search, police officers lawfully obtain knowledge of relevant and material facts they may testify to those facts. State v. Bartlett ---------- 502
7. The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons. State v. Skonberg ---------- 550
8. The existence and voluntariness of a consent to search is a question of fact. State v. Skonberg ---- 550
9. The special protection accorded by the Fourth Amendment to the people in their person, houses, papers, and effects is not extended to the open fields. State v. Poulson ---------- 601
10. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Franklin ---------- 630
11. In order to have standing to raise Fourth Amendment rights the individual must show he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence. State v. Van Ackeren ---------- 650
12. A defendant in a criminal case has no standing to assert Fourth Amendment claims merely because evidence may have been obtained as the product of the invalid arrest of a third person. State v. Van Ackeren ---------- 650
13. A person against whom a search is directed and whose property is seized in a search has standing to challenge the validity of the search under the Fourth Amendment where the prosecution case against him depends upon the defendant's possession of the goods. State v. Van Ackeren ---------- 650
14. The determination of whether a consent to search is voluntarily given is a question of fact. State v. Van Ackeren ---------- 650
15. The burden of proving the voluntariness of the consent is upon the prosecutor. State v. Van Ackeren ---------- 650

16. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Van Ackeren -- 650
17. In determining the voluntariness of the consent to search, the fact that a person is in custody when the consent is given is one of the circumstances to be considered. State v. Van Ackeren ---------- 650
18. The applicable standard of review of the District Court's determination of the voluntariness of a consent to search is: The findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence. State v. Van Ackeren ---------- 650
19. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Van Ackeren ---------- 650
20. The Miranda rule is not applicable to searches and seizures under the Fourth Amendment. State v. Shepardson ---------- 673
21. Contraband objects falling in plain view of a peace officer who has a lawful right to be in the position from which he makes his observation are subject to seizure and may be introduced into evidence. State v. Shepardson ---------- 673

Sentences.
1. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Miles ---------- 128
2. The limitation upon the minimum term specified in section 83-1,105(1), R. S. Supp., 1974, is the maximum sentence provided by law and not the maximum sentence imposed by the court. State v. Miles ---------- 128
3. Under section 29-2261, R. S. Supp., 1974, the use of a presentence report is only required for sentencing if the offense is a felony. State v. Cardin -- 231

4. It is preferable that all participants in one crime or series of related crimes should be sentenced by the same judge, if possible, on their conviction. State v. Burkhardt ---------- 265
5. Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence. State v. Burkhardt - 265
6. A sentence within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Huskey ---------- 388
State v. Ford ---------- 400
State v. Swift ---------- 515
State v. Howard ---------- 521
State v. Green ---------- 770
7. The action of a trial court in denying probation and imposing a sentence will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Huskey ---------- 388
8. The interpretation of the indeterminate sentence statute, section 83-1,105(1), R. S. Supp., 1974, announced in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, is adhered to. State v. Ford ---------- 400
9. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Basler ---- 402
10. An erroneous or invalid sentence, unauthorized under the law or the statute, may be set aside by the District Court during the period of time that it retains jurisdiction of the defendant, and a valid sentence authorized by law may be pronounced providing the record shows a personal appearance of the defendant and counsel and the sentence and proceedings are otherwise properly entered. State v. Shelby ---------- 445
11. In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal. State v. Weiand ---------- 461
State v. Suttle ---------- 470
State v. Clark ---------- 487
12. An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity. State v. Williams ---------- 483

13. If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted. State v. Williams 483
14. Section 29-2261, R. S. Supp., 1974, contemplates that when imposing sentence a judge should consider, among other things, the offender's history of delinquency or criminality. Offenses committed while on probation are a part of such a history. State v. Williams ---------- 483
15. 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. Carr ---------- 485
16. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Carr ---------- 485
17. Exercise of discretion by the trial court to impose sentence of imprisonment is properly exercised when the record shows risk of further criminal conduct, and that most effective correctional treatment will be provided by commitment to a correctional facility. State v. Dedrick ---------- 500
18. 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. The above principle does not apply, however, where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crimes, and where the new statute, taken as a whole, may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Country ---------- 570
19. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975). State v. Trowbridge ---------- 582
20. In the absence of statute, when a valid sentence has been put into execution by commitment of a

prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. State v. Adamson ---------- 592

Sentencing.

In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty. State v. Evans ---------- 559

Settlement.

1. Under section 52-118.02, R. R. S. 1943, a final settlement is a determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. - 248
2. An administrative agency settlement involves a statement of account, including all charges and credits deemed allowable by the department, after deciding, with intended finality so far as its functions are concerned, such matters as the sufficiency of performance, allowance of liquidated damages, contingent liabilities, etc. A determination that particular amounts may be due or paid merely as payments on account is not a final settlement. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. ---------- 248
3. So long as the public body contends that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is ordinarily no final settlement of the contract. Zimmerman's Electric, Inc. v. Fidelity & Deposit Co. ---------- 248

Sexual Assault.

State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault stat-

ute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975). State v. Trowbridge 582

Sidewalks.

Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians. § 39-741(44), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

Signatures.

1. Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
2. When signatures are admitted, the burden is upon the defendant to plead and prove a defense. Center Bank v. Mid-Continent Meats, Inc. ---------- 665
3. When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented. Center Bank v. Mid-Continent Meats, Inc. -------- 665

Specific Performance.

Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial, and the party has no right of recovery. Alliance Tractor & Imp. Co. v. Lukens Tool & Die Co. ---------- 473

Standing.

1. In order to have standing to raise Fourth Amendment rights the individual must show he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence. State v. Van Ackeren ---------- 650
2. A defendant in a criminal case has no standing to assert Fourth Amendment claims merely because evidence may have been obtained as the product of

the invalid arrest of a third person. State v. Van Ackeren ---------- 650

3. A person against whom a search is directed and whose property is seized in a search has standing to challenge the validity of the search under the Fourth Amendment where the prosecution case against him depends upon the defendant's possession of the goods. State v. Van Ackeren ---------- 650

States.

1. Ordinarily, no penalty can be incurred under the law of this state except for transactions occurring within this state, and our state law has no extraterritorial effect. State v. Karsten ---------- 227
2. In areas of the law not inherently requiring national uniformity, it is required that state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes that both cannot stand in the same area, or evidence of a congressional design to preempt the field. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. 404
3. Title 47 U.S.C.A., section 221 (b), provides: Subject to the provisions of section 301 of this title, nothing in this act shall be construed to apply, or to give the commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in the connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
4. Mobile radio telephone services are essentially intrastate in nature even though the radio portion of such services may spill over into an adjoining state. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
5. Congress, in enacting section 221 (b) of Title 47 U.S.C.A., intended to reserve to the several states the right to regulate such intrastate mobile radio telephone services in the manner specified in section 221 (b), even though such mobile radio telephone services involved interstate communication.

ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

Statutes.

1. While procedural statutes do apply to pending litigation, they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. State v. Russell -------- 64
2. The criteria for determining obscenity set forth in the Nebraska obscenity statutes and as construed by this court are not violative of the First and Fifth Amendments to the United States Constitution, nor does such judicial construction as it applies to pre-Miller v. California offenses constitute such statutes ex post facto laws. State v. American Theater Corp. 84
3. 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. Jacobsen ---------- 105
4. The limitation upon the minimum term specified in section 83-1,105(1), R. S. Supp., 1974, is the maximum sentence provided by law and not the maximum sentence imposed by the court. State v. Miles 128
5. It is a well-established rule that no one can complain a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason there is a possibility that one's interest may be injuriously affected in the future. Blackledge v. Richards ---------- 188
6. This court will not strike down legislation as violative of the title provision of Article III, section 14, of the Nebraska Constitution, if the title calls attention to the subject matter of the bill, and the portion of the bill challenged is germane to the purpose announced in the title. Blackledge v. Richards 188
7. Where an act does not purport to be amendatory, but it is enacted as original and independent legislation and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication, modify or repeal prior acts or parts thereof. Blackledge v. Richards ---- 188
8. A grant of prescribed administrative powers is not an unlawful delegation of legislative authority. Blackledge v. Richards ---------- 188

9. The fact that a statutory grant of legislative authority to a municipal corporation is made in general terms is not basis for constitutional challenge. Blackledge v. Richards ---------- 188
10. In this state all public offenses are statutory. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law. State v. Ewert ---------- 203
State v. Karsten ---------- 227
11. The Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction. State v. Karsten ---------- 227
12. Where the intent of the Legislature in the enactment of legislation is clearly expressed, the courts are in duty bound to accept that expression. It is not within the province of the courts to read a meaning into a statute which is not warranted by the legislative language. Anderson v. Autocrat Corp. ---------- 278
13. The interpretation of the indeterminate sentence statute, section 83-1,105 (1), R. S. Supp., 1974, announced in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, is adhered to. State v. Ford ---------- 400
14. In areas of the law not inherently requiring national uniformity, it is required that state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes that both cannot stand in the same area, or evidence of a congressional design to preempt the field. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. 404
15. Title 47 U.S.C.A., section 221 (b), provides: Subject to the provisions of section 301 of this title, nothing in this act shall be construed to apply, or to give the commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in the connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
16. Congress, in enacting section 221 (b) of Title 47

U.S.C.A., intended to reserve to the several states the right to regulate such intrastate mobile radio telephone services in the manner specified in section 221 (b), even though such mobile radio telephone services involved interstate communication. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

17. Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Omaha Assn. of Firefighters v. City of Omaha ---------- 436

18. It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. State v. Saltzman ---------- 525

19. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Saltzman -- 525

20. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Saltzman ---------- 525

21. 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. The above principle does not apply, however, where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crimes, and where the new statute, taken as a whole, may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Country ---------- 570

22. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, is not applicable to the sexual assault statute, L.B. 23, Laws 1975, p. 92 (sections 28-408.01 to 28-408.05, R. S. Supp., 1975). State v. Trowbridge 582

23. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Norwood ---------- 595

24. Section 79-1254.02, R. S. Supp., 1974, is applicable to the Board of Trustees of the Nebraska State Colleges. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688
25. In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688
26. Section 79-1254.02, R. S. Supp., 1974, requires the affirmative vote of a majority of all members of the board to amend or terminate the contract of a member of the teaching staff. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688
27. In the absence of a contrary statute or rule, at a meeting of an administrative body where a quorum is present, a vote which is insufficient and ineffective to constitute any official action of the board does not deprive the board of power and jurisdiction to make an effective and final determination on the issue at a subsequent meeting of the board. Chase v. Board of Trustees of Nebraska State Colleges ---------- 688
28. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another. State ex rel. Douglas v. Gradwohl ---------- 745
29. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State ex rel. Douglas v. Gradwohl ---------- 745
30. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. State ex rel. Douglas v. Gradwohl ---------- 745
31. The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter. State ex rel. Douglas v. Gradwohl -- 745
32. Where an act does not purport to be amendatory, but is enacted as original and independent legisla-

tion, and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication modify or repeal prior acts or parts thereof. State ex rel. Douglas v. Gradwohl ---------- 745

33. If an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends other statutes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified. State ex rel. Douglas v. Gradwohl ------ 745

34. The provision of Article III, section 14, of the Constitution of Nebraska, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," is not violated by the failure to mention in the title of a punitive act an incidental provision of the act providing for the payment, or the exemption from payment, of the costs of prosecution, where the title itself appropriately describes the general subject of the legislation. State ex rel. Douglas v. Gradwohl ---------- 745

35. The Civil Service Act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in section 19-1807, R. R. S. 1943. Cummings v. City of Falls City ---------- 759

36. The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission. Cummings v. City of Falls City ------ 759

37. This court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court. State ex rel. Casselman v. Macken ---------- 806

Stop and Check.

1. Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. State v. Holmberg -------- 337

2. The only practical method of enforcing the licensing laws involved in section 60-435, R. R. S. 1943, is

by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws. State v. Holmberg ---------- 337

3. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights. State v. Holmberg ---------- 337

4. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Holmberg ---- 337

5. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning. State v. Holmberg ---------- 337

6. Section 60-435, R. R. S. 1943, is constitutional and it authorizes officers of the law to conduct routine stops for the purpose of checking motor vehicle registrations and operators' licenses, even though there exists no probable cause or reasonable grounds for the officer to believe that a violation of law has occurred or is occurring. State v. Shepardson ---- 673

Streets.

1. An abutting landowner has no vested interest in the flow of traffic past his premises, and a change in the flow of traffic resulting from the placing of medians in a street or highway is not compensable. Deyle v. State ---------- 36

2. Before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory. Deyle v. State ---------- 36

3. Street shall mean the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for

purposes of vehicular travel. § 39-741(49), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

Subrogation.

1. Ordinarily, subrogation under an insurance policy depends upon a payment having been made under the policy. Schmer v. Hawkeye-Security Ins. Co. ----- 94
2. Where there has been no payment under an insurance policy, the insured has no duty to bring an action against a third party. Schmer v. Hawkeye-Security Ins. Co. ---------- 94

Summary Judgments.

1. A motion for summary judgment can be granted only where there is no general issue as to any material fact in the case where under the facts the moving party is entitled to a judgment as a matter of law. Randall v. Erdman ---------- 390
2. The party moving for a summary judgment has the burden of showing that no issue of fact exists, and the court should consider all the evidence in the light most favorable to the party opposing the motion. Randall v. Erdman ---------- 390
3. Section 25-1333, R. R. S. 1943, provides that the court shall if practicable ascertain what material facts exist without substantial controversy, and it shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Randall v. Erdman ---------- 390
4. A summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Simpson v. Simpson ---------- 453

Supersedeas.

Where a dismissal for want of prosecution is vacated upon condition the plaintiff pay costs, fees, and expenses within 30 days, a supersedeas bond filed before the expiration of the 30-day period does not suspend the running of the 30-day period but ac-

celerates the dismissal of the action in accordance with the terms of the order. Korte v. Betzer ---- 828

Taxation.

1. The fact that the minor stepdaughter of a testatrix was physically absent from the home and household of the testatrix attending school, during a part of which time she lived with maternal relatives in another state and was physically present in the testatrix' home only during vacation time, did not of itself prevent the stepdaughter from being a member of the household of and having her permanent home in the home of the testatrix for 5 continuous years within the meaning of section 77-2004, R. R. S. 1943. Wondra v. Platte Valley State Bank & Trust Co. ---- 41
2. An occupation and license tax levied by a municipality under the Downtown Improvement and Parking District Act of 1969 for the purpose of raising revenue may be based upon a square footage formula. Blackledge v. Richards ---- 188
3. A classification of businesses made pursuant to the levying of an occupation and license tax will not be set aside unless it is arbitrary, capricious, and unreasonable. Blackledge v. Richards ---- 188

Telecommunications.

1. There are exceptions to the general rule requiring identification of participants in telephone conversations. One is a class of cases comprising statements which themselves are facts constituting part of the transaction under investigation and which are admissible in evidence under the rule of res gestae. The motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act; such statements are in the nature of verbal acts and are admissible in evidence with the remainder of the transaction which they illustrate. The purpose of admitting a verbal act or fact is to prove the nature of an act rather than to prove the truth of any alleged statement. State v. McSwain ---- 31
2. Circumstances preceding or following a telephone conversation may serve to sufficiently identify the caller so as to render the telephone communication admissible. State v. McSwain ---- 31

3. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission. Myers v. Blair Tel. Co. ---------- 55
4. Title 47 U.S.C.A., section 221 (b), provides: Subject to the provisions of section 301 of this title, nothing in this act shall be construed to apply, or to give the commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in the connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
5. Mobile radio telephone services are essentially intrastate in nature even though the radio portion of such services may spill over into an adjoining state. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404
6. Congress, in enacting section 221 (b) of Title 47 U.S.C.A., intended to reserve to the several states the right to regulate such intrastate mobile radio telephone services in the manner specified in section 221 (b), even though such mobile radio telephone services involved interstate communication. ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc. ---------- 404

Time.

1. While procedural statutes do apply to pending litigation, they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. State v. Russell ---------- 64
2. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the entry of the decree. Carper v. Rokus ---------- 113
3. The requirement that on an appeal under section 60-420, R. R. S. 1943, a petition be filed in the

District Court within 30 days from filing of the final order of the director is mandatory and jurisdictional. Miller v. Sullivan ---------- 127

4. Where in a criminal prosecution the face of the record clearly discloses that the information upon which the defendant has been found guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and no appeal has been taken, the trial court should, upon proper motion, vacate the judgment of conviction. State v. Ewert ---------- 203

5. Whether a proceeding be criminal or civil the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. Durousseau v. Nebraska State Racing Commission ------ 288

6. A real estate broker becomes the agent of a property owner and owes the fiduciary duties incident to such relationship from the moment the parties orally agree to the listing of the property for the owner. Vogt v. Town & Country Realty of Lincoln, Inc. -- 308

7. An erroneous or invalid sentence, unauthorized under the law or the statute, may be set aside by the District Court during the period of time that it retains jurisdiction of the defendant, and a valid sentence authorized by law may be pronounced providing the record shows a personal appearance of the defendant and counsel and the sentence and proceedings are otherwise properly entered. State v. Shelby ------ 445

8. Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. State v. Williams ---------- 483

9. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. State v. Bartlett ---------- 502

10. An application for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on

appeal unless there is a clear abuse of discretion. State v. Boyce ---------- 538

11. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the District Court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. State v. Adamson ---------- 592

12. The statutory requirement that the transcript be filed in the District Court within 30 days from the entry of judgment in the lower court is mandatory, and unless the appellant was prevented from complying with the statute by some default of the lower court, the District Court acquires no jurisdiction of the appeal if the filing was out of time. First Nat. Bank of Omaha v. Mitchell ---------- 628

13. A refusal by the trial court to set aside a decree within the 6-month period will not be reversed on appeal in the absence of an affirmative showing of an abuse of discretion. Klabunde v. Klabunde ---- 681

14. Where a dismissal for want of prosecution is vacated upon condition the plaintiff pay costs, fees, and expenses within 30 days, a supersedeas bond filed before the expiration of the 30-day period does not suspend the running of the 30-day period but accelerates the dismissal of the action in accordance with the terms of the order. Korte v. Betzer ---- 828

Torts.

The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

Trial.

1. Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented. Nebraska State Bank v. Dudley-- 1

2. The proper method of presenting a case to a jury is a clear and concise statement by the court of the

issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal. Nebraska State Bank v. Dudley ---- 1

3. In conspiracy cases unusual latitude is permitted in the admission of evidence where the prosecution must depend upon circumstancial evidence to establish criminal intent, and the entire history of the conspiracy may be shown if the evidence tends to establish the ultimate fact. State v. McSwain -- 31

4. In the reception of circumstantial evidence in a conspiracy prosecution, great latitude must be allowed, and jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable jurors to come to a satisfactory conclusion. State v. McSwain ---------- 31

5. A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. State v. Russell ---------- 64

6. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. State v. Russell -- 64

7. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell ---- 64

8. A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective. State v. Russell ---------- 64

9. While procedural statutes do apply to pending litigation, they have no retroactive effect upon any

steps that may have been taken in an action before such statutes were effective. State v. Russell ---- 64

10. Where a movie film is publicly shown, knowledge of its contents by the exhibitor is sufficiently demonstrated so as to establish scienter necessary in criminal cases. State v. American Theater Corp. ------ 84

11. In reviewing a jury verdict involving rights of free expression under the First Amendment to the United States Constitution, the reviewing court shall make an independent judgment as a matter of law as to the obscenity vel non of the particular work. State v. American Theater Corp. ---------- 84

12. While in a divorce action the case is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Tavlin v. Tavlin ---------- 98

13. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. State v. Jacobsen ---------- 105

14. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Robinson ---------- 111

15. In the absence of a special requirement, the board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board. South Maple Street Assn. v. Board of Adjustment ---------- 118

16. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Moser v. Jeffrey ---------- 132

17. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. Moser v. Jeffrey ---------- 132

18. The approval by counsel of a form or forms of verdict to be submitted to a jury constitutes a waiver of objections based on the form of verdict, and precludes raising such an objection on appeal. Moser v. Jeffrey ---------- 132

19. A verdict will not be set aside as inadequate unless it is so clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record or that the jury disregarded the evidence or rules of law. K & R, Inc. v. Crete Storage Corp. ---------- 138
20. The jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. K & R, Inc. v. Crete Storage Corp. ---------- 138
21. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof. K & R, Inc. v. Crete Storage Corp. ---------- 138
22. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. Olson v. Pedersen ---------- 159
23. The state or a subdivision thereof, having formulated a law or rule which establishes a system of classifica- which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest. Viochahoske v. City of Grand Island ------ 175
24. The failure to object promptly to an offer of evidence waives the objection. State v. Hogan ------ 207
25. A written extrajudicial utterance may be admissible in evidence without regard to the truth of the assertion made for its nontestimonial value as a circumstance, provided it is legally relevant. The hearsay rule does not apply to such use. State v. Hogan 207
26. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal. State v. Hogan ---------- 207
27. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal

on one or more degrees of a crime, an attempt to do so will be treated as withdrawing the issue from consideration by the jury. State v. Hogan -------- 207

28. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence. State v. Miller --- 215

29. Error in the admission of evidence is not ground for reversal if no substantial miscarriage of justice occurred. State v. Miller ---------- 215

30. The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. State v. Goodrich ---------- 217

31. To sustain a conviction the evidence must show beyond a reasonable doubt not only that the crime was committed, but also that the defendant committed it. State v. Cardin ---------- 231

32. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief. State v. Turner 252

33. In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use. State v. McClanahan ---------- 261

34. If an objection to the introduction of evidence is made, the party making the objection must insist that the trial court rule on the objection or else it is waived. State v. McClanahan ---------- 261

35. Ex parte statements are too unreliable to be con-

sidered in the investigation of controverted facts, and due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. Jorgensen v. Jorgensen ---------- 271

36. Neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he takes the stand as a witness, is sworn, and is subjected to the usual test of cross-examination. Jorgensen v. Jorgensen ---------- 271

37. Where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report to testify and may call other witnesses to contradict any facts in the report. Jorgensen v. Jorgensen -- 271

38. A motion for a directed verdict or its equivalent 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, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

39. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295

40. The burden of proving a cause of action is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. Wees v. Creighton Memorial St. Joseph's Hospital -- 295

41. Negligence is never presumed. The more happening of an accident does not create a presumption or authorize an inference of negligence. Wees v. Creighton Memorial St. Joseph's Hospital -------- 295

42. In every case before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the

party upon whom the burden is imposed. Wees v. Creighton Memorial St. Joseph's Hospital 295
43. The burden of proof is upon the real estate agent to show that he satisfied the fiduciary duties he owed his principal. Vogt v. Town & Country Realty of Lincoln, Inc. 308
44. The opinion of a witness as to the value of property will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the trier of fact. Vogt v. Town & Country Realty of Lincoln, Inc. .. 308
45. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Vogt v. Town & Country Realty of Lincoln, Inc. 308
46. In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties as required by law. Nebraska Railroads of Omaha v. Nebco, Inc. 322
47. 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 thereon obtained. State v. Lytle 353
48. The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. State v. Lytle 353
49. It is elementary that a confession, in order to be admissible in evidence against its maker, must be voluntarily made with knowledge of the maker's constitutional rights, or in other words his rights must be voluntarily and intelligently waived. State v. Lytle 353
50. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Lytle 353
51. Juvenile courts do not have the sole or exclusive

jurisdiction of children under 18 years of age who have violated our laws. State v. Lytle ---------- 353

52. In a disciplinary proceeding against an attorney, the burden rests upon the relator to establish each count of the complaint to a reasonable certainty by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365

53. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365

54. Section 25-1333, R. R. S. 1943, provides that the court shall if practicable ascertain what material facts exist without substantial controversy, and it shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Randall v. Erdman ---------- 390

55. An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal. Omaha Assn. of Firefighters v. City of Omaha ---- 436

56. In the absence of fraud or mistake an arbitration award, whether at common law or under the statute, when regularly made and published, is prima facie binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it. Simpson v. Simpson ------ 453

57. Unless the contrary appears expressly, or is shown, it will be presumed that all matters which were presented to the arbitrators were passed on by them, and that the award is in conformity to the submission in this regard. Simpson v. Simpson -------- 453

58. To maintain an action for malicious prosecution, plaintiff must prove want of probable cause. Rose v. Reinhart ---------- 478

59. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed

in the evidence on behalf of the plaintiff. Rose v. Reinhart ---------- 478

60. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom it is made, it is the duty of the court, on motion for judgment notwithstanding the verdict timely made, to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for a directed verdict. Rose v. Reinhart ---------- 478

61. 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. State v. Clark ---------- 487

62. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is 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. State v. Clark ---------- 487

63. Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting under the provisions of section 28-201, R. R. S. 1943. State v. Spidell ---------- 494

64. 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. Bartlett ---------- 502

65. 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 narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Bartlett ---------- 502

66. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An

additional independent factor linking the defendant with the narcotic must be shown. State v. Bartlett 502

67. It is not error for the trial court to refuse to give instructions tendered where the substance of the request is covered by instructions given. State v. Bartlett ---------- 502

68. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. St. Clair ---------- 519

69. Where defendants participated in the same series of acts or transactions constituting the offense charged, in the absence of a showing that a defendant would be prejudiced by a consolidation of the cases for trial, the consolidation is proper and will not be disturbed on appeal. State v. Saltzman -- 525

70. The admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant. State v. Saltzman ---------- 525

71. The improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error in some cases. State v. Saltzman ---------- 525

72. The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination. State v. Saltzman ---------- 525

73. In a joint trial where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable. State v. Saltzman ---------- 525

74. Circumstantial evidence is sufficient to sustain a finding of guilty if it is substantial. State v. Billingsley ---------- 532

75. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory

which does not include the guilt of the accused, the evidence is sufficient to sustain a finding of guilty. State v. Billingsley ---------- 532

76. In a post conviction proceeding the petitioner has the burden of establishing a basis for relief. State v. McClelland ---------- 535

77. Where a county attorney has a disqualifying personal interest in obtaining an acquittal or conviction, a special prosecutor should be appointed to conduct the criminal prosecution. State v. Boyce ---------- 538

78. The existence and voluntariness of a consent to search is a question of fact. State v. Skonberg --- 550

79. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Bell ---------- 554

80. When the evidence is insufficient to establish a taking of property or the ownership of such property, a charge of larceny should be dismissed. State v. McFarland ---------- 569

81. When the instructions given to the jury correctly submit the essential elements of the offense charged and state generally the law of the case, error may not be predicated on the failure to further instruct the jury on some particular phase of the case, when no proper instruction on the subject was requested by appellant. State v. Fischer ---------- 578

82. The findings of the trial court as to the evaluation of the evidence and the question of custody will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Norwood ---------- 595

83. An instruction should not be given which is likely to confuse or mislead the jury. State v. Poulson --- 601

84. Where portions of a statute are inapplicable, it is not error to omit them from an instruction to the jury given in the language of the statute. State v. Poulson ---------- 601

85. When parties to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. Burhoop v. Pegram ---------- 606

86. In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Burhoop v. Pegram ---------- 606
87. The admission of irrelevant evidence and the asking of improper questions is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Gurule 618
88. After trial and conviction in the District Court, any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Franklin ---------- 630
89. It is the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. One exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Evidence of similar crimes with third persons is not admissible. State v. Franklin ------ 630
90. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Franklin ---------- 630
State v. Van Ackeren ---------- 650
91. The determination of whether a consent to search is voluntarily given is a question of fact. State v. Van Ackeren ---------- 650
92. The burden of proving the voluntariness of the consent is upon the prosecutor. State v. Van Ackeren 650
93. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Van Ackeren ---- 650
94. In determining the voluntariness of the consent to search, the fact that a person is in custody when the consent is given is one of the circumstances to be considered. State v. Van Ackeren ---------- 650
95. The applicable standard of review of the District

Court's determination of the voluntariness of a consent to search is: The findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence. State v. Van Ackeren 650

96. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Van Ackeren 650

97. Where an offer consists of several statements tendered as a unit, e.g., a letter, a conversation, or a transcript of testimony, and parts are admissible and parts are not, objection should be made only to the improper parts and not to the offer as a whole. The general objection cannot avail the defendant on appeal to this court. State v. Van Ackeren 650

98. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Van Ackeren 650

99. Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Center Bank v. Mid-Continent Meats, Inc. 665

100. Affidavits not offered and received in evidence will not be considered on appeal. Center Bank v. Mid-Continent Meats, Inc. 665

101. A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law. Schweitz v. Robatham 668

102. Contraband objects falling in plain view of a peace officer who has a lawful right to be in the position

from which he makes his observation are subject to seizure and may be introduced into evidence. State v. Shepardson ---------- 673

103. A party cannot retry the issues in the original proceeding upon a motion to vacate. Klabunde v. Klabunde ---------- 681

104. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Vistron Corp. v. Scoular-Bishop Grain Co. ---------- 696

105. Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. State ex rel. Frasier v. Whaley ---------- 703

106. On appeal to the District Court under section 60-420, R. R. S. 1943, from an order of the Director of the Department of Motor Vehicles made under section 39-669.16, R. R. S. 1943, revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal. Mackey v. Director of Department of Motor Vehicles ---------- 707

107. One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. Cummings v. City of Falls City ---------- 759

108. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Farmers Union Coop. Ins. Co. v. Reinwald 766

109. There can be no recovery if there is a material variance between the allegations and the proof. Farmers Union Coop. Ins. Co. v. Reinwald ---------- 766

110. In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Fanning v. Fanning ---------- 821

Trusts.

An action to enforce a constructive trust is an equitable action, and on appeal the Supreme Court will consider the record de novo. Bellairs v. Dudden --- 5

Venue.

Service of process on the Secretary of State pursuant to section 21-20,114, R. R. S. 1943, is valid only where the action is brought in a court in a county where the cause of action, or some part thereof, arose, or in counties where the contract, or portion thereof, has been violated or is to be performed. Failure to file the action in such a court renders the service void. Anderson v. Autocrat Corp. ---- 278

Verdicts.

1. The approval by counsel of a form or forms of verdict to be submitted to a jury constitutes a waiver of objections based on the form of verdict, and precludes raising such an objection on appeal. Moser v. Jeffrey ---------- 132
2. A verdict will not be set aside as inadequate unless it is so clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record or that the jury disregarded the evidence or rules of law. K & R, Inc. v. Crete Storage Corp. ---------- 138
3. A motion for a directed verdict or its equivalent 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, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Wees v. Creighton Memorial St. Joseph's Hospital ---------- 295
4. A finding as to damages will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the trial court disregarded the evidence or rules of law. Schweitz v. Robatham --- 668

Wages.

1. Prevalent wage rates to be determined by the Court of Industrial Relations for firemen in the City of Omaha, Nebraska, must of necessity be determined

by comparison with wages paid for comparable services in reasonably similar labor markets. Omaha Assn. of Firefighters v. City of Omaha ---------- 436
2. Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Omaha Assn. of Firefighters v. City of Omaha ---------- 436
3. In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits. Omaha Assn. of Firefighters v. City of Omaha ---------- 436

Waiver.

1. Where an in-custody interrogation of a defendant fully complied with the procedures laid down in Miranda v. Arizona, appellate courts should be slow to mandate additional responsibilities. State v. Russell ---------- 64
2. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. State v. Russell 64
3. A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective. State v. Russell ---------- 64
4. The approval by counsel of a form or forms of verdict to be submitted to a jury constitutes a waiver of objections based on the form of verdict, and precludes raising such an objection on appeal. Moser v. Jeffrey ---------- 132
5. An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the

right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children. Berigan v. Berigan -- 185

6. The failure to object promptly to an offer of evidence waives the objection. State v. Hogan ------ 207

7. Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief. State v. Turner 252

8. If an objection to the introduction of evidence is made, the party making the objection must insist that the trial court rule on the objection or else it is waived. State v. McClanahan ---------- 261

9. Generally, a party cannot accept the benefits of a contract, and then claim that the contract is forfeited. Randall v. Erdman ---------- 390

10. Where a party to a contract, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach. Randall v. Erdman -------- 390

11. The courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constitute a waiver of the default so as to entitle the lessee to enforce the option to purchase. Randall v. Erdman ---------- 390

12. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony or to limit the interrogation of his own witnesses on matters which are relevant and material. State v. Bartlett ---------- 502

13. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Norwood ---------- 595
14. Where a dismissal for want of prosecution is vacated conditionally, and the plaintiff elects to review the order by filing a notice of appeal and supersedeas bond within the time provided for complying with the condition, the plaintiff abandons any right to later comply with the condition. Korte v. Betzer ---------- 828

Warranty.

Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial, and the party has no right of recovery. Alliance Tractor & Imp. Co. v. Lukens Tool & Die Co. ---------- 473

Wills.

1. The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. The intention is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Wondra v. Platte Valley State Bank & Trust Co. -- 41
2. Generally speaking, a residuary clause of a will is that clause which disposes of property, not usually specifically described, which has not been disposed of by the other provisions of the will. Such a clause commonly, but not always, refers to the "rest, residue or remainder," or uses language of similar import. As a matter of mechanical arrangement the residuary clause is often last, but need not necessarily be. The mere fact that property is particularly described does not necessarily exclude it from the residuary estate. Wondra v. Platte Valley State Bank & Trust Co. ---------- 41
3. Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed

by the court. Clymer v. La Velle ---------- 91
4. The testamentary appointment of a guardian for a minor child by the last surviving parent will be upheld unless the best interests of the child require otherwise. Clymer v. La Velle ---------- 91
5. Where a will, in express terms, creates a life estate in the donee, and annexes thereto a power of appointment or disposal, with remainder over to certain named beneficiaries, the first taker takes but a life estate. McDonald v. Schaughnessy ------- 221

Witnesses.

1. Ex parte statements are too unreliable to be considered in the investigation of controverted facts, and due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. Jorgensen v. Jorgensen ---------- 271
2. Neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he takes the stand as a witness, is sworn, and is subjected to the usual test of cross-examination. Jorgensen v. Jorgensen ---------- 271
3. Where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report to testify and may call other witnesses to contradict any facts in the report. Jorgensen v. Jorgensen 271
4. The opinion of a witness as to the value of property will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the trier of fact. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
5. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Vogt v. Town & Country Realty of Lincoln, Inc. ---------- 308
6. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of wit-

nesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Spidell ---------- 494
State v. Bartlett ---------- 502

7. Where, as a consequence of a lawful search, police officers lawfully obtain knowledge of relevant and material facts they may testify to those facts. State v. Bartlett ---------- 502

8. The admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant did not take the stand, even though the trial court gave clear, concise, and understandable instructions that the statement could only be used against the declarant and must be disregarded with respect to the other defendant. State v. Saltzman ---------- 525

9. The improper admission of a codefendant's statement in violation of the Bruton rule may be harmless error in some cases. State v. Saltzman ------ 525

10. The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination. State v. Saltzman ---------- 525

11. In a joint trial where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable. State v. Saltzman -------- 525

12. Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers. State v. Gurule -- 618

13. An undercover agent who is employed by the State and paid a weekly salary to investigate and gather evidence of drug violations is not an informer such as to require that the jury be advised his testimony is entitled to special scrutiny. State v. Gurule -- 618

Words and Phrases.

1. The word "willfully" as used in section 48-145.01, R. R. S. 1943, is that failure by act or omission to act, done knowingly and intentionally. Schademann v. Casey ---------- 149
2. To lie is to make an untrue statement with intent to deceive. Even though a statement as to the truth of a fact is mistaken, the statement is not a lie if the sayer himself honestly believes it to be true. State ex rel. Nebraska State Bar Assn. v. Cook ---------- 365
3. Malfeasance by a public officer consists of doing some act which is wholly wrongful and unlawful. State v. Kilmer ---------- 434
4. The Nebraska statute on kidnapping, section 28-417, R. S. Supp., 1974, refers to "any person" and does not exclude a wife or former wife as a victim. State v. St. Clair ---------- 519
5. A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, and escape with the loot is as important in the commission of the crime as gaining possession of the property. State v. Bell ---------- 554
6. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken. Mathias v. Mathias ---------- 598
7. A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player. Indoor Recreation Enterprises, Inc. v. Douglas ---------- 715
8. Intersection shall mean: (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if there are no lateral curb lines, then the lateral boundary lines of the roadways of two highways, which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict. (b) Where a highway includes two roadways 30 feet or more

apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection. § 39-741(17) (a), (b), R. S. Supp., 1972. Therkildsen v. Gottsch ------- 729

9. Crosswalk shall mean: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edge of the traversable roadway; or (b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface. § 39-741(10) (a), (b), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

10. Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians. § 39-741(44), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

11. Street shall mean the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. § 39-741(49), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

12. Roadway shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term roadway shall refer to any such roadway separately but not to all such roadways collectively. § 39-741(39), R. S. Supp., 1972. Therkildsen v. Gottsch ---------- 729

13. "Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue. Shepherd v. City of Omaha ---------- 813

Workmen's Compensation.

1. Absent either statutory disqualification, bias, or other cause shown, it is not prejudicial for the one judge of the Workmen's Compensation Court to

thereafter serve as one of the judges of that court on rehearing. Schademann v. Casey ---------- 149

2. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. Schademann v. Casey ---------- 149

3. Where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment. Schademann v. Casey ---------- 149

4. The word "willfully" as used in section 48-145.01, R. R. S. 1943, is that failure by act or omission to act, done knowingly and intentionally. Schademann v. Casey ---------- 149

Zoning.

In the absence of a special requirement, the board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board. South Maple Street Assn. v. Board of Adjustment ---------- 118